

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: June 10, 2010

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF DEFENSE
U.S. DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA

RESPONDENT

AND

Case No. SF-CA-09-0087

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION

CHARGING PARTY

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **July 12, 2010**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

SUSAN E. JELEN

Administrative Law Judge

Dated: June 10, 2010
Washington, D.C.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
U.S. DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA

RESPONDENT

AND

Case No. SF-CA-09-0087

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION

CHARGING PARTY

John R. Pannozzo, Jr., Esq.
For the General Counsel

Michael Wells, Esq.
Warren Seidel, Esq.
For the Respondent

Steven Oldebeken
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101 *et seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority), Part 2423.

On November 28, 2008, SPORT Air Traffic Controllers Organization (Union/SATCO) filed an unfair labor practice charge with the San Francisco Region of the Authority against the Department of Defense, U.S. Department of the Air Force, Edwards

Air Force Base, California (Respondent/Edwards AFB). (G.C. Ex. 1(a)) On December 14,

2009, the Regional Director of the San Francisco Region issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(A) of the Statute by conducting meetings with bargaining unit employees on August 1 and October 15, 2008, without affording the Union an opportunity to be represented. The complaint also alleged that the Respondent violated section 7116(a)(1) and (5) of the Statute by soliciting input from bargaining unit employees at the meeting on October 15, 2008, regarding possible changes to the new control room, thus bypassing the Union as the collective bargaining representative. (G.C. Ex. 1(b)) On January 11, 2010, the Respondent filed an Answer to the complaint in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(c)).

A hearing was held at Edwards AFB, California on February 9, 10, and 25, 2010, at which time all parties were afforded an opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel filed a timely Post-Hearing Brief, which has been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

STATEMENT OF THE FACTS

The Respondent operates Space Positioning Optical Radar Tracking (SPORT), which services aircraft within restricted airspace that is delegated by the Federal Aviation Administration (FAA) to the Department of Defense (DOD) for its mission at Edwards AFB. (Tr. 47) The Respondent is an agency within the meaning of section 7103(a) of the Statute. (G.C. Ex. 1(b), (c)) The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. (G.C. Ex. 1(b), (c)) During the time period relevant in this matter, particularly July 2008 through October 2008, Timothy Hershberger held the position of SPORT Air Traffic Manager, Frank Arnold held the position of Chief, Operations Evaluation and Training, and Chuck Cooper held the position of supervisor, and all were supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(b), (c); Tr. 402).

The Union and the Respondent are parties to a collective bargaining agreement (CBA), effective March 17, 1994. (Jt. Ex. 1) The bargaining unit as described in the CBA consists of “all nonsupervisory, nonmanagement civilian GS-2152 Air Traffic Control Specialists (ATCS) who are employed by Edwards AFB and provide air traffic control services for the Department of the Air Force, and the nonsupervisory, nonmanagement civilian GS-0856 Electronic Technicians who directly support those ATCS.” (Jt. Ex. 1 at 1, Article 1, Section 4) The CBA further states in Article 1, Section 3 that “The Union

President shall be the principal union representative. The Union Vice President shall be the alternate Union Representative. Only the Union President or the Union Vice President, in the President’s absence, may deal with management.” (*Id. at 1*) Steven Oldebeken has been the Union President since September 2006. (Tr. 17) SATCO represents eighteen air traffic controllers, including fourteen controllers assigned to the SPORT Military Radar Unit

(MRU). (Tr. 18).

August 1, 2008 meeting

On July 31, 2008,¹ Hershberger sent an email to all SATCO employees informing them of a mandatory informational meeting on August 1 at 10:00 a.m. “The purpose of this meeting is for me to disseminate information on a variety of subjects and will be your duty location if not working in position.” (G.C. Ex. 4; Tr. 29) Later Hershberger clarified that the meeting was mandatory for those employees already scheduled to work, and no one would be called in for the meeting and no overtime would be given. (G.C. Ex. 4; Tr. 29).

Oldebeken responded to Hershberger and Terry Ayres, Labor Relations Officer, by email on July 31, stating “SATCO should be given notification for these types of mandatory meetings. Also, it is unfair to give us such short notice. It does not give us the opportunity to plan. Randy is off and I have another meeting scheduled @ 10:00.” (G.C. Ex. 5; Tr. 32-33) As Union president, Oldebeken was scheduled to meet with the other union presidents on base to discuss a partnership agreement and a safety program at Edwards AFB. (Tr. 31-32).

Hershberger responded on August 1, stating “This meeting was short notice, so I couldn’t have given you any more advance heads up. Also, there is no need for SATCO to plan. This is an informational meeting, not a formal discussion or negotiation.” (G.C. Ex. 5; Tr. 33, 436).

The meeting was held on August 1 in the conference room, which is adjacent to Hershberger’s office and in the general control room area, although it is separate. Present for management were Hershberger, Frank Arnold and Chris Cooper. Hershberger ran the meeting and it lasted about thirty (30) minutes. There were about fourteen controllers present. (Tr. 403, 423-25, 456-57, 498-99, 504, 518).

During the meeting, Hershberger discussed several items. The facility had changed to a MRU and there was discussion regarding possible outcomes of this change, including the FAA taking over the tower and the facility at Edwards AFB shutting down; Edwards AFB taking over; or Edwards AFB continuing to work on behalf of FAA, but with different aircraft support responsibilities (Tr. 431-32, 499) Hershberger also mentioned there was a possibility of the controllers being downgraded from GS 13s to GS 12s. (Tr. 503).

Hershberger also discussed a command and control letter from October 2007, signed by Arnold W. Bunch, Jr., Colonel, USAF, Commander, 412th Test Wing, which provided guidelines for controllers to operate aircraft within restricted airspace. (G.C. Ex. 8; Tr. 429-430, 503, 521) This command and control letter was not to apply to the controllers due to a Memorandum of Understanding (MOU) signed by Oldebeken on December 31, 2007 and Hershberger on January 2, 2008. (G.C. Ex. 9; Tr. 429-430, 503, 521).

While Arnold passed out copies of a MOU resolving an overtime grievance filed by

¹ All dates are in 2008, unless otherwise specified.

the Union, Hershberger discussed the controllers' ten hour shifts and overtime issues. (G.C. Ex. 6; Tr. 478, 501) Hershberger addressed controller concerns about working beyond their ten hour shift, and his attempt to put extra money in their pockets. (Tr. 501, 576) Hershberger also stated that overtime money was tight due to base funding, and he solicited suggestions from controllers on how to ease the budgetary shortfall. (Tr. 576-577).

Oldebeken did not attend the August 1 meeting. He had a conflict with the 10:00 a.m. time period, since he had another meeting already scheduled. Further, Hershberger informed him that the meeting was not a formal meeting, but informational in nature. Hershberger did not give Oldebeken specific information about what was going to be covered in the meeting. Oldebeken did not designate any other Union official to be the Union's representative at the meeting. (Tr. 23-25).

Renovation of the control room

In early 2006, the Respondent determined that SPORT would remain in the Ridley Mission Control Center and a new control room would be built. (Tr. 210-211, 489) The Union agreed to work in partnership on the renovation and several meetings were held. (Tr. 207, 327) Supervisor Charles Cooper was the primary management official working on the move and he reported to Hershberger on a regular basis. (Tr. 414) The new control room became operational sometime in August – September 2008.

Cooper apparently kept a list in the control room on which the controllers could make suggestions regarding the new control room. On September 10, 2008, Cooper, Oldebeken and Randall Drago, controller and Union vice president, met at the facility to discuss suggested improvements regarding the renovation of the new control room. (G.C. Ex. 10; Tr. 56, 58, 396, 451, 611) They came to a general consensus on some of the items and others were still being considered, but needed additional information.

On September 10, 2008, Cooper sent an email to all employees in SATCO, including Oldebeken, noting that “[a] small group of us met and discussed the improvement suggestions everyone has been submitting.” The email listed thirteen items and Cooper noted the status of each item. (G.C. Ex. 10; Tr. 57-58) The parties had reached agreement on eight of these items. (G.C. Ex. 10; Tr. 311-312).

October 15, 2008 meeting

On October 10, Hershberger sent an email to all employees and supervisors, stating that he wanted to have a Feedback Meeting with as many controllers as possible on the following Wednesday, October 15. “I invite everyone in SPORT to come and share your likes and dislikes of the new facility. The purpose of the meeting is to get feedback on how the look and feel of the new rooms sits with everyone. Any changes from the current layout will be negotiated with the union as appropriate.” (G.C. Ex. 11; Tr. 437, 441).

Oldebeken responded on October 14, stating:

SATCO received the proposal for the SPORT renovation from the labor

relations office. Management requested that the Union work in “partnership” rather than formal negotiations. SATCO agreed to work in partnership, and outside of few pending issues (foot pedals & others (sic) items on the list) the renovation has gone well.

Is it now your intent to by-pass the Union and deal directly with the controllers?

As you should know, our contract and the statutes prohibit this. You have not given any notification to the Union regarding this meeting. This is certainly not “partnership”.

I’d like to meet with you and Terry to discuss this matter.

(G.C. Ex. 11 at 2; Tr. 60).

Hershberger responded on October 14, stating, in part:

As you noticed, I’ve included Mr. Ayres on all my emails and consulted with him prior to making this offer to the controllers. He agrees, I am simply asking for opinions and listening. I am not negotiating anything and not holding a formal discussion. Also, there is no intention to bypass the Union, because if anything comes up that might reflect a change to working conditions, I will certainly bring it to SATCO’s attention and negotiate what is required.

I think it’s important the controllers have the opportunity to present ideas. As long as I stay away from formal discussions or negotiations, I believe I’m within my rights. This doesn’t discount working as partners in any way.

(G.C. Ex. 11 at 3).

The Feedback Meeting was held on October 15 in the conference room, which is adjacent to Hershberger’s office and in the same general area as the control room. Both Hershberger and Cooper were present and Hershberger solicited the controllers’ views and opinions regarding the new control room. (Tr. 457, 469, 508, 575-76) Essentially it was an open forum where management received eighteen suggestions concerning the new facility. (G.C. Ex. 12; Tr. 510) Both Hershberger and Cooper took notes. Hershberger referred to a list as he requested the controllers’ opinions concerning the recently renovated control room. (Tr. 379-81) About seven or eight controllers were present, which appeared to be all the controllers not working a position in the control room at the time. (Tr. 380, 571) Curtis Scanlan, a controller, was specifically told to attend the meeting. (Tr. 505) Both Dragoo, Union Vice President, and Jimmy Berry, Controller and Union Treasurer, attended the meeting as employees; neither was designated by Oldebeken to represent the Union. (Tr. 23-24, 378-379).

The meeting lasted about 1 hour and 15 minutes. (Tr. 456) Hershberger and Cooper responded to questions and there was a great deal of discussion among the controllers

regarding the new control room. (Tr. 456, 510) At the conclusion of the meeting, Hershberger told the controllers that he would review the suggestions and decide upon those he wished to consider or discard. (G.C. Ex. 12; Tr. 448, 511).

Following the meeting, on October 16, Hershberger sent an email to all employees listing the suggestions offered by the controllers at the October 15 meeting. Hershberger attached the eighteen suggestions and noted that he intended to go through all the suggestions to determine if there were items management wished to pursue. He also told employees to send any additional suggestions. "When we get to the point where we think we might want to make changes in the facility, I will provide that list to SATCO for their review and conduct any I&I negotiations that are necessary. It was great being able to sit down with everyone and listen to your comments. I purposely didn't try to interject, but do appreciate Randy and Troy being in the meeting and providing the inputs they did so this was really a (sic) effort through partnership." (G. C. Ex. 12).

Of the eighteen items listed, the Respondent implemented a few. Specifically, the Respondent improved room lighting by adding white lights and removing the blue light coverings. (G.C. Ex. 12 at 3; Tr. 223, 350) Respondent placed a set of lamps on the communication console to light the progress strips and keyboard. (G.C. Ex. 12; Tr. 227-28, 385-86) Supervisors moved non-mission strips near the controllers. (G.C. Ex. 12; Tr. 232-35) Respondent also prevented the Orion System from simultaneously broadcasting transmissions and telephone conversations. (G.C. Ex. 12; Tr. 350-51).

Oldebeken had planned to attend the October 15 meeting, but was assigned to work Position F immediately prior to the meeting. Oldebeken had worked Position E from 10:59.28 a.m. to 12:13.28 p.m. on the morning of October 15. (Jt. Ex. 2) Position E is the primary scope and must always be staffed. (Tr. 72) At 11:00 a.m., Supervisor Tom Raphael

was present in the control room but did not recall seeing Oldebeken at Position E. (Jt. Ex. 2; Tr. 640-641) At about 12:45 p.m., Raphael approached Oldebeken near the union office and told him that he (Raphael) might need Oldebeken. (Tr. 90, 304).

At approximately 1:00 p.m. Oldebeken left the union office with a notepad planning to attend the Feedback Meeting in his representational capacity. (Tr. 91) He stopped in the control room to check with Raphael, who told him to take Position F. (Jt. Ex. 2; Tr. 91) Scanlan had previously been ordered by Cooper to take Position F and was about to sign onto the position when Oldebeken arrived. (Tr. 505, 554-556, 560-561) Oldebeken told Scanlan he was taking Position F; Scanlan left and Oldebeken logged onto Position F at 1:03.10 p.m. (Jt. Ex. 2; Tr. 505).

Cooper then ordered Scanlan to attend the Feedback Meeting, which he did. (Tr. 505) Scanlan questioned Cooper about Oldebeken's position assignment, but Cooper did not respond. (Tr. 507) There is no evidence that Oldebeken told Raphael or Cooper that he planned to attend the Feedback Meeting as the Union's representative.

Positions of the Parties

General Counsel

The General Counsel (GC) asserts that the Respondent violated section 7114(a)(2)(A) of the Statute when it conducted the August 1 mandatory meeting. The August 1 meeting met the criteria for a formal discussion and the Respondent's failure to provide advance notification to the Union and afford it an opportunity to be present was a violation. The GC asserts that the August 1 meeting was a discussion, that the meeting was formal in nature, and that it concerned "personnel policies, practices and matters affecting working conditions". The GC further asserts that the Respondent failed to provide formal notice of the August 1 meeting and the actual notice misrepresented the nature of the meeting.

The GC also asserts that the Respondent violated section 7114(a)(2)(A) of the Statute when it conducted the October 15 Feedback Meeting. Again the GC asserts that the October 15 meeting met the criteria for a formal discussion and the Respondent's failure to allow Oldebeken the opportunity to be present was a violation of the Statute. The GC asserts that the October 15 meeting was a discussion, that the meeting was formal in nature, and that it concerned "personnel policies, practices and matters affecting working conditions." The eighteen suggestions that came out of the meeting all involved working conditions and at least four of the suggested changes were implemented without involvement from the Union. While the Respondent argued that no promises were made to the controllers regarding the

suggested modifications to the control room, and that the Respondent would negotiate the impact and implementation of any changes with the Union, the evidence reflects that no negotiations took place.²

The GC further argues that the Respondent prevented Oldebeken from attending the Feedback Meeting. By assigning Oldebeken to work Position F, when Raphael knew he was the Union president and should have known Oldebeken was planning on attending the meeting, and when there were other controllers available to work the position, the Respondent prevented him from attending the meeting. Further, Raphael or any other supervisor could have worked Position F, which would have afforded the maximum number of controllers to attend the meeting, particularly Union President Oldebeken. This would have been consistent with Hershberger's email message that he wanted as many employees as possible to attend the meeting. Referencing the position logs, the GC asserts that by the time of the meeting (1 p.m.), there had been a total of nine position assignments and Oldebeken was given two of those. Seven of the fourteen controllers had not worked a single position assignment before Oldebeken worked his second. The Respondent gave no explanation for these numbers, and the GC asserts that Raphael deliberately prevented Oldebeken from attending the meeting.

Finally, the GC asserts that the Respondent violated section 7116(a)(1) and (5) of the Statute when it bypassed the Union on October 15 by soliciting the views and opinions of the

² The complaint does not allege that the Respondent violated section 7116(a)(1) and (5) of the Statute by implementing any changes to the control room.

unit employees concerning the control room renovations. Hershberger admitted that he was soliciting the employees' input concerning changes and improvement to their work area. As a result, there were eighteen suggestions; four were adopted by the Respondent and implemented within days or weeks of the meeting. The Respondent adopted the selected changes without negotiation or further partnership discussion with the Union.

Respondent

The Respondent did not file a brief in this matter, but did set forth its defense in its prehearing disclosure and its opening statement at the hearing. With regard to the formal meeting allegations, the Respondent asserts that the Union received actual notice of both meetings and had sufficient time and opportunity to delegate a representative of its own choosing and to be represented at the meetings. The Respondent noted that the Union's Secretary-Treasurer attended both meetings and the Union's Vice President attended the October 15 meeting. The August 1 meeting was held in order to disseminate information to the workforce; there was no reason to postpone the meeting and no request by the Union to reschedule. With regard to the October 15 meeting, the Respondent denies that anyone from management assigned the Union President to a scope position in order to prevent him from attending.

The Respondent would have accommodated Oldebeken, if requested. Finally, the Respondent asserts that neither meeting met the criteria of a formal meeting under section 7114(a)(2)(A) and therefore, the Union had no right to receive formal notice and an opportunity to be represented.

With regard to the bypass allegation, the Respondent asserts that it has always made an effort to include and involve the Union and there was no attempt to bypass the Union and deal directly with employees.

DISCUSSION AND ANALYSIS

Section 7114(a)(2)(A) of the Statute provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

A union is entitled to representation under section 7114(a)(2)(A) only if all elements of that section exist. There must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; and (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *De'pt of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 29 FLRA 594, 597-98 (1987). In examining these elements, the Authority is guided by the intent and purpose of section 7114(a)(2)(A), which is to provide a union with an opportunity to safeguard its interests and the interests of bargaining unit employees, as viewed in the

context of the union's full range of responsibilities under the Statute. *Gen. Serv. Admin.*, 50 FLRA 401, 404 (1995)(*GSA*). This is not a separate element of the statutory analysis, but rather a "guiding principle that informs our judgments in applying the statutory criteria." *Id.* at 404 n.3.

August 1, 2008 meeting

Was there a Discussion?

The evidence reflects that the meeting on August 1 was held in order for Hershberger to disseminate information on various topics to bargaining unit employees. Topics included the employees' ten hour shifts, overtime, the possible results of the facility changing to a MRU, a command and control letter which provided guidelines for controllers to operate aircraft within restricted airspace, as well as MOUs between Management and the Union. Although Hershberger did most of the talking, he did respond to questions from the

controllers. See *Veterans Admin., Wash., D.C. and Veterans Affairs Med. Ctr., Brockton Div., Brockton, Mass.*, 37 FLRA 747, 754 (1990)(*VA Brockton*); *Dep't of the Air Force, Air Force Materiel Command, Space and Missile Systems Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 179 (2009)(*Kirtland AFB*).

Under these circumstances, I find that the meeting on August 1 was a discussion, within the meaning of section 7114(a)(2)(A).

Was the Meeting Formal?

In *Gen. Serv. Admin., Region 9*, 48 FLRA 1348, 1355 (1994)(*GSA, Region 9*), the Authority stated:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), we have advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. See *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 157 (1996) (*F.E. Warren*).

Looking at the circumstances of the August 1 meeting, I find that the criteria for formality are met. The meeting was conducted by the employees' second level supervisor, the SPORT Air Traffic Manager; the Chief, Operations Evaluation and Training, was also present at the meeting, although there is no evidence he actually addressed the employees. The meeting took place in a conference room close to the control room. Although this conference room is occasionally used for meetings, it does not appear from the evidence that

it was a place frequented by the controllers. The meeting was announced by an email to all employees, which specifically stated that it was a mandatory meeting. The meeting lasted about thirty minutes. No formal agenda was handed out at the meeting, but it is clear that Hershberger had a number of topics that he wished to relay to the employees, and he came prepared with copies of the MOUs for the employees. There is no evidence that notes were taken of the meeting. The meeting was conducted in an organized and controlled manner by the Hershberger.

Taking all these factors into consideration, I find that the meeting was formal within the meaning of section 7114(a)(2)(A) of the Statute.

Did the Meeting Concern “any grievance or any personnel policy or practice or other general condition of employment”?

The evidence reflects that the specific purpose of this meeting was to announce various issues to the employees. Some of these issues related to the change to the MRU and the possible changes as a result of this, including the possibility of FAA taking over the MRU. At the meeting, Hershberger also discussed the employees’ 10 hour shifts and overtime issues. Hershberger also referred to two MOUs between management and the Union relating to 10 hour shifts and overtime and a command and control letter.

Although the Respondent appears to assert that the meeting in question did not involve any discussion concerning either a grievance or personnel policy, it presented no specific arguments in this defense. After a careful review of the evidence, I find that the meeting in question concerned “personnel polic[ies] or practice[s] or general condition[s] of employment” within the meaning of section 7114(a)(2)(A) of the Statute. *See, U.S. DOD, Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal., 37 FLRA 952 (1990)(DLA)*. In that regard the topics covered by Hershberger - hours of work, overtime, possible reductions in grade, etc., - all relate to working conditions of all of the controllers. *See Kirtland AFB, 64 FLRA at 174; U.S. Dep’t of Health and Human Serv., Soc. Sec. Admin., Baltimore, Md., 41 FLRA 1309, 1317 (1991)*.

Under these circumstances, the Union had the right to be offered an opportunity to be present and to represent employees. The question then becomes whether the Union was provided notice of the meeting. The evidence reflects that Hershberger announced the August 1 meeting in an email to all the employees of SPORT, including Oldebeken, the Union president. The email was not addressed to Oldebeken at the Union’s formal email address. While Hershberger denied every using the Union’s email address, the evidence reflects that he sometimes used it. However, it is clear from the correspondence that although the Union did not receive a separate specific notice, Oldebeken was aware of the meeting on the day before the meeting; and that he protested the shortness of the notice and that he would be unavailable due to previous scheduling conflicts. Oldebeken also protested that the Union did not have enough time to plan. Interestingly, Hershberger responded that the Union did not need to plan and asserted to Oldebeken that the meeting was not a formal meeting. Given the shortness of the notice of the meeting, the Respondent’s assurances that the meeting was not a formal meeting, that there would be no need for the Union “to plan”, and the Respondent’s failure to explain why the meeting could not be postponed to

accommodate the Union's president's schedule, I find that the Union was not given adequate notice of the meeting.

Further, I find that the Union did not waive its right to attend the meeting. Any waiver by a union of its statutory right to designate its representative must be clear and unmistakable. *Food and Drug Admin., Newark Dist. Office, West Orange, N.J.*, 47 FLRA 535, 566 (1993). Here there was no clear and unmistakable waiver by the Union of its

representational rights under Article 1, Section 3 of the CBA. Oldebeken clearly indicated the Union's interest in being represented at the meeting, but noted his conflict with the scheduled meeting. Even if the Union's Treasurer was present at the meeting, he had not been designated as the Union's representative in this matter and he was present only as a bargaining unit employee. Hershberger failed to reschedule the meeting, although there was no evidence that the meeting could not have been delayed. Under all these circumstances, I find that Oldebeken did not waive the Union's right to representation at the meeting.

Accordingly, all of the statutory elements of a formal discussion under section 7114 (a)(2)(A) were satisfied. The Respondent's failure to provide the exclusive representative with an opportunity to be represented at the formal discussion on August 1 is an unfair labor practice under section 7116(a)(1) and (8) of the Statute.

October 15, 2008 meeting

Was there a Discussion?

The meeting on October 15 was called in order for Hershberger to solicit the opinions of controllers on the new control room. Hershberger started off the meeting by asking for opinions and there was lots of give-and-take with the controllers giving their opinions and suggestions regarding possible changes to the control room. Both Hershberger and Cooper took notes during the meeting, and apparently, both attempted to clarify questions from the controllers.

Under these circumstances, I find that the meeting on October 15 was a discussion, within the meaning of section 7114(a)(2)(A). *See VA Brockton; Kirtland AFB*, 64 FLRA at 179.

Was the Meeting Formal?

In *GSA, Region 9*, 48 FLRA at 1355, the Authority stated:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), we have advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. *See F.E. Warren, 52 FLRA at 157.*

Looking at the circumstances of the October 15 meeting, I find that the criteria for formality are met. The meeting was conducted by the employees' second-level supervisor, the SPORT Air Traffic Manager, with one of the first-line supervisors also present. The meeting took place in a conference room close to the control room. Although this conference room is occasionally used for meetings, it does not appear from the evidence that it was a place frequented by the controllers. The meeting was announced by an email to all employees, which was sent five days prior to the meeting, and referred to the meeting as a "Feedback Meeting". The meeting lasted about one hour and fifteen minutes. No formal agenda was handed out at the meeting, and it appears that the primary purpose of the meeting was for the controllers to discuss the new control room and any suggestions they had to make it better. Notes were taken by both Cooper and Hershberger, and Hershberger sent a follow-up email to all the employees with a list of eighteen (18) suggestions that came out of the meeting. (G.C. Ex. 12) The meeting was conducted in an organized and controlled manner by the Hershberger.

Taking all these factors into consideration, I find that the meeting was formal within the meaning of section 7114(a)(2)(A) of the Statute. *See F.E. Warren, 52 FLRA at 159.*

Did the Meeting Concern "any grievance or any personnel policy or practice or other general condition of employment"?

The evidence reflects that the specific purpose of this meeting was to solicit suggestions from the controllers about ways in which the new control room could be improved. The discussion concerned the lighting in the control room, the position of control strips which are utilized in the daily work of the controllers, the telephone system, and other matters involving the control room.

Although the Respondent appears to assert that the meeting in question did not involve any discussion concerning either a grievance or personnel policy, it presented no specific arguments in this defense. After a careful review of the evidence, I find that the meeting in question concerned "personnel polic[ies] or practices or other general condition[s] of employment" within the meaning of section 7114(a)(2)(A) of the Statute. *See DLA, 37 FLRA at 952.* In that regard the topics covered by Hershberger, and the suggestions put forth by the controllers relate to the working conditions of all of the controllers.

Under these circumstances, the Union had the right to be offered an opportunity to be present and to represent employees. The evidence clearly reflects that Oldebeken was aware of the announced meeting and was prepared to attend the meeting in his position as the Union president. The GC asserts that Oldebeken was deliberately prevented from attending the meeting when he was assigned to work Position F just prior to the start of the meeting. Otherwise, the Union would have had the opportunity to be represented at the meeting and

there would be no violation of the Statute.

I am in agreement with the GC that the Respondent never fully explained why Oldebeken was selected to work Position F at the time of the meeting. The logs show that other controllers were available and that they had not worked a position prior to that time. Further, Oldebeken had previously worked a position the same morning. While it appears that controllers generally work two or three positions during their shifts, these discrepancies from the usual course of business are puzzling. However, I am concerned that Oldebeken did not speak up for himself and inform the supervisor that he had intended to attend the Feedback Meeting in his position as the Union President. The GC offered no explanation of this failure on Oldebeken's part. However, given the totality of the circumstances, as well as the controllers apparent obedience when told to take a scope position, I find that Oldebeken was prevented from attending the meeting as the Union president. There is no explanation from the Respondent of why Scanlan was removed from Position F and ordered to go to the meeting and then replaced by Oldebeken, the Union president. In reviewing all of the evidence, I find the evidence sufficient for an overall finding that Oldebeken intended to represent the Union at the meeting and was unable to do so due to his sudden work assignment.

Accordingly, all of the statutory elements of a formal discussion under section 7114 (a)(2)(A) were satisfied. The Respondent's failure to provide the exclusive representative with an opportunity to be represented at the formal discussion on October 15 is an unfair labor practice under section 7116(a)(1) and (8) of the Statute.

Bypass allegation

It is well settled Authority precedent that "(a)gencies unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship." *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 63 FLRA 280, 282 (2009)(*FCI Elkton*); *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Bastrop, Texas*, 51 FLRA 1339, 1346 (1996)(*FCI Bastrop*).

Agency negotiations with unit employees over conditions of employment "inherently undermine the status of the union." *See, e.g., Dep't of the Treasury, Internal Revenue Serv., Kansas City Serv. Ctr., Kansas City, Mo.*, 57 FLRA 126, 129 (2001); *Air Force Accounting and Fin. Ctr., Lowry Air Force Base, Denver, Colo.*, 42 FLRA 1226, 1239 (1991). In *U.S. Dep't of the Interior, Bureau of Indian Affairs, Gallup, N.M.*, 52 FLRA 1442, 1451 (1997) (*BIA Gallup*), the agency bypassed the union when it solicited opinions from employees, and adopted the selected change without bargaining with the union.

This conduct constitutes direct dealing with employees, and violates section 7116(a) (1) and (5), because it interferes with the union's rights under section 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit. *FCI Bastrop*,

51 FLRA at 1346. In addition, this conduct also constitutes an independent violation of

section 7116(a)(1) because it demeans the union, and inherently interferes with the rights of employees to designate and rely on the union for representation. *Id.* at 1346-47.

The evidence reflects that, at the October 15 meeting, Hershberger actively sought the controllers' views and opinions of the new control room and solicited their input for improving the facility. This discussion resulted in eighteen suggestions for changes and/or improvements to the facility, and four of the suggested changes were implemented without any involvement from the Union. The Respondent appears to argue that this discussion was similar to its past dealings with the controllers regarding the new control room. However, there is evidence that the Union was involved, through partnership, with the renovation and Oldebeken, as the Union president, participated in the renovation from its inception. Hershberger's solicitation of the controllers' views and opinions therefore directly undermined the status of the Union. *See BIA Gallup*, 52 FLRA at 1451; *Department of Health and Human Serv., Soc. Sec. Admin., Baltimore, Md.*, 28 FLRA 409, 429-30 (1987).

I therefore find that the Respondent unlawfully bypassed the Union when Hershberger and Cooper directly communicated with controllers over matters relating to the collective bargaining relationship, in violation of section 7116(a)(1) and (5) of the Statute.

Based on the above findings and conclusions, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Defense, U.S. Department of the Air Force, Edwards Air Force Base, California, shall:

1. Cease and desist from:

(a) Failing to provide the SPORT Air Traffic Controllers Organization (SATCO) advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings that discuss overtime and 10 hour shifts, options for supporting aircraft, and other issues affecting conditions of employment.

(b) Failing to provide SATCO advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including Feedback Meetings that solicit views and opinions over suggested changes to the Control Room.

(c) Bypassing SATCO, by dealing directly with bargaining unit employees concerning their conditions of employment, including the solicitation of views and

opinions over suggested changes to the Control Room.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Provide SATCO with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees, including meetings that discuss overtime and 10 hour shifts, options for supporting aircraft, and other issues affecting conditions of employment.

(b) Provide SATCO with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees, including meetings that solicit views and opinions over suggested changes in the Control Room.

(c) Post throughout Edwards Air Force Base, California, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Installation Commander, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued Washington, D.C., June 10, 2010.

Susan E. Jelen
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Defense, U.S. Department of the Air Force, Edwards Air Force Base, California, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to provide the SPORT Air Traffic Controllers Organization (SATCO) with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings that discuss overtime and 10 hour shifts, options for supporting aircraft, and other issues affecting conditions of employment.

WE WILL NOT fail to provide SATCO advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including Feedback Meetings that solicit views and opinions over suggested changes to the Control Room.

WE WILL NOT bypass SATCO, by dealing directly with bargaining unit employees concerning their conditions of employment, including the solicitation of views and opinions over suggested changes to the Control Room.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights assured by the Statute by soliciting controllers' views and opinions over suggested changes to the Control Room.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured by the Statute.

WE WILL provide SATCO with advance notice and an opportunity to be represented at any formal discussion, including meetings that discuss overtime and 10 hour shifts, options for supporting aircraft, and other issues affecting conditions of employment.

WE WILL provide SATCO with advance notice and an opportunity to be represented at any formal discussion, including meetings that solicit views and opinions over suggested changes to the Control Room.

(Agency/Activity)

Dated: _____

By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, and whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: 415-356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by **CSUSAN E. JELEN**,
Administrative Law Judge, in Case No. SF-CA-09-0087, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: June 10, 2010
Washington, DC