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

MEMORANDUM DATE: December 12, 2007

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: VA CONNECTICUT HEALTHCARE SYSTEM
NEWINGTON, CONNECTICUT

Respondent

AND Case No. BN-CA-06-0354

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-109

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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NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R1-109

Charging Party

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned 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 **JANUARY 14, 2008**, and addressed to:

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

PAUL B. LANG
Administrative Law Judge

Dated: December 12, 2007
Washington, DC

OALJ 08-06

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

VA CONNECTICUT HEALTHCARE SYSTEM NEWINGTON, CONNECTICUT Respondent AND NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R1-109 Charging Party	Case No. BN-CA-06-0354

Philip T. Roberts, Esquire
For the General Counsel

Kimberly M. Jacobs, Esquire
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge dated June 16, 2006 (GC Ex. 1(a)), filed by the National Association of Government Employees (NAGE) against the Department of Veterans Affairs (VA). On September 10, 2007, the Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(c)) in which it was alleged that the VA Connecticut Healthcare System, Newington, Connecticut (Respondent) committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by repudiating a provision of the master collective bargaining agreement between the VA and NAGE. It was further alleged that the Respondent's repudiation occurred by virtue of its refusal to form a facility level Training and Career Development Committee. NAGE,

Local R1-109 (Union) was named as the agent of NAGE for the purpose of representing a collective bargaining unit of the Respondent's employees at its Newington facility. The Respondent filed a timely Answer (GC Ex. 1(i)) in which it raised certain affirmative defenses and denied that it had committed the unfair labor practice as alleged.

A hearing was held in Hartford, Connecticut on October 23, 2007. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence and of the post-hearing briefs submitted by the parties.

Positions of the Parties

General Counsel

The General Counsel maintains that Article 19, Section 2A of the Master Agreement between the VA and NAGE (Joint Ex. 1, p. 64) obligates the Respondent to form a Training and Career Development Committee (Training Committee) solely for the bargaining unit represented by the Union. Instead, the Respondent formed a Training Committee which included, in addition to the Union, representatives of two other bargaining units of the Respondent's employees at its Hartford and Newington facilities. The General Counsel further alleges that the Respondent's breach of the Master Agreement was clear and patent. Furthermore, the Training Committee is the sole venue for addressing training issues other than the grievance procedure and is, therefore, at the heart of the Master Agreement.

The General Counsel denies that the Union's unfair labor practice charge was untimely filed. The Union was entitled to accept the Respondent's assurances that it would create the Training Committee in accordance with the Master Agreement. Regardless of the composition of the Training Committee, the Respondent was not justified in significantly delaying the formation of any such committee.

The General Counsel also denies that the unfair labor practice charge is barred under §7116(d) of the Statute. The prior grievance by the Union arose out of the Respondent's alleged breach of Article 19, Section 2A of the Master Agreement; the grievance did not raise the additional issues which are elements of the charge of repudiation. Therefore, the issues in the instant case are not substantially similar to those of the grievance.

Respondent

The Respondent maintains that its Hartford and Newington campuses have been integrated and that they constitute a single "facility" within the meaning of the Master Agreement. Accordingly, it did not breach the Master Agreement when it formed a single Training Committee which includes representatives of all three of the bargaining units, including the unit represented by the Union, at West Haven and Newington. The Respondent's formation of a single Training Committee is consistent with the practice at other VA facilities with multiple bargaining units. Alternatively, the Respondent maintains that any breach of the Master Agreement was not clear and patent.

The Respondent denies that the Training Committee carries out collective bargaining and maintains that Article 10, Section 5 of the Master Agreement (Joint Ex. 1, p. 24) has specific language which provides for mid-term bargaining. Therefore, its refusal to form a separate Training Committee for the Union relates to a subject that is covered by an existing collective bargaining agreement.

The Respondent argues that the Authority lacks jurisdiction in this case in view of the fact that, on October 7, 2005, the Union initiated a grievance over the Respondent's alleged violation of Article 19, Section 2A of the Master Agreement. Accordingly, the Complaint should be dismissed pursuant to §7116(d) of the Statute. The Respondent also maintains that the Complaint should be dismissed pursuant to §7118(a)(4) of the Statute because the underlying unfair labor practice charge was untimely filed.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. NAGE is a labor organization as defined in §7103(a)(4) of the Statute. The Union is the agent of NAGE for representing bargaining unit employees who are assigned to the Respondent's Newington medical center. At all times pertinent to this case the VA and NAGE were parties to a Master Agreement (Joint Ex. 1) which went into effect on November 28, 2003. The Respondent and the Union were parties to a Supplemental Labor-Management Agreement (Supplemental Agreement) (Joint Ex. 2) which went into effect on April 25,

1983, and which covered bargaining unit employees assigned to the Newington Medical Center.[1/]

The Respondent consists of medical centers at Newington and West Haven as well as several community-based outpatient clinics, a regional office and a veterans benefits facility; the Newington and West Haven campuses were consolidated around 1995. In addition to the Union, which represents nonprofessional employees at Newington, the Respondent also bargains with two locals of the American Federation of Government Employees (AFGE). One of the AFGE locals represents professional employees at both Newington and West Haven, while the other AFGE local represents nonprofessional employees, including those at the veterans benefits office and the community-based outpatient clinics (Tr. 20, 21).

Contractual Language

Article 19 of the Master Agreement, entitled "**TRAINING AND CAREER DEVELOPMENT**", states, in pertinent part:

> **Section 2 – Local Training Committees**
>
> A. There shall be a facility level Training and Career Development Committee which will be authorized to reach joint agreements, and make joint recommendations regarding training and career development programs.
>
> B. The number of Local representatives on the Training Committee is a subject for local bargaining. . . .

(Joint Ex. 1, p. 64)

Article 10 of the Master Agreement, entitled "**NATIONAL CONSULTATION RIGHTS AND MID-TERM BARGAINING**" states, in pertinent part:

> **Part B: Midterm Bargaining**
>
> **Section 1 – Definitions**
>
> Mid-term bargaining is defined as all negotiations, including Local, Union, Department or Management

1/ Although the initial terms of the Master and local agreements have expired, the parties have agreed to extend them for another term (Tr. 21).

initiated, which occur during the duration of this Agreement, concerning changes to conditions of employment not covered by the terms of this Agreement. Nothing shall preclude the Parties from negotiating procedures and appropriate arrangements which management officials will observe in exercising any rights under 5 USC § 7106.

. . .

Section 5 – Local Level Bargaining

A. Management shall notify the Local in writing prior to the planned implementation of proposed changes that affect conditions of employment and shall simultaneously provide copies of documents relied upon for the proposed changes. The method of notification, whether electronic or other, will be a subject for local negotiations.

. . .

E. Nothing in this section restricts the Local from initiating local mid-term bargaining over issues not contained in published facility policies or covered by this Agreement. . . .

(Joint Ex. 1, pp. 20, 21, 24)

Article 11, entitled "**LOCAL SUPPLEMENTAL AGREEMENTS**" states, in pertinent part:

Section 1 – General

Contract provisions contained in Local Contracts/Supplements in existence prior to the Master Agreement will continue in effect, provided they do not conflict with the Master Agreement. Whenever any subject is addressed in the Master Agreement, the terms of the Master Agreement shall prevail over the provisions of the Local agreement concerning the same subject. Recognizing that the Master Agreement cannot cover all aspects or provide definitive language for local adaptability on each subject addressed, it is understood that Local Supplemental Agreements may include substantive bargaining on all subjects covered in the Master Agreement provided they do not conflict, interfere with, or impair implementation of the Master

> Agreement. Supplemental Agreements must be approved pursuant to statute.
>
> **Section 2 – Procedures for Local Supplemental Agreements**
>
> . . .
>
> B. Negotiation for a Local Supplemental Agreement will be conducted between Local and Management representatives and the Agreement shall be applicable only in such facilities represented by the Local representatives who executed the agreement.

(Joint Ex. 1, p. 26)

The Controversy Over the Training Committee

By an e-mail message dated May 12, 2004 (GC Ex. 2), John Valenti, the Union President, forwarded to Charles Lee, a Labor Relations Specialist and chief negotiator for the Respondent, a memorandum dated May 11, 2004 (GC Ex. 3) containing the Union's proposals regarding tuition support. The first of those proposals was that:

> The Employer shall create a local facility training and career development committee comprised of three Labor and three Management representatives (see NAGE Master Contract Article 19)[.]

Lee eventually responded to Valenti by an e-mail message dated August 23, 2004 (GC Ex. 5), in which he forwarded a proposed policy regarding the Hospital Education Committee. According to the proposed policy, the committee would be composed of three representatives of the Respondent and representatives of each of the three local unions, including the Union, representing bargaining units at the Respondent's Newington and West Haven campuses. Valenti replied on September 9, 2004, by an e-mail message (GC Ex. 6) in which he forwarded his message to Lee of August 23, 2004, and stated, "I have already replied to this issue (below)". Lee and Valenti subsequently exchanged messages (GC Ex. 7, 8) in which the Respondent and the Union reiterated their respective positions, which remained unchanged, regarding the composition of the committee.

On December 20, 2004, Karen Waghorn, the Respondent's Associate Director, sent an e-mail message to Valenti and

others announcing the formation of an Employee Support Committee and a Steering Council. The stated purpose of the Steering Council was to:

> . . . develop the policy governing the committee scope and practices, recommend membership, and develop procedures for coordinating and scheduling activities . . . .

Waghorn also proposed that the Steering Council:

> . . . examine the purpose and function of the following committees and plan for appropriate interface.

(GC EX. 9, p. 1)

Among the named committees was Education/Tuition Support. Waghorn listed examples of employee services that might fall under the purview of the Employee Support Committee, including "Employee training programs and tracking; mandatory training requirements; orientation" (GC EX. 9, p. 2)

Finally, Waghorn requested that the presidents of the two AFGE locals and of the Union, or their designees, participate along with seven others in the work of the Steering Council. Valenti testified that he interpreted the Respondent's position as delaying the creation of the Training Committee until after the Employee Support Council[2/] had addressed the subject (Tr. 39).

Valenti responded to Waghorn by e-mail message dated December 22, 2004, stating that the functions of the Employee Support Committee were already covered by collective bargaining agreements and that the committee had no authority to alter those agreements. He further stated that:

> Where a subject is not covered, and concerns general conditions of employment, NAGE will exercise formal bargaining rights. The committee is rejected.

(GC Ex. 9)

On April 13, 2005, Valenti sent an e-mail message to Lee and Edward Kobylanski, a site manager, with copies to other Union officers (GC Ex. 10) in which he requested that the

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2/ The Employee Support Council was sometimes called the Employee Support Committee.

issue of the Training Committee be added to the agenda of the next semi-weekly midterm bargaining session; he attached a copy of his proposal of May 12, 2004, regarding a separate Training Committee for the Union (Tr. 40, 41).

On April 21, 2005, Valenti sent an e-mail message to Lee (GC Ex. 11) asking for the Respondent's proposals concerning various issues including the Training Committee. According to Valenti, he received no response (Tr. 42). The parties eventually bargained over the issue and the Union unsuccessfully sought the aid of the Federal Service Impasses Panel (Tr. 55, 56).

On October 7, 2005, the Union initiated a grievance (GC Ex. 12) in which it stated:

> Matter Grieved: It is the Union's position that the Employer has violated the terms and conditions [of] the parties' Master collective bargaining agreement by failing to create or provide the Union with [a] local training committee as provided for by Article 19 section 2, of the agreement.
>
> Relief Sought: The Employer shall create or provide the Union with a local training committee as provided for by Article 19 section 2, of the parties Master collective bargaining agreement, and shall fulfill all bargaining obligations concerning the creation of the committee.

The grievance was directed to Roger Johnson, Respondent's Director, by e-mail; Valenti received an electronic receipt that the message had been opened by Johnson or by someone on his behalf on the same date (Tr. 43; GC Ex. 13).

On November 23, 2005, Valenti sent an e-mail message to Johnson (GC Ex. 14) in which he stated that:

> The agency did not meet or respond to the attached grievance within contractual time frames. Pursuant to Article 44 section 7 of the Master Agreement, the grievance is resolved in favor of the grievant (Union) please implement the remedy.

Valenti received no response to the grievance or to his message (Tr. 44, 45).

The portion of the Master Agreement cited by Valenti states:

> Should Management fail to comply with the time limits of Step 1, the grievance may be advanced to Step 2. Should Management fail to comply with the time limits for rendering a decision at Step 2 or Step 3, the grievance shall be resolved in favor of the grievant, provided the following exists:
>
> 1. Receipt of the grievance has been acknowledged, in writing by Management at the appropriate step in the grievance procedure; and
> 2. That the remedy requested by the grievant is legal and reasonable under the circumstances.

(Joint Ex. 1, p. 129)

Step 1 of the grievance procedure is for the grievance to be presented to the immediate or acting supervisor. Step 2 is for its submission to an appropriate management official (Joint Ex. 1, pp. 127, 128).

Neither the Union nor the General Counsel have alleged, in the instant case or in any other proceeding before the Authority, that the Respondent has committed an unfair labor practice because of its failure to comply with the grievance procedure. On September 22, 2006, the Union filed an unfair labor practice charge against the Respondent, identified as Case No. BN-CA-06-0536, alleging that, beginning on or about December 16, 2005, the Respondent failed to bargain in good faith by unilaterally creating the Employee Support Council (Council) and naming the Union as a member. The Regional Director refused to issue a complaint; his decision was affirmed by the General Counsel on February 8, 2007 (Resp. Ex. 25).[3/]

The refusal of the Regional Director to issue a complaint and the General Counsel's affirmance of that decision is of no significance since, pursuant to §2423.11(f) and (g) of the Rules and Regulations of the Authority, the General Counsel's action in such matters is final. Such action by the General Counsel does not constitute a decision by the Authority and

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3/ The court reporter has labeled the Respondent's exhibits with the letter "A" for agency; I will cite them in the customary manner.

creates no precedent. Furthermore, the General Counsel's decision in the prior case is no bar to the later issuance of a complaint based upon the same alleged violation of the Statute.

The Formation and Operation of the Council and the Training Committee

On December 14, 2005, Margaret Owens, a management representative of the Respondent, sent an e-mail message (GC Ex. 15) to Valenti and the Presidents of the two AFGE locals informing them that the Respondent had recently established the Council and that its first meeting would take place on December 16, 2005. Owens attached a copy of the Council charter. Among the stated functions of the Council was to:

> Develop and implement education & employee development programs that will ensure that the VA Connecticut Healthcare System's workforce is prepared to meet the challenges facing the VA Connecticut Healthcare System today and into the future.

According to the charter, the Council Chair is to be appointed by the Medical Center Director. The Council is to report to the Governing Board. Among the listed standing committees and boards is the Education/Tuition Support Committee. Owens signed the charter as Council Chair on November 10, 2005, and Johnson signed on November 14, 2005. There is no provision for signatures on behalf of the Union or the AFGE locals (Resp. Ex. 8).

Sadiann Ozment is the Director of Hospital Education Services and a member of the Council. One of the responsibilities of the Council was to create a Training Committee of which Ozment is the Chair (Tr. 73, 74). The Training Committee makes recommendations to the Council which, in turn, makes recommendations to the Medical Center Director; the Director has the ultimate authority to approve the recommendations. Both the Training Committee and the Council operate by consensus; the only agreements reached by the Training Committee are on the substance of its recommendations. The Training Committee has not yet failed to reach an agreement on a recommendation (Tr. 76, 78-81).

On September 7, 2006, Owens sent an e-mail message to Ozment and others, including Valenti, reminding them of a Council meeting on September 8. Valenti responded on the same date stating:

> NAGE is NOT a part of this counsel [*sic*] and has advised the employer that it will exercise formal bargaining rights concerning ALL issues addressed by the counsel over which it is entitled to do so. I remind the employer of its contractual and statutory obligations to provide the Union with formal notice and opportunity to bargain concerning inter alia, any of [*sic*] changes to policies, practices, and working conditions addressed by this counsel PRIOR to any implementation. The employer acts at its own peril in failing to meet its obligations. The union has not authorized the employer to reference the NAGE as a party or participant in any minutes, or counsel proceedings.

(Resp. Ex. 17)

Valenti's message is consistent with his prior messages demanding what he characterized as the Union's contractual right to a Training Committee and demanding to bargain over any initiatives arising out of Training Committee recommendations (GC. Ex. 17-19). It is significant to note that Valenti never specifically stated that he objected to the Union being on the same Training Committee as the representatives of the two AFGE locals.

On January 12, 2007, Ozment and Owens signed a document entitled, "Training and Career Development Committee 2006-2007" (Resp. Ex. 24). Ozment testified that this is the charter of the Training Committee which was developed in concert with the Council (Tr. 77, 78). The charter provides, in pertinent part, that:

> The Committee will be chaired by an Education Program representative as appointed by the Director of the Education Program. The Committee will report directly to the Employee Support Council.
>
> . . .
>
> The Committee is authorized to establish and support implementation plans . . . subject to approval by the Medical Center Director. . . . charge letters and potential membership for committees must be reviewed and approved by the Employee Support Council.

According to Lee, the Union has consistently maintained that committees do not bargain (Tr. 124). Furthermore, during the course of the hearing counsel for both the General Counsel and the Respondent stated that they did not contend that either the various committees or the Council engage in collective bargaining (Tr. 94). Lee further testified that, on July 30, 2007, he forwarded to Valenti and the representatives of the two AFGE locals copies of a proposed policy on training and career development for their review (Resp. Ex. 9). Although the policy had been recommended by the Training Committee with the concurrence of the representative of AFGE Local 1674 (a representative of the other AFGE local apparently had not attended the meeting in which the action was taken), it was still subject to review by AFGE Local 1674 since the AFGE locals also maintain that the deliberations of the Training Committee do not constitute collective bargaining (Tr. 125, 126). During cross-examination Ozment acknowledged that, while the Training Committee does not engage in collective bargaining, its recommendations are afforded significant weight and that the Director has adopted some of those recommendations (Tr. 88, 89).

Bargaining History

Lee testified that, on December 8 and 9, 2004, he attended a meeting at which representatives of the VA and NAGE introduced the Master Agreement to bargaining unit employees. Four representatives of the Union also attended, including Valenti. Lee identified a transcript of the training session as well as the positions of some of the persons who spoke (Tr. 101-103; Resp. Ex. 3)[4/]. Mr. Haltigan, a VA representative, stated:

> We have no definitions in the master contract. This was an item we went back and forth with on negotiations. And you're not going to find a list of definitions anywhere. This could be problematic at some places. For example, I'll mention right away people, we didn't get many questions, by the way, or problems so far. But one of them was - what is a facility? And we intentionally did not define a facility. Management certainly has the right, and I don't think there's any disagreement, to organize. And so in that case management will define a facility however they define it. Now obviously when

4/ The Respondent introduced an excerpt of the transcript; accordingly, the pages in the record are not numbered consecutively.

> they organize and change conditions of employment, then they have to meet all of the bargaining obligations that go along with that. . . .

(Resp. Ex. 3, p. 4)

Ms. Pitts, a union negotiator, stated:

> We tried to make this contract straightforward, and you should be able to read it, interpret it. We didn't come up with definitions because we had a hard time ourselves. So we struggled, and that's why we don't have definitions.

(Resp. Ex. 3, p. 5)

Haltigan further stated:

> . . . I'm going to go ahead and start on Article 19, Training and Career Development. . . . But Section 2 is the key point here that the training committee locally is going to be basically decided by the parties at the local facility, including the number of union representatives on the training committee. And I know we've had issues about how many committees and what's a facility and so on . . . .

(Resp. Ex. 3, p. 52)

The above language is consistent with the testimony of George Pearson, the Chief of Human Resources at the VA Medical Center in Coatesville, Pennsylvania and a member of the VA negotiating team for the Master Agreement. According to Pearson, proposals by management to define the term "facility" were presented but were eventually dropped (Tr. 168, 169).

The General Counsel has not cited any portion of the Supplemental Agreement in which the term "facility" is defined. Article III of the Supplemental Agreement (Joint Ex. 2, p. 1), entitled "Definitions" contains only a definition of an emergency. There is no other evidence of either an oral or written agreement between the Union and the Respondent as to what constitutes a facility.

The Respondent submitted evidence to show that other VA facilities had single training committees in spite of the fact that they each had more than one bargaining unit (Tr. 129-138; Resp. Ex. 27-29). I have assigned no weight to that evidence

because the Respondent has not shown whether those committees were established over the objections of the various unions. Furthermore, Lee testified that the Respondent did not consult with VA management at other locations before establishing a single Training Committee (Tr. 134).

Upon consideration of the foregoing evidence, I find as a fact that neither the Master or Supplemental Agreements, nor any other agreement between the Union and the Respondent, defines the term "facility" either directly or by implication, nor is there any allegation or evidence of a past practice concerning the structure of committees at the Respondent's Newington or West Haven campuses. Furthermore, the statements by VA and NAGE representatives at the contract meeting on December 8 and 9, 2004, indicate that NAGE accepted the proposition that decisions as to the structure of facilities are within the purview of the VA, but without prejudice to the right of NAGE to require notice and bargaining over resulting changes to conditions of employment.

Discussion and Analysis

Preliminary Defenses

Limitations. Section 7118(a)(4)(A) provides that no complaint shall be issued on the basis of an alleged unfair labor practice that occurred more than six months before the filing of the unfair labor practice charge. Since the Union filed its unfair labor practice charge on June 16, 2006, the charge was timely if the unfair labor practice occurred on or after December 16, 2005. The evidence shows that the parties engaged in a prolonged period of correspondence beginning on May 12, 2004, when the Union first proposed the formation of a Training Committee (GC Ex. 2) to September 7, 2006, when the Union informed the Respondent that it would not be part of the recently formed Council whose purpose included the creation of a Training Committee (Resp. Ex. 17). Again, the Union never specifically stated that it was insisting on a separate Training Committee for its own bargaining unit, but kept insisting that the Respondent adhere to Article 19, Section 2 of the Master Agreement. Nevertheless, the Respondent has not alleged that it was unaware of the Union's position. While it is less clear when the Union first became aware of the Respondent's intention to form a single Training Committee, the composition of the Council, which included all three labor organizations, could not have been an encouraging sign. Whether or not by coincidence, the Union filed the unfair labor practice charge exactly six months after the first meeting of the Council, which was the earliest date on which

the Council could have recommended the formation of a Training Committee.

It is of no consequence that the unfair labor practice charge could have been filed earlier because of the delay in the formation of the Training Committee. The charge was not untimely and is not barred by limitations.

The prior grievance. Section 7116(d) of the Statute is an election-of-remedy provision which requires an aggrieved party to choose between the submission of a grievance and the filing of an unfair labor practice charge. Each of the parties has cited Authority precedent to the effect that an essential element to the application of that provision is that the subject matter of the grievance is the same as that of the unfair labor practice charge, *i.e.*, that each of the proceedings must arise out of the same factual circumstances and that the legal theories in support of each claim are substantially identical, *Dep't of Homeland Security*, 61 FLRA 272 (2005). There can be no valid doubt that the factual basis of the prior grievance and the requested relief, other than the posting of a notice, are identical to those of the underlying unfair labor practice charge and of the Complaint. The legal theories are another matter. The only legal issue in the grievance was whether the Respondent had breached Article 19, Section 2, of the Master Agreement. In order to meet her burden of proof in the instant case, the General Counsel must show not only that a breach occurred, but that the breach was clear and patent and that the provision in question is at the heart of the agreement, *Dep't of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218 (1991) (*Warner Robins*). The Authority has held that repudiation is an independent violation of the Statute, *U.S. Dep't of Labor, Occupational Safety and Health Administration, Chicago, Illinois*, 19 FLRA 454, 467 (1985).

In *U.S. Dep't of Labor, Washington, D.C.*, 59 FLRA 112 (2003), a case essentially on point, the Authority held that an unfair labor practice charge of repudiation was not a bar to a grievance for breach of the same contractual provision. If that precedent is to be re-examined, the Authority, rather than an Administrative Law Judge, must do so. Accordingly, I am bound by the holding of the Authority and must deny the Respondent's request that the Complaint be dismissed pursuant to §7116(d) of the Statute.

The Nature of the Alleged Breach of Contract

The Union and the General Counsel maintain that Article 19, Section 2 of the Master Agreement requires the Respondent to create a separate Training Committee for the Union and that the Respondent breached the Master Agreement when it established a committee which included representatives of the AFGE locals. In spite of that contention the Union never stated that it wanted such a committee. Rather, the Union, through Valenti, repeatedly insisted that the Respondent comply with the Master Agreement while declaring that it would not participate in the deliberations of the Council or the Training Committee. Indeed, the relief which the Union sought through the grievance procedure was similarly non-specific as is the Order and Notice proposed by the General Counsel. If the vague claims for relief by the Union and the General Counsel are motivated by a deliberate strategy, the strategy is not obvious and has not been explained.

Apparently the Union was so sure of its position that its initial proposal regarding the composition of the Training Committee (GC Ex. 2) was that the committee be comprised of "three Labor and three Management representatives" rather than that the Union itself have three representatives. The Respondent acquiesced to the Union's proposal and responded with a draft of a policy in which the Training Committee was to include representatives of each of the three labor organizations (GC Ex. 5). The Union never stated in writing that it did not consider representatives of the two AFGE locals to be "Labor" representatives within the meaning of its proposal. However, Lee testified that there was disagreement over whether all of the labor representatives should have been from the Union (Tr. 113).

The language of the Master Agreement and the explanation of its language at the training session of December 8 and 9, 2004 (Resp. Ex. 3), indicate that the Master Agreement contains no definition of a "facility", that such definition is within the purview of the VA in the first instance and that the details of the composition and operation of the committees were left to local bargaining. Both Valenti and Lee testified that the Newington and West Haven campuses have been integrated since around 1995 (Tr. 21, 99). While the integration of the campuses supports the Respondent's position that the Newington and West Haven campuses were a single facility within the meaning of the Master Agreement, that does not absolutely preclude the formation of a facility-wide Training Committee only for the Union. However, it is

somewhat far fetched to suppose that the Master Agreement requires such a separate committee for the Union, in the absence of specific language to that effect, when the bargaining unit represented by the Union consists only of employees assigned to Newington.

The proposition that the Respondent breached the Master Agreement at all, let alone that its breach was clear and patent, is at odds with all of the evidence as cited herein. I need not decide whether the Master Agreement requires the establishment of a separate Training Committee for the Union in order to conclude that the construction of the Master Agreement by the Respondent was reasonable and, therefore, its breach, if any, was not clear and patent as required by *Warner Robins* and similar holdings by the Authority.

The Significance of Article 19

The General Counsel appears to have partially retreated from her concurrence with the proposition that the Training Committee does not engage in collective bargaining. In the conclusion to her post-hearing brief the General Counsel asserts that Article 19 of the Master Agreement is the "sole vehicle addressing training issues short of filing a grievance" (GC brief, p. 15). Presumably, if I were to accept that assertion, I would then conclude that Article 19 is at the heart of the Master Agreement.

The problem with the General Counsel's position is that it flies in the face of the evidence that the parties met twice a week to conduct mid-term bargaining. There is nothing in the language of Article 10 of the Master Agreement that excludes the composition of committees from the scope of such bargaining, nor is there any evidence to show that the Respondent refused to discuss the subject. To the contrary, the evidence submitted by both parties shows that there was hard bargaining, often by e-mail, over the composition of the Council and the Training Committee and that the Union considered the parties to have reached an impasse.

In *U.S. Dep't of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 319 (1997) the Authority recognized that the definition of collective bargaining set forth in §7103(a)(12) of the Statute does not prescribe any particular method by which collective bargaining may occur. Thus, the designation of a body as the Training Committee does not, in itself, mean that the committee could not have engaged in collective bargaining. However, the undisputed evidence

shows that the Training Committee did not, in fact, engage in collective bargaining. The committee itself was formed upon the recommendation of the Council; the charters of the Council and the Training Committee were issued solely by the Respondent. The function of the Training Committee is to make recommendations to the Council which, in turn, makes recommendations which are subject to the approval of the Director of the Medical Center. Each of the labor organizations with which the Respondent bargains has the right to name a representative to the Training Committee, but the Respondent's representatives far outnumber those of the labor organizations. Furthermore, the Training Committee, like the Council, makes decisions by consensus.

In summary, the proceedings of the Training Committee have none of the indicia of collective bargaining, especially in light of the unambiguous language of Article 10 which provides for midterm bargaining. The language of Article 19, Section 2A, by which the Training Committee is authorized to reach joint agreements, does not support a contrary conclusion. The actual functioning of the Training Committee suggests that the term "joint agreements" refers to the formulation of recommendations. As a practical matter, the Training Committee may make recommendations which would obviate the need for bargaining or motivate either of the parties to initiate bargaining. However, there is nothing in the Master Agreement to suggest that, in participating in the work of the Training Committee, the Union would be waiving or compromising its right to conduct midterm bargaining in accordance with Article 10.

The determination as to whether a contractual provision is at the heart of an agreement must, by its very nature, be made on a case-by-case basis. There would be no question if the composition of the Training Committee were the sole subject of a memorandum of understanding. In this case the language in dispute is part of a Master Agreement consisting of 64 articles which cover the full range of subjects governing the relationship between the parties. While the Training Committee may serve a useful purpose, it cannot be considered as an essential element of the agreement. The reliance of the General Counsel on *Office of the Adjutant General, Missouri National Guard, Jefferson City, Missouri*, 58 FLRA 418 (2003) is misplaced. That decision, as well as the underlying decision of the Administrative Law Judge, turned on the affirmative defense that the repudiated provision of the collective bargaining agreement was contrary to law. The agency did not deny that the contractual

provision, which involved a uniform allowance, was at the heart of the agreement.

As shown above, I have concluded that the General Counsel has not supported her burden of proof that the alleged breach of the collective bargaining agreement was clear and patent or that the provision in question was at the heart of the agreement. Accordingly, I have concluded that the Respondent did not commit an unfair labor practice by failing to establish a separate Training Committee for the Union.[5/] I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, December 12, 2007.

PAUL B. LANG
Administrative Law Judge

5/ Since the contractual provision is not at the heart of the agreement, I would reach the same conclusion even if the Respondent were considered to have breached Article 19 by virtue of its delay in forming the Training Committee.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-06-0354, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS:**
Philip T. Roberts, Esquire Federal Labor Relations Authority Thomas P. O'Neill, Jr., Fed. Bldg. 10 Causeway Street, Suite 472 Boston, MA 02222	**7005 2570 0001 8450 3825**
Kimberly M. Jacobs, Esquire 555 Willard Avenue Newington, CT 06111	**7005 2570 0001 8450 3832**
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DATED: December 12, 2007
Washington, DC