

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

MEMORANDUM

DATE:

August 24, 2007

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
355 MSG/CC
DAVIS-MONTHAN AIR FORCE BASE
ARIZONA

Respondent

and

No.: DE-CA-07-0138

Case

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924

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

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

DEPARTMENT OF THE AIR FORCE
355 MSG/CC
DAVIS-MONTHAN AIR FORCE BASE
ARIZONA

Respondent

and

Case No. DE-CA-07-0138

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924

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 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~~1~~, 2429.12, 2429.21~~2~~2429.22, 2429.24~~3~~2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 24, 2007**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: August 24, 2007
Washington, DC

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

DEPARTMENT OF THE AIR FORCE
355 MSG/CC
DAVIS-MONTHAN AIR FORCE BASE
ARIZONA

Respondent

Case No. DE-CA-07-0138

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924

Charging Party

Michael Farley, Esquire
For the General Counsel

Phillip G. Tidmore, Esquire
Major Timothy J. Tuttle, Esquire
Thomas J. Burhenn, Esquire, on brief
For the Respondent

John Pennington
For the Charging Party

Before: SUSAN E. JELEN
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 (the Authority), 5 C.F.R. Part 2423.

On November 9, 2006, the American Federation of Government Employees, Local 2924 (Union or Local 2924) filed

an unfair labor practice charge with the Denver Region of the Authority against the Department of the Air Force, 355 MSG/CC, Davis-Monthan Air Force Base, Tucson, Arizona (Respondent or Davis-Monthan). (G.C. Ex. 1(a)) An amended unfair labor practice charge was filed on April 30, 2007. (G.C. Ex. 1(b)) On April 30, 2007, the Regional Director of the Denver Region of the Authority 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 in holding a formal meeting regarding a grievance filed by an individual bargaining unit employee. (G.C. Ex. 1(c)) On May 25, 2007, 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(d))

A hearing was held in Tucson, Arizona, on June 19, 2007, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent have filed timely post-hearing briefs, which 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

Davis-Monthan AFB is an activity of the United States Air Force, which is an agency under 5 U.S.C. §7103(a)(3). (G.C. Exs. 1(c) & (d)) During all times material to this matter, Robert Foley was Chief, Resource Management Division for the Aerospace Maintenance and Regeneration Group (AMARG) on Davis-Monthan Air Force Base, and a supervisor and/or management official under 5 U.S.C. §7103(a)(10) and (11) and acted on behalf of the Respondent. (G.C. Exs. 1(c) & (d); Tr. 8-9, 38) Barbara Dycus has been the Military Equal Opportunity (MEO) and Equal Employment Opportunity (EEO) Program Manager at Davis-Monthan AFB, as well as the Air Force Alternative Dispute Resolution (ADR) champion for Davis-Monthan AFB. (Tr. 63)

AFGE Local 2924 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 at the Respondent. (G.C. Ex. 1(c) and 1(d)) At all times material to this matter, John Pennington has been the President for

Local 2924. (Tr. 19)

Davis-Monthan AFB and Local 2924 have a Labor Management Relations Agreement (LMRA), which has been in effect since 1998. (G.C. Ex. 2) Davis-Monthan AFB also has an Alternate Dispute Resolution Program Plan that has been in effect since 2005. (G.C. Ex. 4; Tr. 30)

Ken Rineer has been a bargaining unit employee in AMARG and was originally hired as an aircraft electronic mechanic. Due to a disability, at the time of the hearing he was working as a security guard. Prior to that, he worked as a file clerk in the technical order library for about 1½ years. Eugene Frier was his immediate supervisor and Robert Foley, Chief, Resource Management Division, was his second level supervisor. (Tr. 20, 34-35, 37-38).

On July 11, 2006,^{1/} Rineer received a proposal to reprimand from his first level supervisor, Eugene Frier. (G.C. Ex. 5; Tr. 37-38) Rineer responded to this proposal in writing; he did not ask for Union assistance in making his response. (Tr. 38) On August 14, the Respondent, through Foley, issued a Decision to Reprimand to Rineer. (G.C. Ex. 6; Tr. 38-39) On August 17, Rineer directed a request for ADR to Brenda Joy, a supervisor in Employee Management Relations; this request was denied. (G.C. Exs. 7 and 8; Tr. 39-40) On September 14, Rineer filed a grievance over his reprimand. The grievance was filed with Brian Burchard, Rineer's third level supervisor and Foley's immediate supervisor. (G.C. Ex. 9; Tr. 40-42) Rineer did not seek Union representation in the filing or processing of this grievance. (Tr. 42)

On September 21, the Respondent issued its first step grievance response, denying the grievance. (G.C. Ex. 10; Tr. 42)

On September 26, Rineer sent a memorandum to Thomas O'Halloran, Director of Maintenance, requesting ADR prior to his submission of his Step 2 grievance response. (G.C. Ex. 11; Tr. 44). The request for ADR was handled through the Respondent's EEO office and on October 2, Carol De La Rosa Green sent both Rineer and Foley the following e-mail message:

Good Afternoon Mr. Foley & Mr. Rineer:

First, allow me to congratulate you all for your

^{1/} All dates are in 2006, except where specifically noted.

willingness to participate in mediation. Mediation is an alternate, voluntary means to resolve workplace disputes in a safe and structured forum.

Two documents are attached for your review.

1. The form entitled, **Agreement to Meditate**, focuses on participants' responsibilities and rights.
2. The form entitled, **The ADR Mediation Process**, details the basic tenets and procedures of the actual process.

Please take some time to thoroughly review both forms before your Thursday 5 October 2006 mediation (10:30 am in Bldg 2300, Room 2047). Mr. Efren Medrano will serve as your mediator. You should plan for at least three hours of time to participate in this mediation.

Again, congratulations and we look forward to a successful mediation. If you have any questions please do not hesitate to contact me via phone or email.

(G.C. Exs. 3, 12, 13; Tr. 22, 23, 45-46)

The mediation was held as scheduled on Thursday, October 5. Efren Medrano was present as the mediator, with Rineer and Foley. No one else was present. The meeting took place in a conference room, outside the EEO offices in Building 2300. This building is separate from AMARG, where both Rineer and Foley worked at the time. (Tr. 47-48, 91)

Efren Medrano works for the Department of Army and is the EEO Officer at Fort Huachuca, Arizona. Medrano is also trained as a mediator and is part of a Shared Neutrals Program. (Tr. 91, 94, 95) He is in a management position at Fort Huachuca and does not participate in mediations in that location, although, as noted, volunteers his services outside Fort Huachuca. Medrano had been contacted by the Respondent and had agreed to mediate the dispute in this matter. (Tr. 94-95) As the mediator, Medrano had no authority to compel the parties to settlement. It was Medrano's understanding that Foley had the authority to resolve the underlying complaint in the mediation. (Tr. 101) In this particular mediation, the parties did not sign a

confidentiality agreement. (Tr. 92) Medrano was aware that a letter of reprimand had been issued to Rineer and that a grievance had been filed. (Tr. 97) At the beginning of the mediation, Medrano explained to the parties his position as a mediator and set out the guidelines for conducting the mediation; *i.e.*, no interrupting, no shouting, notes could be kept but he would take and destroy them at the end of the mediation session. Medrano asked both parties to give an opening statement, which they did. Rineer took the position that he did not deserve the reprimand and wanted it removed from his personnel file. Foley took the position that the letter of reprimand needed to remain in Rineer's personnel file for a period of time that Rineer deemed unacceptable. (Tr. 50-53) Medrano met with the parties together and also on an individual basis. The mediation lasted about 2 to 2½ hours. Medrano terminated the mediation session when the parties could not reach any settlement. (Tr. 97-98, 100-101, 48-51) Rineer testified that the mediation followed the ADR mediation process as set forth in one of the attachments to the October 2 e-mail. (G.C. Ex. 3, 13; Tr. 50) Neither Rineer nor Foley had a representative during the mediation. (Tr. 55) Participation in the mediation was voluntary and Rineer was aware that he was not required to attend the mediation. (Tr. 56) At the end of the mediation, Medrano submitted to Dycus a written report, which contained information such as the names of the parties, the date and location, the type of dispute, the number of hours spent, and the outcome of the mediation. (Tr. 71, 79)

According to Medrano, Rineer was adamant that he did not have representation and that he did not want the Union present. (Tr. 99) Rineer denies that he ever said he didn't want the Union present, asserting that it would be "foolish of me to have the Union upset at me when I expected that my grievance would be denied at all three levels and I would need them for the arbitration process." (Tr. 107) Rineer also stated that during the mediation there was no discussion about the Union or the Union not being present. (Tr. 61) Rineer did agree that, at a later EEO process proceeding, with mediation, he did not want the Union present. (Tr. 107)

On October 5, following the mediation, Rineer forwarded the October 2 e-mail from De La Rosa Green to AFGE Local 2924, noting "I was surprised when I did not see a representative to protect the Union's rights at the mediation that was conducted today. . . ." (G.C. Ex. 13; Tr. 22-23, 54) There is no evidence that Rineer or the Respondent contacted the Union prior to the mediation.

Once the parties had agreed to mediation, Rineer's grievance was held in abeyance, meaning no processing was accomplished and time restraints were stopped. When the mediation was unsuccessful, the processing of Rineer's grievance resumed. Rineer continued to process his grievance without Union assistance, although the Union was present at the third step grievance meeting. The grievance was eventually denied at the third step and the Union declined to take it to arbitration. (Tr. 54, 58)

There is no dispute that the Union did not receive prior notice and an opportunity to be represented at the October 5 mediation.

Issue

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(A) by holding a formal meeting on October 5, 2006, regarding a grievance filed by an individual bargaining unit employee.

Positions of the Parties

General Counsel

The General Counsel asserts that the October 5 mediation session was a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute. The G.C. further asserts that the meeting qualified as a "discussion", citing *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 29 FLRA 594, 598 (1987), and noting that the Respondent admitted in its Answer that a meeting was held with Rineer on October 5. (G.C. Exs. 1(b) and 1(c)).

The G.C. notes that it is undisputed that Rineer attended this meeting as a bargaining unit employee and that Foley attended as a management representative. The G.C. also maintains that Efren Medrano, the mediator, was acting on behalf of the Respondent during the mediation session. The Respondent took the responsibility for making all of the arrangements associated with the mediation session, including selecting Medrano as the mediator. Medrano completed a written report following the mediation session and provided a copy to the Respondent. The G.C. thus argues that Medrano should be deemed to have been acting on behalf of the Respondent during the mediation session.

During the mediation session, the parties discussed and attempted to resolve a grievance that Rineer had filed under the negotiated grievance procedure. The discussion of this grievance therefore satisfied the content requirement for a formal discussion under section 7114(a)(2)(A).

Finally, the G.C. asserts that the mediation session on October 5 was formal in nature. The evidence shows that the meeting was scheduled in advance and all the arrangements for the meeting were made by management. Although no confidentiality agreement was signed at the session, Medrano did instruct Rineer and Foley that the discussions during the mediation session were confidential.

The mediation session was held in an EEO conference room which was apart from Rineer's and Foley's work site, the meeting lasted a significant period of time (approximately 2-3 hours), and Rineer and Foley took notes during the meeting.

In *U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York)*, 29 FLRA 584, 589 (1987), *aff'd sub nom. American Federation of Government Employees, Local 3882 v. FLRA*, 865 F.2d 1283 (D.C. Cir. 1989), the Authority described the intent and purpose of section 7114(a)(2)(A) as providing a union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit. The Union's presence at the mediation session would have permitted it to protect the interests of the grievant, the Union, and the bargaining unit as a whole. This would have been accomplished by allowing the Union to police whether the established mediation process was being used appropriately by management and to track whether the results of the mediation would have any negative effect on the working conditions of the bargaining unit. The Union's presence would help ensure that the grievant was being treated fairly by management, and would give the Union direct knowledge of the grievance history, for any future representation.

Respondent

The Respondent takes the position that it has not violated the Statute as alleged in the complaint because the mediation session in question was 1) not a formal discussion and 2) did not concern a grievance, a requirement for a formal discussion.

The Respondent asserts that the parties' labor relations

agreement demonstrates the ADR process was created as an informal option to the grievance process, as set forth in Article 5, Section 5 and Article 30, Section 7, Step 1. Citing to *Internal Revenue Service, Fresno Service Center v. FLRA*, 706 F.2d. 1019 (9th Cir. 1983), the Respondent asserts that the basis and the purpose of the meeting was to informally resolve the dispute, and thus the mediation in this matter was informal rather than formal.

The Respondent further argues that an application of the basic facts to the eight-factor test for determining if a discussion is formal or informal supports the conclusion the mediation session was an informal discussion. There were only three persons present during the meeting: Rineer, the complainant; Foley, the management representative, and Medrano, the mediator. Medrano was not a management representative and was not in Rineer's supervisory chain. Further Medrano acted in a neutral capacity, was neither employed nor paid by the Air Force, and had no authority to compel either party to settle. The meeting was held in the EEO conference room, a neutral site located away from the work area for both Rineer and Foley. There was no formal agenda for the meeting and no set period of time. All parties were at the mediation voluntarily, and Rineer had requested the mediation. No minutes were kept of the meeting; all notes taken during the meeting were destroyed by the mediator at the end of the session. The parties did not sign a confidentiality agreement. Although Foley was the second level supervisor for Rineer, they were equal parties at the mediation. Further neither individual had a representative.

The Respondent further asserts that the Union's right to represent the bargaining unit was not violated. Under the ADR plan, the Union has the right to void any settlement reached under the ADR plan by refusing to sign the ADR Coordination

Sheet. (R. Ex. 3).^{2/} The Union could ratify or reject any agreement, if reached. If no agreement is reached, the matter is eligible to be placed back into the formal grievance process and out of the informal ADR process. (G.C. Ex. 4) In this case, it was placed back into the grievance process at the second step of the grievance procedure.

The Respondent therefore argues that, based on the totality of the circumstances, the meeting on October 5 was only an informal discussion and there was no requirement to provide the Union with notice of the meeting.

In its second argument, the Respondent asserts that the mediation session did not concern a grievance within the meaning of the Statute. The Respondent first notes that the parties have a collective bargaining agreement that allows a grievance to be held in abeyance pending an informal alternative dispute resolution request and takes the grievance out of the grievance process for the purposes of ADR. Thus, while the ADR process, in this case the mediation, was being conducted, the grievance was not being processed, but was suspended. Therefore, the mediation did not concern the grievance, which had been "temporarily set aside".

Analysis

In order for a union to have the right to representation under section 7114(a)(2)(A) of the Statute, there must be

^{2/} The section titled ADR Union Grievance Procedures states, in part:

1. If the grievant elects ADR, it is understood the intent is to augment the NGP [Negotiated Grievance Procedure] in accordance with Article 30, of the Labor Management Relations Agreement and not replace the NGP. . . .

. . .

3. With the exception of cases arising under Title VII (EEO cases), all settlement agreements will be provided in writing to the ADR Program Manager or designee, and will be subject to review by 355WG/JA, and 355MSS/CPF before being considered final. . . . Settlement agreements concerning bargaining unit employees represented by AFGE Local 2924 will be subject to review by the AFGE Local 2924 President (or designee) prior to ratification and adoption of the settlement agreement.

(G.C. Ex. 4, pp. 4-5)

(1) a discussion; (2) which was formal; (3) between a representative of the agency and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practices or other general condition of employment. See, e.g., *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304, 306 (2001) (*Dover AFB*); *Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts*, 59 FLRA 875, 878 (2004).

The Respondent admits that the October 5 mediation session was a meeting within the meaning of section 7114(a)(2)(A).

A. The meeting was formal

The determination as to whether a discussion is formal is based on the totality of the facts and circumstances presented. See *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 155-57 (1996). In making that determination, the Authority has stated 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 discussion lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted. See *General Services Administration, Region 9 and American Federation of Government Employees, Council 236*, 48 FLRA 1348, 1355 (1994). However, these factors are illustrative, and other factors may be identified and applied as appropriate. *Dover AFB*, 57 FLRA at 307.

On October 1, De La Rosa Green, an employee in Respondent's EEO office sent an email to Rineer and Foley, informing them that a mediation was scheduled on October 5 at a conference room in Bldg. 2300, Room 2047. The meeting was scheduled to start at 10 a.m. and could take up to three hours. Efren Medrano had been selected as the mediator for the session. The mediation was conducted as scheduled on October 5, lasted 2 to 2½ hours, was conducted in a neutral setting, i.e., a conference room located adjacent to the EEO in a building apart from the work location of both Rineer and Foley. While Rineer and Foley were allowed to take notes during the meeting, these notes were destroyed by Medrano following the session. Medrano did submit a written report to the Respondent's EEO office, which set forth the names of the parties; the amount of time spent, the purpose of the mediation and whether resolution was reached.

Although the mediation session does not meet all of the

criteria set forth in *Dover AFB*, I find that a sufficient number of criteria are present to constitute a formal discussion within the meaning of the Statute. In that regard, Rineer and Foley had advance notice of the mediation session, the site of the mediation was at a neutral location away from the work locations of both Rineer and Foley, and the discussions lasted about 2 to 2½ hours. Foley, who had the authority to resolve the matter on behalf of the Respondent, was Rineer's second level supervisor and the individual who had issued the letter of reprimand, which was the subject of the grievance as well as the mediation. While there was not a formal agenda established for the meeting, Medrano set forth guidelines for the conduct of the meeting at the beginning and generally followed the format set out in one of the handouts furnished to both parties, *The ADR Mediation Process*. (G.C. Ex. 13) The evidence further reflects that the meeting had a formal purpose, specifically the mediation of the dispute which was the basis of Rineer's grievance over his letter of reprimand. See *Dover AFB; Luke Air Force Base, Arizona*, 54 FLRA 716 (1998), *rev'd Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 60 (2000).

The Respondent argued that participation in the mediation by Rineer was voluntary and that he was the one who had requested some form of ADR. In *U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988), the Authority found that the meeting in question had been held pursuant to a Stipulation and Dismissal, mutually agreed on by the agency and the employee. Since the meeting was held by mutual agreement, the identity of the party who originally proposed the requirement for the meeting was not relevant to determining whether the meeting was formal within the meaning of the Statute. In this matter, although Rineer requested ADR, the Respondent agreed to participate in the mediation; therefore, who made the initial request is not relevant to determining the formality of the meeting.

Therefore, based on the totality of the evidence, I find that the October 5 mediation session met the criteria for formality as set forth by the Authority.

B. Status of the Agency Representatives

The Respondent admits that Foley, who was Rineer's second level supervisor at the time of the mediation session, was a representative of the Respondent. For the purpose of the mediation, Foley possessed the authority to resolve the grievance issue. Although no agreement was reached, there was

discussion regarding settlement at the mediation. Therefore, Foley was a representative of the Respondent within the meaning of §7114(a)(2)(A) of the Statute. The G.C. further asserts that Medrano, as the mediator, was also a representative of the Respondent within the meaning of section 7114(a)(2)(A). The G.C. notes that Medrano is a management official who works at Fort Huachuca for the Department of Army as the Equal Employment Opportunity Officer. Medrano is also a trained mediator and was at the mediation session under a Shared Neutrals Program and at the request of the Respondent. Medrano was not paid by the Air Force, but continued to receive his regular salary during this mediation. At the conclusion of the mediation, Medrano wrote a report, outlining the parties, the issues, the time involved, and the possibility of settlement, which was forwarded to Dycus. Considering all of these factors, the G.C. argues that Medrano was a management official who was acting on behalf of management during the mediation. The Respondent asserts that Medrano, in his capacity as a mediator, was not a management representative, was not in Rineer's supervisory chain, had no authority to compel settlement by either party, and acted in a neutral capacity and was neither employed by nor paid by the Air Force.

Since I have found that Foley was acting on behalf of the Respondent during the mediation session, it is unnecessary to determine the status of the mediator in this case. See, *United States Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA 528, 532-33(2003).

C. The Mediation Session Concerned a "Grievance"

The Respondent argues that the mediation session did not concern a grievance within the meaning of §7114(a)(2)(A) of the Statute because the grievance filed by Rineer was being held in abeyance pending the conclusion of the mediation process.

I find the Respondent's defense that the mediation session did not concern a grievance without merit. The evidence clearly establishes that mediation was requested as a result of, and in order to resolve, the underlying issue of the grievance, *i.e.*, Rineer's letter of reprimand. Rineer originally requested mediation after he received the notice of reprimand and before the final reprimand was issued; this request for mediation was denied by the Respondent. Following receipt of the final letter of reprimand, Rineer filed a first step grievance under the parties' negotiated grievance procedure, and, after receiving the first step response, requested mediation on the grievance. (G.C. Ex. 11) At the

mediation itself, the parties discussed possible settlement of the grievance, although no agreement could be reached. Both Rineer and Medrano testified that the Agency was insisting that the reprimand remain in his file longer than Rineer felt was acceptable. During the mediation Rineer discussed his military career, his injury, his desire not to have a CC card (which is apparently some type of government credit card and directly related to the conduct that resulted in the written reprimand which is the subject of the grievance filed by Rineer and the purpose of the mediation session at issue in this case) and other matters. However, these topics in no way negate the purpose of the mediation session, which was to resolve the grievance. And the fact that the grievance was being held in abeyance during the processing of the mediation does not invalidate the existence of the grievance and the Union's connection with it and the negotiated grievance procedure. The Respondent's argument that the mediation did not concern the grievance and therefore could not be the subject of section 7114(a)(2)(A) is not plausible in terms of the overall evidence and is rejected.

Therefore, I find that the mediation session was a meeting which concerned "any grievance or any personnel policy or practices or other general condition of employment", as required by section 7114(a)(2)(A) of the Statute. See *Dover AFB*, in which the Authority found that a mediation of an EEO complaint fell within the parameters of section 7114(a)(2)(A) of the Statute and that the Agency violated section 7116(a)(1) and (8) of the Statute when it failed to give the Union prior notice and the opportunity to be present at the mediation.

I further reject the Respondent's defense that it was somehow entitled to abrogate the Union's Statutory right to prior notice and the opportunity to attend a formal meeting on the basis that the employee did not want the Union present. Rineer asserts that he never said that he did not want the Union present, although he admits that he was not interested in the Union representing him in either his grievance or the mediation. There is little evidence regarding what his objections to the Union's presence might have been and there is no evidence the Union's presence was discussed prior to the actual mediation session. The purpose of the mediation was to attempt to resolve the underlying grievance issue, which was filed pursuant to the parties' negotiated grievance procedure. The Union would not have been present at the mediation session to represent Rineer, but rather to represent itself and the bargaining unit as a whole. Neither the Respondent nor the bargaining unit employee had the authority to deny the Union's Statutory right to be present at a formal meeting.

Finally, I also reject the Respondent's argument that the Davis-Monthan ADR process protects the Union's rights in this matter by ensuring that the Union would be entitled to sign off on any agreement reached during the mediation. Coordinating with the Union on a mediation settlement does not invalidate the Union's Statutory right to have prior notice and the opportunity to attend a formal meeting, including the mediation in this matter. The Davis-Monthan ADR process does not specifically waive the Union's right to be present in a mediation session, nor does the Respondent make this argument.

In conclusion, I find that the October 5 mediation session was a formal meeting within the meaning of section 7114(a)(2)(A) of the Statute and that the Respondent's failure to give the Union prior notice and the opportunity to be present at the meeting was in violation of section 7116(a)(1) and (8) of the Statute.

It is therefore recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41 of Rules and Regulations of the Authority and section 7118 of the Federal Service Labor-Management Regulations Statute, it is hereby ordered that the Department of the Air Force, 355 MSG/CC, Davis-Monthan Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, AFL-CIO, Local 2924 (the Union), the exclusive representative of certain employees, advance notice and the 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 to mediate settlement of grievances filed by bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing 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 concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to mediate settlement of

grievances filed by bargaining unit employees.

(b) Post at its facilities 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 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.

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

Issued, Washington, DC, August 24, 2007

SUSAN E. JELEN
Administrative Law Judge

whose telephone number is: 303-844-5226.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-07-0138, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Michael Farley, Esquire
Federal Labor Relations Authority
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DATED: August 24, 2007
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