

63 FLRA No. 129

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Charging Party/Union)

WA-CA-07-0087

DECISION AND ORDER

June 5, 2009

Before the Authority: Carol Waller Pope, Chairman
and Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions.¹

The complaint alleges that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by holding a formal discussion without providing the Union advance notice and the opportunity to attend, in violation of § 7114(a)(2)(A) of the Statute. The

1. After the Respondent filed its opposition, the Authority issued an Order directing the Respondent to correct a failure to comply with the service requirements in 5 C.F.R. § 2429.27. The Order cautioned the Respondent that failure to respond in a timely manner could result in the Authority not considering the opposition. *Id.* After the Respondent missed the deadline in the Order, the Authority issued an Order to Show Cause why the Authority should not disregard the opposition. *See* November 27, 2007 Order. The Respondent filed a timely response to the Order to Show Cause but gave no explanation for its prior failure to respond to the Order. Because the Respondent neither complied with the Authority's Order nor explained its failure to do so, the Authority will not consider the opposition. *See United States Dep't of Veterans Affairs*, 60 FLRA 479, 479 n.1 (2004).

Judge found that the Respondent did not violate the Statute and recommended that the complaint be dismissed.

II. Background and Judge's Decision**A. Background**

The facts are fully set out in the Judge's decision and are summarized here. In 2005, a bargaining unit employee (the applicant) submitted an application for an educational expense reimbursement under the Respondent's Education Debt Reduction Program (EDRP). The EDRP Coordinator, a unit employee (the Unit Employee) denied the application. Subsequently, the Union filed a grievance on the applicant's behalf, which was eventually scheduled for arbitration. Decision at 3.

A Labor Relations Specialist for the Respondent (the Labor Relations Specialist), who was assigned to represent the Respondent in arbitration, sent an e-mail message to the Unit Employee asking him to come to the Labor Relations Specialist's office to discuss the arbitration at the Unit Employee's convenience on one of two specific days. *Id.* According to the Labor Relations Specialist, the purpose of the meeting was to determine if the Unit Employee had any relevant documents. *Id.*

The Unit Employee came to the Labor Relations Specialist's office as requested, but without an appointment. *Id.* The meeting was held in the Labor Relations Specialist's office because the Unit Employee, who had since transferred to a position as an emergency room nurse, had no office of his own. *Id.* The Unit Employee was not in the Labor Relations Specialist's chain of command. *Id.* at 4.

The Labor Relations Specialist and the Unit Employee offered differing accounts as to whether the Unit Employee's attendance was mandatory. In addition, while the Labor Relations Specialist testified that he did not ask the Unit Employee any questions about the upcoming arbitration, Decision at 3-4, the Unit Employee testified that the Labor Relations Specialist asked him whether he was aware that the educational expense reimbursement request had been referred to the New Orleans office and, again, denied. *Id.* at 3. In addition, the testimony of a third witness, the Union President, differed from that of both the Labor Relations Specialist and the Unit Employee. In this regard, the Union President, who did not attend the meeting, testified that the Unit Employee told her that the Labor Relations Specialist provided him with questions likely to be asked at the hearing and instructed him on how to respond to the questions. *Id.* at 5.

B. Judge's Decision

The Judge found that the sole issue before him was whether the meeting between the Labor Relations Specialist and the Unit Employee constituted a formal discussion under § 7114(a)(2) of the Statute, which requires that an exclusive representative of an appropriate bargaining unit be given notice of and the opportunity to attend a formal discussion.² Decision at 7. The Judge, citing *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1012 (1991), identified the requirements for a formal discussion as being: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more bargaining unit employees or their representatives; and (4) concerning any grievance or personnel policy or practices or other general conditions of employment. Decision at 7. The Judge found that the parties disagreed only as to whether the meeting was formal. *Id.*

In addressing whether the meeting at issue was formal, the Judge considered the following criteria set forth in *United States Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988) (*DOL*): (1) whether the meeting was held by a first-level supervisor; (2) whether any other management representative attended; (3) where the meeting took place; (4) how long it lasted; (5) whether the meeting was called with advance notice or spontaneously; (6) whether there was a formal agenda; (7) whether attendance was mandatory; and (8) whether there was a formal record or transcription of attendance and comments. Decision at 7.

As to the first *DOL* factor, the Judge found that although the Labor Relations Specialist was not the Unit Employee's supervisor, his status as a Labor Relations Specialist clearly identified him as a representative of management and suggests that the meeting was formal. Decision at 7. As to the second *DOL* factor, the Judge found that the absence of any other management representative suggests neither formality nor informality. *Id.* Regarding the third *DOL* factor, the Judge found that the location of the

meeting in the Labor Relations Specialist's office does not suggest formality. *Id.* at 8. The Judge acknowledged the Unit Employee's testimony that the office setting intimidated him but attributed that to the nature of the discussion, not its location. *Id.* Regarding the fourth *DOL* factor, the Judge found that the meeting lasted between 15 and 30 minutes, and that such a duration does not necessarily indicate formality. *Id.* at 6, 9.

As to the fifth *DOL* factor, the Judge found that although the Unit Employee entered the Labor Relations Specialist's office without giving him advance notice, the meeting was not spontaneous because it was initiated by the Labor Relations Specialist's e-mail request. *Id.* at 8. As to the sixth *DOL* factor, the Judge found that even though the Labor Relations Specialist had a specific reason for requesting the meeting, there was no formal agenda, suggesting that the meeting was not formal. Finding that it was reasonable for the Unit Employee to assume that he was compelled to attend the meeting, the Judge found that the seventh *DOL* factor supports that the meeting was formal. *Id.* While acknowledging evidence that the Labor Relations Specialist may have taken notes during the meeting, the Judge found that no formal record of the meeting existed and that, therefore, the eighth *DOL* factor indicates that the meeting was not formal. *Id.*

In addition to the above factors, the Judge, following the Authority's guidance in *DOL*, 32 FLRA at 470, considered other factors in determining whether the meeting was formal. In this regard, evidence that the meeting was prolonged by the Unit Employee's questions and expressions of dissatisfaction suggested to the Judge that the meeting was less formal than a duration of up to 30 minutes might otherwise indicate. Decision at 9. The Judge also considered evidence contradicting the General Counsel's position that the purpose of the meeting was to influence the Unit Employee's testimony at the arbitration hearing. *Id.* at 2, 9. In this regard, the Judge found that the evidence did not support the General Counsel's assertion that the Labor Relations Specialist subjected the Unit Employee to "intense questioning" concerning the grievance or his possible testimony. *Id.* at 9. In addition, the Judge found that "in the absence of reliable evidence to the contrary", the Union did not formally identify the Unit Employee as a potential witness before the meeting took place. *Id.* at 6. Accordingly, the Judge found that the purpose of the meeting does not indicate that the meeting was formal.

Based on the foregoing, the Judge found that the

2. Section 7114(a)(2)(A) of the Statute provides, in relevant part, that:

An exclusive representative . . . shall be given the opportunity to be represented at -
 (A) any formal discussion . . . concerning any grievance or any personnel policy or practices or other general condition of employment[.]

meeting fell “into something of a gray area between formality and informality.” Decision at 9. On balance, he concluded that the General Counsel did not meet the burden under 5 C.F.R. § 2423.32 to prove the allegations in the complaint by a preponderance of the evidence. Therefore, the Judge recommended that the Authority dismiss the complaint. *Id.* at 9-10.

III. Positions of the Parties

A. General Counsel’s Exceptions

The General Counsel contends that the Judge erred when he found that the meeting may have lasted only 15 minutes and, instead, should have found that it lasted at least 30 minutes. Exceptions at 6-7. The General Counsel claims that the Judge committed a second factual error by not making a definitive finding that the Labor Relations Specialist took notes of the meeting. *Id.* at 8.

The General Counsel contends that the Judge’s conclusion that the General Counsel did not meet the burden of proving that the meeting was formal was based on the Judge’s incorrect conclusions as to several indicia of formality. Specifically, the General Counsel contends that, even if the Judge was correct in his finding that the meeting lasted between 15 and 30 minutes, he then should have found, consistent with several Authority decisions, that this duration indicates that the meeting was formal. Exceptions at 8-9. In addition, the General Counsel contends that the Judge should have viewed the location of the meeting, in a Labor Relations Specialist’s office, and the Labor Relations Specialist’s taking of notes, as additional indicia of formality. *Id.* at 8-11.

The General Counsel asserts that the totality of facts and circumstances establishes that the meeting was a formal discussion and that, therefore, the Respondent violated § 7114(a)(2)(A) of the Statute by holding the meeting without providing the Union notice and the opportunity to be represented at the meeting. Exceptions at 12.

B. Agency’s Opposition

As explained above, we do not consider the Agency’s opposition.

IV. Analysis and Conclusions

A. The Judge did not err in his findings of fact.

The General Counsel contends that the Judge’s finding that the meeting may have lasted only 15 minutes rested on testimony erroneously attributed to

the Labor Relations Specialist. Exceptions at 6. In this regard, the Judge made a finding that the Labor Relations Specialist testified that the meeting lasted for about 15 minutes. Decision at 4. Although the Labor Relations Specialist did not testify as to the duration of the meeting, the Unit Employee’s testimony supports the Judge’s finding that the meeting may have been as short as 15 minutes. In particular, the Unit Employee testified that he left work at 8 a.m. to attend the meeting, that it lasted “[t]hirty minutes, forty minutes”, and that it ended at “I don’t know, 8:30, something.” (Tr. at 50). Further, he testified that “[t]he meeting was just after I got off work, 8, 8:15, thereabouts.” (Tr. at 57-58). Therefore, the Unit Employee’s testimony suggests that the meeting could have been as short as 15 minutes. We note the General Counsel’s contention that the Judge’s finding that it would have taken the Unit Employee at least 5 minutes to walk from his work station to the Labor Relations Specialist’s office is not supported, and that such a walk might have taken “less than 30 seconds.” Exceptions at 7. However, under either scenario, the record supports the Judge’s finding that the meeting lasted between 15 and 30 minutes.

The General Counsel contends that the Judge also erred when he failed to find that the Labor Relations Specialist took notes of what the Unit Employee said during the meeting. Exceptions at 8. The General Counsel points out that the Unit Employee testified that the Labor Relations Specialist took notes and that the Labor Relations Specialist did not deny doing so. *Id.* Although the Unit Employee testified that during the meeting “[the Labor Relations Specialist] was writing down things,” (Tr. 60), he was not asked if he knew what the Labor Relations Specialist was writing. When asked if he was provided a copy of the notes, he testified that he was not. (Tr. 60-61). Moreover, the Labor Relations Specialist was not asked whether he had taken notes. As such, the preponderance of the evidence does not support a finding that anything said by the Unit Employee during the meeting was transcribed into notes.

Based on the foregoing, we deny the General Counsel’s exception.³

B. The Judge did not err in finding that the meeting was not formal.

The determination as to whether a meeting is a formal discussion is based on the totality of the facts

3. As such, it is unnecessary to address the General Counsel’s claim that the note-taking indicates that the meeting was formal.

and circumstances presented. See *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 155-57 (1996) (*F.E. Warren*). The DOL factors, discussed above, are illustrative, and other factors may be identified and applied as appropriate. *F.E. Warren*, 52 FLRA at 157. In this regard, the Authority has recognized that a meeting can have some indicia of formality and yet, based on the totality of the circumstances, not be a formal discussion. See *United States Department of Veterans Affairs Northern Arizona Veterans Affairs Healthcare, Prescott, Arizona*, 61 FLRA 181,186 (2005) (*Northern Arizona*); *United States Dep't of Justice, U.S. Immigration & Naturalization Service, Los Angeles, California*, 18 FLRA 550, 553 (1985). Moreover, the Authority has found that the purpose of a discussion may be relevant in assessing formality. See *F.E. Warren*, 52 FLRA at 156-57; *Dep't of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 35 FLRA 594, 605 (1990) (*McClellan*) (agency management's interview of a bargaining unit employee with knowledge that union would call employee as a witness to an upcoming arbitration hearing is a formal discussion).

The General Counsel contends that the Judge's conclusions that the meeting's duration and location do not suggest that the meeting was formal are "clearly erroneous." Exceptions at 8. Regarding the meeting's duration, the General Counsel cites two Authority decisions for the proposition that formality is indicated by a meeting that lasts 15 to 30 minutes. *Id.* See *McClellan*, 35 FLRA at 604 (finding that a 15-25 minute witness preparation interview "lasted a significant length of time"); *United States Dep't of Justice, Bureau of Prisons, Fed. Correctional Inst., Bastrop, Tex.*, 51 FLRA 1339, 1343 (1996) (formality is indicated by a meeting that lasts 25 to 30 minutes).

Contrary to the General Counsel's contention, the Authority has not found a meeting length of 15 to 30 minutes to indicate formality under all circumstances. *E.g.*, *Northern Arizona*, 61 FLRA at 185 (a 15-minute meeting found to be of "short duration" and an indication of informality); *Defense Logistics Agency, Defense Distribution Region West, Tracy, California*, 48 FLRA 744, 745 n.2 (1993) (meeting lasting "only 15 minutes" was not a formal meeting); *Dep't of Health and Human Services, Social Security Admin. and Social Security Admin. Field Operations, Region II*, 29 FLRA 1205, 1208 (1987) (meeting lasting "about 20 minutes" was not formal). The Judge found that, under circumstances where the Unit Employee prolonged the meeting by asking the Labor Relations Specialist questions and

expressing complaints, the meeting's duration is not a reliable indicator of its formality. Decision at 9. The General Counsel points to no precedent to the contrary. Accordingly, we deny the General Counsel's exception on this point.

Regarding the location of the meeting, the General Counsel contends that the Judge should have found that it indicates formality because the meeting was held away from the Unit Employee's work site and in the Labor Relations Specialist's private office. Exceptions at 10. However, the Judge found, and the General Counsel does not dispute, that the meeting took place away from the Unit Employee's work site simply because he did not have an office there. Decision at 3. The General Counsel, having presented no evidence of any other explanation for the location of the meeting, failed to establish that the location indicates formality.

Based on the foregoing, the General Counsel has not demonstrated that the Judge erred in his evaluation of the indicia of formality set out in *DOL*. Further, the General Counsel has not demonstrated that the Judge's decision is inconsistent with *McClellan* and *General Services Administration, Region 9, New York, New York*, 54 FLRA 864 (1998). In the meetings involved in those decisions, counsel representing management in arbitration cases interviewed union employees who had been designated by the union as witnesses in the cases. The Authority recognized that under such circumstances a union would have an interest in being present to be assured that its witnesses would not be coerced or intimidated prior to the hearings. *McClellan*, 35 FLRA at 605. Here, the General Counsel does not except to the Judge's finding that the purpose of the meeting was not to prepare a Union witness for an arbitration hearing. Therefore, these decisions are distinguishable.

Based on the foregoing, we deny the General Counsel's exception.

V. Order

The complaint is dismissed.

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2145
Charging Party

Case No. WA-CA-07-0087

Shamar R. Cowan
For the General Counsel

Theodore Knicely
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On November 8, 2006, the American Federation of Government Employees, Local 2145 (Union) filed an unfair labor practice charge against the Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia (Respondent) (GC Ex. 1(a)). On May 11, 2007, the Regional Director of the Washington Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by holding a formal meeting with a member of the bargaining unit represented by the Union without providing the Union with advance notice and the opportunity to have a representative in attendance. It was further alleged that the Respondent's action was in violation of §7114(a)(2)(A) of the Statute. The Respondent filed a timely Answer^{1/} in which it denied the alleged violations.

A hearing was held in Richmond, Virginia on June 27, 2007. The parties were present with counsel

^{1/} The index to the formal documents lists the Answer as GC Ex. 1(e). However, the actual exhibit is a document entitled "Settlement Response to Complaint CA-WA-07-0087" which is, in effect, the Respondent's pre-hearing disclosure.

and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that, on or about November 2, 2006, the Respondent, through Charles Snow, a Labor Relations Specialist, held a formal discussion with Ronald Spencer, a member of the bargaining unit, concerning an upcoming arbitration hearing arising out of a grievance which had been filed by the Union. According to the General Counsel the purpose of the meeting was to influence Spencer's testimony at the hearing. The Respondent did not notify the Union of the meeting or provide the Union with an opportunity to have a representative attend. The General Counsel further maintains that Spencer's attendance at the meeting was mandatory and that the duration, as well as the location and all other aspects of the meeting, indicate that it was formal.

The Respondent acknowledges that the meeting in question was initiated by Snow who had requested that Spencer drop by his office at his convenience on either of two days to discuss the grievance, but maintains that Snow had no advance notice of when Spencer would arrive and that the meeting had none of the indicia of a formal discussion.

Findings of Fact

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization within the meaning of §7103(a)(4) of the Statute. Spencer is an employee as defined in §7103(a)(2) of the Statute. Spencer is a member of a unit of the Respondent's employees which is represented by the Union and is appropriate for collective bargaining.

Some time in 2005 Michelle Trotter, a member of the bargaining unit, submitted a claim for educational expense reimbursement under the Respondent's Education Debt Reduction Program (EDRP). Spencer, who was then the EDRP Coordinator, informed Trotter that her claim was not timely and that her job classification had not been identified as hard to fill or hard to retain and, consequently, was not covered under EDRP. Spencer's supervisor subsequently directed him to rescind the bar as to timeliness, but Spencer denied Trotter's application because of her job classification (Tr. 33, 35, 36). A grievance filed by the Union on

Trotter's behalf was eventually scheduled for arbitration on November 14, 2006^{2/} (GC Ex. 3).

Snow was assigned to prepare the Respondent's case for presentation to the arbitrator. On October 30 Snow sent an e-mail message to Spencer asking him to come to his office to discuss the arbitration at his convenience either on Thursday or Friday of that week (GC Ex. 5). According to Snow, the purpose of the meeting was to determine if Spencer had any relevant documents. He asked Spencer to come to his office because Spencer was then working as a registered nurse in the emergency room and, consequently, had no office of his own. Snow further testified that Spencer's compliance with his request was voluntary (Tr. 80-82). When asked why he did not mention the documents in his e-mail message to Spencer, Snow testified that he needed to meet with Spencer because he "wanted to be sure I got results" (Tr. 84). In any event, Spencer came to Snow's office as requested, but with no advance notice as to when he would appear (Tr. 39).

Snow and Spencer expressed differing recollections of their meeting. Spencer testified that he considered his compliance with Snow's request to have been mandatory and that he had never before been called to Snow's office. According to Spencer the meeting lasted from between 30 and 40 minutes. Snow asked Spencer if he had retained any files regarding Trotter's application; he said that he had not (Tr. 60). Snow showed Spencer a copy of a letter dated August 22, 2005, from Jennifer Marshall, the Union President, to Spencer requesting reconsideration of the denial of Trotter's request (GC Ex. 2) and asked him if he had seen it before; Spencer replied that he had not. Snow asked Spencer if he was aware that Trotter's request had been referred to New Orleans where it was again denied and Spencer said that he was not. Snow did not ask him any other questions about the arbitration or the grievance. In fact, Spencer testified that Snow did not ask him any questions about the arbitration (Tr. 43-48).

According to Spencer, he had the impression that the purpose of the meeting was to prepare him to testify for the Respondent. Spencer further testified that Snow never mentioned the Union, but told him that he might be a witness and to remain available for the arbitration hearing (Tr. 51).^{3/}

^{2/} All subsequently cited dates are in 2006 unless otherwise indicated.

^{3/} It is undisputed that neither party called Spencer as a witness at the arbitration hearing.

Spencer was assigned to a midnight to 8:00 a.m. shift in the emergency room. On the morning of the arbitration hearing he continued to work until late morning. He then went to the room where the hearing was to be held and asked Snow and others if he would be needed. They told him that he would not (Tr. 52, 53).

Snow testified that the meeting with Spencer lasted about 15 minutes and was voluntary since Spencer was not in his chain of command. The Union had not yet followed the contractual procedure for identifying Spencer as a witness so that his work schedule could be adjusted, but Snow felt that Spencer probably would be called by the Union. Snow had determined that Spencer was not going to be needed as a witness for the Respondent because a management official in New Orleans had rejected Trotter's request subsequent to the initial rejection by Spencer. He told Spencer that the Respondent would not call him but that he might be called by the Union. Snow further testified that he did not ask Spencer how he would answer particular questions at the arbitration hearing. Spencer questioned him about the status of the grievance and Snow got the impression that he was annoyed at how it was being handled by both the Union and the Respondent (Tr. 70-76).

There was a degree of inconsistency in Snow's testimony. On the one hand, he stated that he needed to see Spencer so that he could determine whether there were any pertinent documents that he (Snow) had not received and whether the Medical Director had followed the proper procedure. Yet, Snow acknowledged that he did not ask Spencer to bring any documents to their meeting (Tr. 80-82).

Marshall's stated impression of what transpired at the meeting was second-hand and is somewhat at odds with the testimony of both Spencer and Snow. Marshall testified that she had received no advance notice of Spencer's meeting with Snow (this is undisputed). On November 6 Marshall asked Spencer to meet with her and, on November 8, he came to the Union office. Spencer told her that Snow had told him the questions that he would be asked at the arbitration hearing as well as the answers that he should give (Tr. 20, 21). Spencer also told her that he was unaware that he was entitled to Union representation at the meeting (Tr. 22). Marshall further testified that Spencer was included in a list of witnesses that the Union's attorney had provided to Ted Knicely, whom she identified as the head of Human Resources (Tr. 19). On cross-examination (by Knicely), Marshall acknowledged that she had not seen the list and did not know when it was

submitted (Tr. 22, 23); the list was not offered in evidence.

On February 10, 2006, the Union and the Respondent entered into an agreement in settlement of a negotiability appeal that the Union had instituted with the Authority (Resp. Ex. 4). The agreement states in pertinent part:

1. Upon written notice from AFGE 2145, delivered not less than seven calendar days prior to the date of an arbitration, that the union has identified a bargaining unit employee as an arbitration witness:
 - a. HRMS [the Respondent] will notify the employee's supervisor that AFGE 2145 has identified a subordinate employee as a potential union arbitration witness;
 - b. HRMS will advise the supervisor of the date, place, and time of the arbitration;
 - c. HRMS will advise the supervisor that the witness should be on duty time and that appropriate schedule changes should be made if necessary to make the employee available to testify; and
 - d. HRMS will advise the supervisor that the subordinate should be allowed to participate in the arbitration.

2. On the day of the arbitration, management will make every effort to make the employee available to participate. Unforeseen medical emergencies impacting an employee's availability on the day of the arbitration will be brought to the union's attention, including a description of the emergency. The parties will discuss alternatives and the arbitrator will determine how the issue will be resolved.

Upon consideration of the evidence, I find as a fact that the meeting between Snow and Spencer lasted from between 15 and 30 minutes. Spencer's recollection of its duration seemed somewhat uncertain; he testified that it lasted, "From 8 until, I don't know, 8:30, something." Yet, he also testified that he got off of work at 8:00 a.m. (Tr. 50). Assuming that Spencer went directly to Snow's office, it would have taken him at least five minutes. Furthermore, the testimony of both Spencer and

Snow as to what transpired at the meeting suggests that the meeting was of relatively short duration.

In the absence of reliable evidence to the contrary, I find that the Union did not formally identify Spencer as a potential witness. Marshall testified that she did not see the list that the Union's attorney sent to the Respondent and the list was not produced at the hearing. Therefore, it is logical to assume that the Union's attorney had determined that he would not need Spencer's testimony. This finding is corroborated by the fact that Spencer worked his regular shift on the day of the arbitration hearing and there is no evidence that the Union had requested that his schedule be changed. This issue is not crucial since Snow acknowledged that he told Spencer that the Union might call him as a witness. Snow's supposition was not unreasonable since the contractual deadline for the identification of witnesses by the Union had not yet passed.

Discussion and Analysis

Section 7114(a)(2) of the Statute provides, in pertinent part, that:

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

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

In numerous cases, such as *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1012 (1991), the Authority has held that, in order for a formal discussion to occur, there must be (1) a discussion (2) which is formal (3) between one or more representatives of the agency and one or more bargaining unit employees or their representatives (4) concerning any grievance or personnel policy or practices or other general conditions of employment.

The Respondent does not allege that the meeting failed to satisfy any of the above-stated criteria other than formality. The evidence, as described above, clearly shows that a discussion occurred between Snow, a representative of the Respondent, and Spencer, a member of the bargaining unit, concerning the grievance which the Union filed on behalf of Trotter. Therefore, the only remaining issue is whether the meeting was formal.

In *U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988) (*DOL*) the Authority considered the following factors in determining whether a meeting was formal: (1) whether the meeting was held by a first-level supervisor, (2) whether any other management representative attended, (3) where the meeting took place, (4) how long it lasted, (5) whether the meeting was called with advance notice or spontaneously, (6) whether there was a formal agenda, (7) whether attendance was mandatory, and (8) whether there was a formal record or transcription of attendance and comments. In order to resolve the issue of formality, I will apply the criteria set forth in *DOL*.

Whether the meeting was held by a first-level supervisor. While Snow was not Spencer's supervisor, his status as a Labor Relations Specialist clearly identified him as an influential representative of management. This factor suggests that the meeting was formal.

Whether any other management representative attended. It is undisputed that only Spencer and Snow were present. This factor lends no weight to the position of either party.

Where the meeting took place. While Spencer had never before been in Snow's office, he presumably had previously visited the Human Resources department during his 29 years of employment by the Respondent. Furthermore, Spencer had no office in the emergency room, although a conference room might have been available. Spencer testified that he felt somewhat intimidated, but that feeling appears to have been the result of the nature of the discussion, including the presentation of a letter to him from the Union (GC Ex. 2) that he had never seen before^{4/}, rather than its location. This factor does not, in itself, suggest that the meeting was formal.

Whether the meeting was called with advance notice or spontaneously. The meeting at issue falls somewhere between the alternatives stated in this factor. Although Snow did not specify a particular time for Spencer to come to his office, Spencer naturally felt that he was obligated to meet with Snow on either of the two specified days. Accordingly, the meeting could hardly be

characterized as spontaneous. While Snow could not have informed Marshall of the exact time and date of the meeting, he could have informed her of his request to Spencer so that she could have contacted Spencer and arranged to be present. This factor weighs in favor of the General Counsel's position.

Whether there was a formal agenda. Contrary to the General Counsel's assertions, there is no evidence that a formal agenda was published and it has not been alleged that Snow referred to one. Snow had a specific reason for wanting to meet with Spencer, but there is often a specific reason for even the most spontaneous and informal meetings. This factor suggests that the meeting was not formal.

Whether attendance was mandatory. Although Spencer was never told that he had to comply with Snow's request, it is reasonable to assume that he felt compelled to do so. This factor supports the argument that the meeting was formal.

Whether there was a formal record or transcription of attendance and comments. Although Snow might have taken notes, there was no formal record or transcription of the meeting or comments on what had transpired. A record of attendance would have been unnecessary since there were only two participants. This factor indicates that the meeting was not formal.

The Authority has made it clear that factors other than those cited above may be taken into account and that the totality of facts and circumstances are to be considered in determining whether a meeting was formal, *DOL*, 32 FLRA at 470. The duration of the meeting indicates that, while the meeting was not casual, it was not necessarily formal. The evidence suggests that the meeting was prolonged by Spencer's questions as to the status of the grievance and by his expressions of dissatisfaction with the actions of both the Respondent and the Union.^{5/}

The meeting between Spencer and Snow falls into something of a gray area between formality and informality. Although not precisely scheduled, the meeting was not a spontaneous or a casual encounter; there can be no doubt that Spencer came to Snow's office at Snow's request and that Snow expected Spencer to arrive on one of the two days mentioned in his message. Even if the meeting was not mandatory, Snow could reasonably have foreseen

^{4/} Spencer apparently wondered how Snow had obtained a letter that had been addressed to him. He did not notice that a copy of the letter had been addressed to Snow. It is possible that Spencer suspected the Respondent of intercepting the letter and/or the Union of failing to send it to him.

^{5/} Although Spencer was a member of the bargaining unit, he was not a member of the Union (Tr. 57). This might explain why he did not consult a Union representative before going to Snow's office and why he spoke to Snow in the absence of a Union representative.

that Spencer would have felt obligated to attend. In addition, Spencer would naturally have regarded Snow as a person of influence even though they were not in the same chain of command. Nevertheless, Spencer acknowledged that, contrary to the General Counsel's assertion, Snow did not subject him to intense questioning concerning the grievance or his testimony if he were called as a witness at the arbitration hearing. There was no formal agenda and neither the location nor the duration of the meeting suggest that it was formal. Therefore, upon consideration of all of the evidence, I have concluded that the General Counsel has not met her burden of proof under §2423.32 of the Rules and Regulations of the Authority that the meeting in question was formal.

For the reasons stated above I have concluded that the Respondent did not commit an unfair labor practice by failing to notify the Union of the meeting between Snow and Spencer. Accordingly, 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, July 31, 2007

PAUL B. LANG
Administrative Law Judge