

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE 6TH SUPPORT GROUP MACDILL AIR FORCE BASE, FLORIDA  Respondent  and  NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 153	Case No. AT-CA-60888
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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26© through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 29, 1997**, and addressed to:

Federal Labor Relations Authority  
Office of Case Control  
607 14th Street, NW, 4th Floor  
Washington, DC 20424-0001

GARVIN LEE OLIVER  
Administrative Law Judge

Dated: August 27, 1997  
Washington, DC

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges  
WASHINGTON, D.C.

MEMORANDUM  
1997

DATE: August 27,

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER  
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE  
6TH SUPPORT GROUP  
MACDILL AIR FORCE BASE, FLORIDA

Respondent

and

Case No. AT-

CA-60888

NATIONAL FEDERATION OF FEDERAL  
EMPLOYEES, LOCAL 153

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE 6TH SUPPORT GROUP MACDILL AIR FORCE BASE, FLORIDA  Respondent  and  NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 153	       Case No. AT-CA-60888
       Charging Party/Union	

James T. Hedgepeth  
Counsel for the Respondent

Sam F. Sadler  
Representative of the Charging Party

Sherrod G. Patterson  
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER  
Administrative Law Judge

DECISION

Statement of the Case

The issues in this unfair labor practice case are:  
(1) whether the Respondent, through a supervisor, violated section 7116(a) (1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116 (a) (1), and (5), by requiring Sam F. Sadler, a Union representative, to request official time and report to his worksite before and after his use of official time, without giving the Union prior notice and the opportunity to negotiate to the extent required by the Statute; and (2) whether such action was taken in retaliation for Sadler's

protected activity in violation of section 7116(a)(1), (2) and (4) of the Statute.

For the reasons explained below, I conclude that a preponderance of the evidence does not establish the alleged violations of the Statute and recommend that the complaint be dismissed.

A hearing was held in Tampa, Florida. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

### Findings of Fact

#### *The Union and The Respondent*

The Union is the certified exclusive representative of an appropriate unit of about 850 employees of the Respondent.

#### *OSI Investigation*

In December 1995, based upon an allegation that Sam F. Sadler, Union chief steward, was signing out from work indicating that he was going to perform Union duties when he was not doing so, a criminal investigation was undertaken by the Air Force Office of Special Investigations (OSI). This investigation into alleged false statements and misuse of time by Sadler covered the period from December 23, 1995 until August 7, 1996.

#### *Official Time Procedure*

In November 1995, Master Sergeant (MSGT) Roy Shields, 6th Transportation Squadron, Surface Freight, became Sadler's supervisor when Sadler was reassigned from civil engineering. The practice for Sadler to secure official time to perform representational activities when he otherwise would be in a duty status was that he would normally advise Shields or his designee, after reporting to work, that he needed official time and would then write it on a sign-in, sign-out board, indicating the times and the appropriate time allocation code. If Shields or his designee were not in the office, Sadler would make the same notations on the sign-in, sign-out board and proceed on official time. Specific written or verbal supervisory approval of the

official time was not always required. If Sadler told MSgt Shields that he needed to conduct Union business first thing the next morning, Shields did not make Sadler first come in to his place of employment at 7:30 a.m. Similarly, if Sadler were signed out for official time to the end of the workday, he was not required to return to the office before 4:30 p.m., but could go directly home. Shields trusted that Sadler was performing Union business until 4:30 p.m. as he had represented.

This procedure for securing official time was an informal arrangement between Shields and Sadler and was not that unusual at the base. Sadler had essentially the same arrangement with his previous supervisor in civil engineering. Donald E. Bendever, Jr., president of the Union, has essentially the same official time arrangement with his supervisor in the 6th Services Squadron and at various other places he has worked at MacDill. Bendever testified that the procedures in the contract are considered formal "guidance," but informal procedures are generally followed depending on the supervisor. Bendever acknowledged that "you could have a hard-core supervisor that says, 'This is the way it's going to be.'" Even in his section "it's informal in our section . . . until somebody wants to push it, you know. And then you have to walk a line." (Tr. at 74-76).

#### *Procedures in Collective Bargaining Agreement*

The collective bargaining agreement, approved March 21, 1996, provided, in part, as follows concerning official time and the procedures for a Union representative to receive official time:

SECTION 2.4.1 [STEWARDSHIP]. When a Union Representative desires to be released from duty in order to perform representational functions or contract administrative activities, he/she shall first obtain permission from their immediate supervisor or designated representative in the absence of the immediate supervisor. The Union Representative shall indicate to the immediate supervisor that:

- a. he/she has a representational matter to handle and type as required by AFR 177-372A, Volume II,

b. where he/she desires to go, and

c. the anticipated time of departure and return to the work site. The Union Representative will notify his/her immediate supervisor or designated representative in the absence of his/her immediate supervisor, of his/her return to the worksite.

. . . .

SECTION 2.5. OFFICIAL TIME. Union Officials and Stewards shall be permitted reasonable time during duty hours without loss of leave or pay to effectively represent employees in accordance with this agreement. Union Representatives will guard against the abuse of official time and shall restrict such business to authorized periods. . . .

#### *Procedures During Investigation*

Once the criminal investigation was initiated into Sadler's suspected misuse of official time, MSgt Shields was instructed by OSI Special Agent David Brandt to report Sadler's requests for official time to OSI, but not to change anything while the investigation was being conducted so as not to tip off Sadler to the investigation. In any event, Shields was not the source of the misuse of leave allegation and saw no reason to take corrective action at that time, the whole purpose of the investigation being to determine whether there was an abuse of official time on Sadler's part.

#### *OSI Report & Sadler's Explanation*

The OSI investigation was completed on August 22, 1996. OSI reported to management that Sadler, on at least four occasions, when he had signed out for official time until 4:30 p.m., was observed leaving MacDill AFB between 2 and 3 p.m., and, on three such occasions, had arrived at his residence shortly thereafter.

OSI interviewed Sadler regarding these discrepancies as part of the investigation. Sadler told Agent Brandt, in part, that, although he was not on flexitime, he had worked eight hours and left work early to compensate for the extra time he had spent before work and during lunch periods. Sadler testified to the same effect at the hearing.<sup>1</sup> He acknowledged that he signed out on the sign-out board "to 1630 [4:30]", and did not put down the actual time he left the base. He claimed that he did it that way because his fixed hours were 7:30 to 4:30 p.m. and "I had done my eight hours. That's why."

#### *Formal Procedures Required*

Shortly thereafter, on September 9, 1996, as a result of the completed investigation and a suggestion by Special Agent Brandt that a more formal procedure should be instituted to have employees certify their time for accountability purposes, MSgt Shields required Sadler to report to his worksite every morning at 7:30 a.m. If Sadler desired to be released for representational duties, he had to receive specific verbal or written permission from Shields or his designee "in accordance with the contract." It was mandatory that Sadler advise Shields where he was going and how he could be reached. If he should be on official time at the end of the day, Sadler was required to report back to Shields or his designee at 4:15 p.m. before being released at 4:30 p.m., the end of the workday.

#### *Sadler's Protected Activity*

Prior to this action, Mr. Sadler engaged in protected Union activity. On July 30, 1996, the Union, on behalf of Sadler, filed a grievance with MSgt Shields over Sadler's annual performance rating and, on August 15, 1996, Sadler, on behalf of the Union, filed an unfair labor practice charge in Case No. AT-CA-60810 against Respondent, alleging the unilateral implementation of a change in conditions of employment by Supervisor Siddall. In addition, Sadler has been chief steward of the Union since 1985, serving as the primary Union official responsible for arbitration hearings

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Union president Donald Bendever supported Sadler's testimony to some extent by testifying that on "several occasions" during the pertinent period Sadler went to the wastewater treatment plant about 6 a.m. to perform Union work by checking on the administration of an agreement concerning employees at that location. No evidence was presented that any such early hours were specifically reported to Shields or otherwise recorded as being official time for Sadler.



and unfair labor practices. During calendar years 1995-96, he filed about 20-25 grievances or unfair labor practice charges.<sup>2</sup>

#### *Union Requests Bargaining*

On September 13, 1996, the Union wrote to the Respondent regarding the change concerning Sadler's official time. The Union requested to negotiate "the impact, implementation, and/or substance of the proposed changes affecting bargaining unit employees, specifically: Official Time request[s] and the procedures. The change in the manner that a union official secures official time or approval for official time." The Union requested that the Respondent not implement any changes prior to completion of negotiations and return to the status quo until negotiations were completed.

#### *No Response*

The Respondent did not provide the Union notice that it intended to change the procedures by which Sadler requested and received official time nor did it respond to the Union's September 13, 1996, request to negotiate.

#### *Disciplinary Action*

On November 7, 1996, the Respondent, based on the OSI report, suspended Sadler from duty for 10 calendar days for unauthorized absences and deliberate misrepresentation of his whereabouts on six occasions. The Union filed a grievance regarding the suspension on December 10, 1996. The grievance was taken to arbitration and the decision of the arbitrator was pending as of the date of the hearing.

### Discussion and Conclusions

#### *Statutory Rights*

Section 7116(a) (1) of the Statute provides that it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of any right provided by the Statute. Consistent with the findings and purpose of Congress as set forth in section

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Sadler has also had periodic conflicts with management since 1985 allegedly because of his failure to wear steel-toed boots on the job. According to Sadler, he secured reversals on review, by an arbitrator and the Merit Systems Protection Board, of a 1985 reprimand and a 1991 suspension, respectively, based on his doctor's orders and further findings that the disciplinary actions were partially based on retaliation for his Union activities.

7101, section 7102 of the Statute sets forth certain employee rights including the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal and that each employee shall be protected in the exercise of such right. Such right includes the right to act for a labor organization in the capacity of a representative. Section 7116(a)(2) of the Statute provides that it shall be an unfair labor practice for an agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. Section 7116(a)(4) provides that it is also an unfair labor practice for an agency "to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter[.]"

#### *The Authority's Analytical Framework*

Under the Authority's analytical framework for resolving complaints of alleged discrimination under section 7116(a)(2) of the Statute, the General Counsel has, at all times, the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. However, satisfying this threshold burden also establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. Where the respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. United States Air Force Academy, Colorado Springs, Colorado, 52 FLRA 874, 878-89 (1997); Federal Emergency Management Agency, 52 FLRA 486, 490 n.2 (1996) (FEMA); Letterkenny Army Depot, 35 FLRA 113 (1990) (Letterkenny).

The Authority applies the same analytical framework of Letterkenny and its progeny in resolving complaints alleging discrimination under section 7116(a)(4) of the Statute as it does in resolving discrimination complaints under section 7116(a)(2). FEMA, 52 FLRA at 490; Department of Veterans

Affairs Medical Center, Brockton and West Roxbury, Massachusetts, 43 FLRA 780, 781 (1991).

*Protected Activity - Motivation*

The General Counsel satisfied the threshold burden by showing that Sadler was engaged in protected activity as a Union steward during the pertinent period. A grievance was filed on his behalf on July 30, 1996, and he filed an unfair labor practice charge on August 15, 1996. In addition, the record reflects that Sadler has been an active Union official, serving as chief steward of the Union since 1985 and being the primary Union official responsible for filing and processing grievances and unfair labor practices.

The General Counsel also satisfied the threshold burden of showing that consideration of such activity was a motivating factor in MSgt Shield's decision to change Sadler's method of accounting for his official time. This was shown by (1) the closeness in time between the protected activity and management's decision, General Services Administration, Region IX, San Francisco, California, 40 FLRA 973, 982 (1991) (GSA); and (2) the fact that Sadler was an active and aggressive Union leader who could have been considered a thorn in management's side, United States Forces Korea/Eighth United States Army, 11 FLRA 434, 436 (1983).

*Affirmative Defense Established*

Although the General Counsel satisfied the threshold burden, the Respondent established an affirmative defense for its actions. Although closeness in time between an agency's employment decision and protected activity may support an inference of illegal anti-union motivation, it is not conclusive proof of a violation. GSA, 40 FLRA at 982. Moreover, the Respondent established that it had a legitimate, nondiscriminatory justification for its actions. MSgt Shields required Mr. Sadler to report to work and obtain permission and report back at the end of the day as a result of the criminal investigation that gave MSgt Shields reasonable grounds to believe that Sadler was signing out for official time, but was leaving the base and going home instead. There was no showing that MSgt Shields was aware of any contention during the period that Sadler was coming in early and working through lunch to complete his eight hours for pay purposes. Sadler's explanation for signing out "until 4:30" because this was his normal quitting time is unbelievable. If Sadler had always completed eight hours, it is more likely that he would have advised his supervisor or signed out at the true time he

left the base on at least some of these occasions. It is also noted that the accountability action was suggested to MSgt Shields by Agent Brandt for all employees and not just for Mr. Sadler.

Although the Statute protects employees from discrimination because of the exercise of protected activities, the exercise of those rights does not cloak an individual with immunity from otherwise legitimate and justified management actions.<sup>3</sup> Department of the Navy, Portsmouth Naval Shipyard and Portsmouth FEMTC, 7 FLRA 766 (1982). The rule against terminating or in any way affecting "a term or condition of an employee's tenure on the basis of his participation in protected union activity [ ] . . . is not . . . a prophylactic rule which insulates an employee from any adverse action that an agency may take; on the contrary, an agency may take adverse steps against an employee for any valid reason apart from the employee's union activities." Ray E. Midder v. FLRA, No. 96-60371 (5th Cir. July 18, 1997).

It is concluded that the Respondent has established, by a preponderance of the evidence, the affirmative defense that it had a legitimate justification for its action and it would have taken the same action even in the absence of protected activity or previously-occurring protected activity. Accordingly, there is no basis on which to conclude that the Respondent violated section 7116(a)(1), (2) and (4), as alleged, and it is recommended that the complaint in this respect be dismissed.

### *Bargaining*

The General Counsel contends that the Respondent violated section 7116(a)(1) and (5) by changing the procedures Mr. Sadler used for requesting and using official time without notifying the Union and affording it the opportunity to negotiate the substance of the change to an established past practice. The General Counsel states that the matter is fully negotiable even though Article 2 of the parties' agreement covers official time. According to the

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I recognize that the validity of the Respondent's disciplinary action against Sadler for abuse of time is pending in an arbitration proceeding. In this case I have not found that Sadler did abuse such time, but only that, from all the circumstances, the Respondent had reasonable cause to believe that Sadler was abusing official time when it took the action in his case to require adherence to the formal procedures in the negotiated agreement.

General Counsel, "By establishing and acting pursuant to the past practice, the parties acted in a manner inconsistent with, and thereby modified, Article 2."

The Respondent contends that there was no change in Mr. Sadler's conditions of employment. Sadler always had to be either at his job or conducting Union business during duty hours, and he was allowed the freedom to come and go contingent upon his not abusing the trust his supervisor placed in him. Once management believed he was abusing the trust, he had to "sign-in" and did not have the same amount of freedom.

#### *Statutory Provision*

**Section 7116(a)(5) of the Statute makes it an unfair labor practice for an agency to refuse to bargain in good faith with an exclusive representative of its employees. As a result, an agency must provide the exclusive representative with notice of proposed changes in conditions of employment affecting unit employees and an opportunity to bargain over those aspects of the changes that are negotiable.**

#### *The Authority's Analytical Framework*

In order to conclude that the Respondent violated the Statute, it must be found that the Respondent's action constituted a change in conditions of employment. "The fact that the negotiated agreement addressed the matter is not conclusive, if it is shown, in fact, that over a period of time the parties had engaged in a practice . . . that differed from the contractual procedure. If this showing is made, and the practice satisfies the statutory requirements of section 7103(a)(14) [statutory definition of conditions of employment], it is a condition of employment that cannot be unilaterally altered." U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana, 36 FLRA 567, 570 (1990).

#### *Official Time A Condition of Employment*

The Authority has held that the use of official time by Union officials for representational activities is a condition of employment, U.S. Patent and Trademark Office, 39 FLRA 1477, 1482 (1991), and that "[b]ecause section 7131 (d) carves out an exception to sections 7106(a)(2)(A) and (B), it permits negotiations over the scheduling of official time, including the ability to use official time without advance scheduling or permission from the supervisor, absent emergency situations or other special circumstances," National Treasury Employees Union and U.S. Department of

*No Change in Established Practice*

Prior to September 9, 1996, Sadler was always required to be either at work or conducting authorized Union business on official time during duty hours. He was not always required to report to his worksite before and after his use of official time and, in the absence of his supervisor or his designee, was able to note official time on the sign-out board and proceed on official time without securing specific verbal or written permission. After his suspected abuse of official time, Sadler was no longer trusted to be using official time during duty hours as represented and was required to comply with the terms of the March 21, 1996, collective bargaining agreement; that is, he was required to report to his worksite at the beginning and end of each workday, before and after his use of official time, and was required to receive specific verbal or written permission from Shields or his designee "in accordance with the contract." It was mandatory that Sadler advise Shields where he was going and how he could be reached.

I agree with the Respondent that requiring Sadler to adhere to the strict terms of the collective bargaining agreement and account for his duty hours in the face of reasonable cause to suspect abuse was not a change of an established practice. The informal procedure, which allowed Sadler and other representatives more freedom, was dependent on representatives being trusted and not causing supervisors reason to believe that they were abusing the official time provisions during duty hours. The collective bargaining agreement provided that "Union Representatives will guard against the abuse of official time and shall restrict such business to authorized periods." As the Union president acknowledged, the procedures in the contract were considered formal guidance even where informal procedures were generally followed, depending on the supervisor, but even then "[y]ou could have a hard-core supervisor that says, 'This is the way it's going to be.'" And in the Union president's section, where the informal procedure was also followed, "[I]t's informal in our section . . . until somebody wants to push it, you know. And then you have to walk a line." (Tr. at 74-76). Similarly, Msgt Shields allowed Sadler to follow the informal procedures for authorization of official time contingent on having no reason to believe that Sadler was abusing official time. When he had reason to believe that Sadler was abusing official time, Sadler had to "walk the line" and follow the strict authorization procedures for official time provided in the parties' agreement. The reporting procedures in the

agreement were always present to provide "formal guidance" when informal procedures could no longer be tolerated in cases of suspected abuse.

*No Violation*

Since the General Counsel has not established that this was a newly imposed requirement for a Union representative reasonably suspected of abuse of official time, the General Counsel has not established that the Respondent changed its procedure. Cf. U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Memphis, Tennessee, 42 FLRA 712 (1991) (requirement that two employees cited for sick leave abuse present additional medical evidence did not establish a change in a condition of employment for employees in that status). Therefore, the Respondent was under no obligation to notify the Union and bargain before requiring Sadler to essentially adhere to the official time procedures negotiated by the parties in their collective bargaining agreement.

Moreover, the procedures for Sadler and other Union officials and stewards to take official time are already covered by Article 2, Section 2.4.1 and 2.5 of the agreement. The express language of these provisions of the agreement reasonably encompass the subject of bargaining requested by the Union. Therefore, the Respondent had no duty to bargain based on the terms of the existing negotiated agreement.





U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 51 FLRA 1274, 1277 (1996); U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004, 1018 (1993).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

**ORDER**

The complaint is dismissed.

Issued, Washington, DC, August 27, 1997.

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GARVIN LEE OLIVER  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. AT-CA-60888, were sent to the following parties:

**CERTIFIED MAIL, RETURN RECEIPT**

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Dated: August 27, 1997  
Washington, DC