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

MEMORANDUM DATE: August 16, 2006

TO: The Federal Labor Relations Authority

FROM: CHARLES R. CENTER
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ELKTON, OHIO

Respondent

and Case No. CH-CA-05-0258

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 607, AFL-CIO

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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FEDERAL LABOR RELATIONS AUTHORITY
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U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-05-0258

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Chief Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his 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 **SEPTEMBER 18, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

CHARLES R. CENTER
Chief Administrative Law Judge

Dated: August 16, 2006
Washington, DC

OALJ 06-29

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-05-0258

Sandra J. LeBold, Esquire
Susanne S. Matlin, Esquire
For the General Counsel

Erika S. Turner, Esquire
Darrel Waugh, Esquire
Scot L. Gulick, Esquire
For the Respondent

Carl Halt, President
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

Statement of the Case

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 Rules and Regulations of the Federal Labor Relations Authority (hereinafter FLRA or Authority), 5 C.F.R. Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 607 (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Chicago Regional Office of the Authority. The complaint alleges that the

U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio (Respondent or BOP) violated section 7116(a)(1) and (8) of the Statute when it held a formal meeting with bargaining unit employees without affording the Union notice and the opportunity to be represented at the meeting. (GC Ex. 1(b)) The Respondent timely filed an Answer and an Amended Answer denying the allegations of the complaint. (GC Ex. 1(d) and (f))

A hearing was held in Youngstown, Ohio on March 28, 2006, at which time the parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that have 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.

Findings of Fact

The Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (GC Exs. 1(b), (d) and (f))

The Union is a labor organization under 5 U.S.C. § 7103 (a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining. (GC Exs. 1 (b) and (d))

On March 7, 2005[1], J.D. Robinson, an associate warden (AW) at the Federal Correctional Institution in Elkton, Ohio (FCI Elkton) along with other members of management, conducted a meeting with bargaining unit employees assigned to the Health Services Department at the facility. (Jt. Ex. 1)

At the time of the March 7 meeting, AW Robinson was acting for the Respondent and was a supervisor and/or management official as defined in 5 U.S.C. § 7103(a)(10) and (11). (Jt. Ex. 1)

The Respondent did not give notice of the meeting to the Union and when a Union steward attempted to attend the meeting AW Robinson prohibited his participation. (Jt. Ex. 1).

During the meeting, AW Robinson discussed a focus review and explained the removal and reassignment of two

[1] All dates occur in 2005 unless otherwise stated.

supervisors and two bargaining unit employees from the Health Services Department resulting from the review. He also disclosed some of their replacements and indicated that an investigation was ongoing. Because of the ongoing nature of the investigation, he cautioned employees about discussing the case or assisting those under investigation. In addition, he stated that changes in unit assignments might be forthcoming due to imbalances in the workload, discussed the impact the personnel changes would have on leave and leave approval, and disclosed that "For the time being, Health Services clinical staff will not be pulled for a Custody Post." The AW also indicated that he would request that the Health Services staff be excluded from the custody post roster in future quarters. (Jt. Ex. 1) The meeting also included a discussion of how to deal with the fact that the only x-ray technician on the staff was one of the bargaining unit employees removed from the unit. (Tr. 16, 17, 33, 87)

Attendance at this specially called meeting conducted by AW Robinson was mandatory for all scheduled Health Services staff and it was held in a conference room. The meeting lasted forty-five to fifty minutes with a record of the meeting taken at the order of AW Robinson who approved the recorded minutes as reflected by his signature. (Jt. Ex. 1, Tr. 28)

POSITIONS OF THE PARTIES

General Counsel

Counsel for the General Counsel asserts that the Respondent violated § 7116(a)(1) and (8) of the Statute when it met with Health Services bargaining unit employees on March 7, without first giving the Union notice and an opportunity to be represented.

Counsel for the General Counsel contends that this meeting was a formal discussion concerning personnel policies or practices or other general conditions of employment. Counsel for the General Counsel asserts that the meeting was formal because it was conducted by an Associate Warden, a high level management official with other members of management in attendance, it was in a conference room apart from the employees' work station, attendance was mandatory, the meeting lasted forty-five minutes or more, and a record was prepared.

Counsel for the General Counsel further argues that the discussion of the results of the focus review, staff changes, the ongoing investigation, new and revised duties

that resulted for the staff changes, license and certification issues, workload, work process, staff augmentation and leave procedures all demonstrate that this was more than an informational meeting and that it actually concerned personnel policies or practices or other general conditions of employment.

Respondent

The Respondent asserts that the March 7 meeting only involved providing information about discrete actions involving individual employees and thus, was not a formal discussion concerning a grievance, personnel policy or practice, or other general conditions of employment.

Respondent contends that the ". . . meeting merely involved the dissemination of information pertaining to the four temporarily-reassigned individuals, the identification of the new departmental supervisors, and A.W. Robinson's assurances that, in the wake of the reassignments, no working conditions had been changed for the remaining employees." (Resp. Br. p. 7)

ANALYSIS

§ 7114(a)(2) 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 § 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; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Dept. of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, CA.*, 29 FLRA 594, 604-06 (1987) (*McClellan AFB*).

I find that the March 7, 2005 meeting with the Health Services staff scheduled and conducted by AW Robinson and attended by bargaining unit employees still working in the

department met the four elements of a formal discussion despite the Respondent's characterization of the purpose as "informational". It is clear from the facts that the meeting resulted in more than the dissemination of information. *Dept. of the Treasury, U.S. Customs Service, Miami, FL.*, 19 FLRA 1123, 1131 (1985). Even if disseminating information about discrete individual actions had been the sole intent of the Respondent when the meeting started, by the time it was over, the discussion between the Respondent's representatives and members of the duly recognized bargaining unit covered personnel policies and practices and general conditions of employment such that it was a formal discussion. *U.S. Dept. of the Army, New Cumberland Army Depot, New Cumberland, PA.*, 38 FLRA 671, 677 (1990). Therefore, the Union should have been given advance notice of the meeting and provided an opportunity to be represented. Thus, the Respondent committed an unfair labor practice when it failed to do so and this was not a case of a planned non-formal meeting gone awry.

There can be no doubt that the March 7 assembly was a meeting. AW Robinson called the special assembly of the Health Services staff and spoke forty-five to fifty minutes about the changes that were being made involving personnel assigned to the unit. During the assembly, employees asked questions and made comments. I further find that the meeting was formal and attended by representatives of the agency and more than one member of the bargaining unit. In addition to being conducted by the second ranking member of management at FCI Elkton, AW Robinson was accompanied by the newly appointed acting managers for the unit. The meeting was planned in advance and minutes were recorded at the order of AW Robinson. All bargaining unit employees scheduled for work at the time of the meeting were in attendance. Given the totality of the facts and circumstances, I conclude that this was a formal meeting. *U.S. Dept. of Labor, Office of Asst. Secretary for Admin. and Management, Chicago, IL.*, 32 FLRA 465, 470 (1988).

Having concluded that this was a formal meeting attended by representatives of the Respondent and bargaining unit employees, the determination of violation turns upon the subjects discussed during the meeting.

The Respondent argues that this meeting ". . . merely involved the dissemination of information pertaining to the four temporarily-reassigned individuals, the identification of new departmental supervisors, and A.W. Robinson's assurance that, in the wake of the reassignments, no working conditions had been changed for the remaining employees." And, that "Accordingly, no "'personnel policy or practice'"

was discussed at the meeting." Were the recitations offered in Respondent's brief correct, this would be a much closer case. Unfortunately however, they are not, and I find that the discussion concerned personnel policies and practices and other general conditions of employment.

Part of the meeting involved AW Robinson explaining the results of a "focus review" and the personnel changes resulting from it, which included the reassignment of two members of management and two employees in the bargaining unit. Had the meeting ended there, the argument that it involved discrete personnel actions involving individual employees would be well placed. *U.S. Dept. of Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, NY.*, 55 FLRA 1032, 1035 (1999). However, it did not end there, and based upon his testimony, AW Robinson never intended for it to end there. The reasons for the meeting cited by AW Robinson included: letting the employees know who their new supervisors were and giving them an order not to assist their old supervisors, advising them of the impact the changes would have upon leave and answering any questions the employees might have. (Tr. 85-91)

Based upon the minutes of the meeting and the testimony at the hearing, the topics discussed during the meeting were varied and included, workload distribution, how the remaining employees would deal with losing the only certified x-ray technician assigned to the unit, the impact on approved leave and who would approve future leave, and the use of unit personnel to augment custody post positions. (Jt. Ex. 1) Suffice it to say, each of these involves a personnel policy or practice or general condition of employment and the Respondent's contentions that it conducted nothing more than an informational meeting and changed no working conditions are simply wrong. While tapping your heels together three times may get you to Kansas from Oz, announcing that you are conducting an informational meeting and thrice asserting that you are not changing working conditions does not make a meeting of bargaining unit employees one at which the Union does not have a statutory right to be represented. (Tr. 88) Further, the fallacy in such a notion is particularly acute when you in fact, do change conditions of employment at the meeting.

Respondent's Counsel and AW Robinson appear to be under the impression that the notice and opportunity to represent requirement of § 7114(a)(2)(A) of the Statute is triggered only if the discussion of a general condition of employment involves a change thereto. However, the requirement to give an exclusive representative of an appropriate unit the

opportunity to be represented at a meeting of bargaining unit employees extends to all formal discussions by agency representatives **concerning** personnel policy or practices or general conditions of employment. (*Emphasis added*). The key is that the discussion concerns such matters, not that they are being changed. For example, a meeting called to discuss the enforcement of a dress code concerned a condition of employment even though no changes to the dress code were being made. *U.S. Customs Service, Region VIII, San Francisco, CA.*, 18 FLRA 195, 197-98 (1985).

It appears that Respondent's Counsel as well as AW Robinson, a former human resources manager well experienced on "union issues" (Tr. 81) confuse the opportunity to be represented provided by § 7114 of the Statute, with the right to bargain provided by § 7106(b). During cross-examination, AW Robinson admitted that a change in general conditions of employment was not required for a meeting to be formal. (Tr. 94) However, given the range of topics he planned to discuss at the meeting, if he understood at the time of the meeting that a discussion concerning personnel policies or practices or general conditions of employment was enough to constitute a formal discussion, his failure to notify the Union and his subsequent expulsion of a Union steward who attempted to gain access to the meeting would be a blatant and willful violation of the Statute.[2] Aside from discussing workload, anticipated changes in duty assignments and the work process, one admitted purpose of the meeting was to announce that previously approved leave would not be cancelled, to make clear who now had the authority to approval leave and to whom such requests should be submitted. Such matters clearly involve personnel policies or practices or general conditions of employment.

Furthermore, despite Respondent's protestations otherwise, I find that an actual change in the conditions of employment for bargaining unit members was announced at the meeting. Two of the bargaining unit members in the Health Services unit were on a roster of personnel who could be assigned duty on a custody post in the place of an absent correctional officer. At the meeting, AW Robinson announced, "For the time being, Health Services clinical staff will not be pulled for a Custody Post." (Jt. Ex. 1)

[2] The best case scenario for the Respondent is that this violation resulted from J.D. Robinson's failure to understand and appreciate that the statutory right to notice and opportunity to be represented is different from the statutory right to notice and an opportunity to bargain and the former is not contingent upon a change to conditions of employment.

The minutes from the meeting then indicate: "Mr. Robinson advised them to still turn in their bid sheet for the next quarter, but he would make a request for all Health Services' staff to be excluded from this roster."

By removing the two Health Services staff members from the custody post roster, the Respondent not only changed the duties those two employees would be required to perform "for the time being", but also reduced the number of employees remaining on the roster. This changed the conditions of employment for all of those employees remaining on the custody post roster by increasing the likelihood they would get pulled for custody post duties.

At the hearing, AW Robinson testified that he only told the employees that he was going to try to get the Health Services staff members excluded and that no changes were actually made to the roster. (Tr. 91) However, I find the minutes taken and approved by AW Robinson near in time to the meeting to be a more persuasive record of what was said by AW Robinson at the meeting. In that document, it clearly states: "For the time being, Health Services clinical staff will not be pulled for a Custody Post." There is no expression of doubt, lack of authority or need for further approval of the action. The minutes present the exclusion as an affirmative fact that was *fait accompli* for the time being, and AW Robinson approved that statement as written. While the minutes go on to indicate that he was going to request that the employees be excluded from the roster in the next quarter as well, the clear meaning of the minutes as drafted and approved by AW Robinson, was that as of March 7, the two members of the Health Services staff would not be pulled for custody post "for the time being".

Because the Respondent conducted a formal meeting where it planned to discuss matters that concerned personnel policies or practices or general conditions of employment and actually changed at least one condition of employment for some bargaining unit employees without giving the Union advanced notice and an opportunity to be represented, I conclude that the Respondent violated 7116(a)(1) and (8) of the Statute.

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (Statute), the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio, shall:

1. Cease and desist from:

(a) Failing and refusing to provide the American Federation of Government Employees, Local 607 (Union), advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning grievances or any personnel policies or practices or other general conditions of employment.

(b) Interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

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

(a) Provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees.

(b) Post at at the FCI Elkton, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Warden, FCI Elkton, 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.

(c) Pursuant to section 2423.41(e) of the Rules and Regulations of the Federal Labor Relations Authority, notify the Regional Director of the Chicago Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, August 16, 2006

CHARLES R. CENTER
Chief 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 U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the American Federation of Government Employees, Local 607 (Union), advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning grievances or any personnel policies or practices or other general conditions of employment.

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

WE WILL provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees.

_____

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution
Elkton, Ohio

Dated: _____
By: _____
(Signature) (Warden)

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 its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority,

55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of the DECISION issued by CHARLES R. CENTER, Chief Administrative Law Judge, in Case No. CH-CA-05-0258, were sent to the following parties:

_____

CERTIFIED MAIL & RETURN RECEIPT — CERTIFIED NOS:

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President
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DATED: August 16, 2006
Washington, DC