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

MEMORANDUM DATE: February 9, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, D.C.
RALEIGH, NORTH CAROLINA DISTRICT

Respondent

and Case No. AT-CA-03-0800

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, 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

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE WASHINGTON, D.C. RALEIGH, NORTH CAROLINA DISTRICT Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. AT-CA-03-0800

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 13, 2006**, and addressed to:

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

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RICHARD A. PEARSON
Administrative Law Judge

Dated: February 9, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
Washington, D.C.

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE WASHINGTON, D.C. RALEIGH, NORTH CAROLINA DISTRICT Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. AT-CA-03-0800

Brent S. Hudspeth, Esquire
For the General Counsel

Clifton L. Rowe, Esquire
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

The American Federation of Government Employees, AFL-CIO (the Charging Party) initiated this case on September 30, 2003, when it filed an unfair labor practice charge against the U.S. Department of Agriculture, Food Safety and Inspection Service, Field Operations. After investigating the charge, the General Counsel of the Federal Labor Relations Authority (General Counsel) issued a complaint on May 7, 2004, against the U.S. Department of Agriculture, Food Safety and Inspection Service, Field

Operations, Washington, D.C. (Raleigh, North Carolina).[1] The complaint alleges that the Respondent violated section 7116(a)(1) and (8) of the Statute by conducting a formal discussion within the meaning of section 7114(a)(2)(A) on or about July 28, 2003, without affording the Union the opportunity to be represented by a representative of its own choosing.

A hearing was held in Raleigh, North Carolina, on September 9, 2004, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses.[2] The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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 National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (hereinafter National Joint Council or Union) is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4) and is the exclusive collective bargaining representative of a bargaining unit of the Respondent's employees. Joint Ex. 1 at 4. The National Joint Council consists of eight regional councils, each of which has its own president and is responsible for representing the bargaining unit employees in a designated geographical area.[3] Tr. 23. The Respondent and the Union are parties to a Labor-Management Agreement (LMA) that became effective on October 1, 2002, and remained in effect at all times material to this case. Joint Ex. 1.

Relevant Contractual Provisions

[1] At the hearing, the complaint was amended to change the name of the Respondent to the "U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., Raleigh, North Carolina District." Tr. 8-9. Hereafter, I refer to the latter entity as the Respondent or Agency, and it is this name which appears in the caption of the case.

[2] At the outset of the hearing, the parties entered into a Stipulation of Facts to simplify the issues at the hearing. Tr. 5-6. The Stipulation is included in the record with the Joint Exhibits.

[3] One of the council presidents also serves as the chairman of the National Joint Council. Tr. 23.

Article 4 of the LMA (Joint Ex. 1) is entitled "Union Representatives, Rights and Responsibilities." Section 8a of Article 4 states: "A Union representative will be afforded an opportunity to attend new employee orientation sessions, and to make up to a fifteen (15) minute presentation during new employee orientation sessions. . . ." It also stipulates that the Union representative is authorized official time and mileage reimbursement, but not per diem or overtime, for attendance at such meetings.

The dispute in this case focuses on Section 3 of Article 4, "Designation of Union Officials," which provides in relevant part:

> The Union shall within thirty (30) calendar days of this Agreement, and annually thereafter, provide the Director of Labor and Employee Relations Division (LERD), Field Labor Relations Specialists, and District Managers, by district, with an updated written list of the names, titles, and work telephone numbers of all Union officials, including locations and jurisdiction of the Union officers and representatives. Also, the Union shall provide written notice to the Director, LERD, appropriate District Managers, and Field Labor Relations Specialists of any changes in representatives normally two (2) weeks in advance of performing representational duties.

Cheryl Dunham, Chief of the Labor Relations Branch of LERD in Washington, D.C., and a member of the management team during the negotiation of the LMA, testified that the purpose of Section 3 was to provide the Agency with advance notification of the identities of authorized Union representatives, so that Agency officials could properly fulfill their responsibilities to the Union. Tr. 19. Dunham's testimony was echoed by Charles (Stan) Painter, the President of the Union's Southern Council, who participated in the 2002 LMA negotiations as a member of the Union team. Tr. 79. Both Dunham and Painter stated that the notification provisions of Article 4, Section 3, quoted above, differed from those in the parties' prior collective

bargaining agreement.[4] Tr. 32, 79. Dunham described the reason for the new provision as being to help managers prepare for releasing Union representatives when they need to perform representational duties. Tr. 20. Painter and Jaime Mercado, the Deputy District Manager for Raleigh, described the contract provision as also designating which Union representatives were entitled to official time. Tr. 67, 79.

Painter characterized the two-week advance notification requirement set forth in Article 4, Section 3, as being for the purpose of allowing time for information regarding the identity of new Union representatives to circulate to relevant levels of management. Tr. 79. He recalled that the primary focus of the discussions during negotiation of the notice provision concerned the Union's need to allow for exceptions to the two-week requirement, and that resulted in inclusion of the qualifier "normally." Tr. 80. Dunham recalled that the focus of discussions during bargaining had been on which Agency officials the Union should notify. Tr. 19-20, 52. Dunham did not have much recollection of any discussion about the two-week advance notice requirement (Tr. 53-54), but she said the parties recognized that there would be situations where two weeks advance notice would not be possible, and for that reason the word "normally" was added. Tr. 24.

Despite being specifically asked (Tr. 20-21), Dunham offered no comment on whether there was any discussion during negotiations of the consequences that would occur if the Union did not comply with the contractual notice requirements. She asserted, however, that it is implied in Section 3 that an individual is not an "authorized representative" of the Union until the required notice has been provided. Tr. 30. Painter stated categorically that during the negotiations, there was no discussion of the consequences of noncompliance with the notification requirements. Tr. 79-80.

Dunham testified that when the new contract went into effect, the Agency had some difficulty obtaining the list of Union officials, and that it informed the president of the National Joint Council that the Agency would not recognize

[4] The prior agreement (Article V, Section A) imposed a mutual obligation on officials of each party to notify their "counterparts" of the names, mailing addresses and telephone numbers of their authorized representatives within 30 days of the approval of that agreement and, in the event of changes, within two weeks of the change. Joint Ex. 4 at 32-33.

anyone unless the list of designations was submitted. Tr. 21. According to Dunham, there have also been occasions in conjunction with turnover in council presidents that the Agency advised a new council president that it would not recognize any representatives until a list was properly submitted. Tr. 21-22. She said the Union had never filed a grievance challenging the Agency's interpretation of the contractual provision. Tr. 32.

Refusal to recognize James Harris

As indicated earlier, Painter was the president of the Southern Council. By letter dated May 2, 2003,[5] Painter advised the Agency's Raleigh District Manager that Linwood Pender was the president of the Union local responsible for representing bargaining unit employees in North and South Carolina. Resp. Ex. 3.

On June 9, Steven Lalicker, the Deputy District Manager of the Raleigh District, sent an e-mail to Pender advising him that James Harris would not be allowed official time in conjunction with an employee orientation because he was not "on the list."[6] G.C. Ex. 2. Pender forwarded Lalicker's message to Painter, asking for guidance. *Id.* By e-mail to Lalicker dated June 12, Painter requested that Harris, whom he identified as the 1st Vice President of the Union local representing North and South Carolina, be recognized as the Union's representative at a new employee orientation session scheduled for the latter part of June, and that he be allowed official time to do so. G. C. Ex. 2; Tr. 39, 44, 67-68. In an e-mail sent later that same day, Lalicker agreed to allow Harris to attend the June orientation on official time, but he reminded Painter that Article 4, Section 3 of the LMA requires the Union to notify certain Agency officials and to do so two weeks in advance of performing representational duties. G.C. Ex. 2. Painter replied to Lalicker the next day, thanking him for his "consideration" and stating that because the orientation was

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5 Hereafter, all dates are in 2003 unless otherwise noted.

6 It appears that prior to Lalicker's June 9 message, the Agency had notified the Union of an employee orientation session to be held in late June and Pender had asked Lalicker to approve official time for Harris to attend that session on behalf of the Union. Tr. 43-44, 67-68. No copy of such correspondence was offered into evidence, nor was there testimony describing the correspondence, but this is the clear context of G.C. Ex. 2 and of Dunham and Mercado's testimony. *Id.*

scheduled the same week as an LMR meeting, it was not a "normal circumstance." Resp. Ex. 1.

The controversy that is the focus of the complaint in this case arose in conjunction with the Raleigh District's next orientation for new employees. By e-mail dated June 25, the Agency notified Painter that an employee orientation session was scheduled for July 28-30. Resp. Ex. 2. Painter testified that he did not actually see the June 25 letter until the week of July 24, because he had been on vacation and also had a computer malfunction, which resulted in his not getting e-mail for about a month. Tr. 81, 97-98. According to Painter, he learned of the approaching orientation when he received a telephone call on July 24 from Pender, who informed him that the Agency was not willing to honor the designation of Harris as the Union's representative at the orientation.[7]

In response to this information, Painter faxed a letter to Deputy District Manager Mercado dated July 24, which "document[ed]" the designation of Harris as the Union's representative to attend the upcoming employee orientation. Tr. 82; Joint Ex. 2.[8] In the letter, Painter stated that it was his understanding that Mercado was not going to honor the Union's request that Harris represent it at the orientation session because the Union had failed to provide a two-week notice. Painter contended in the letter that the Statute required the Agency to allow a Union representative to attend formal discussions such as the orientation session and did not require the Union to provide a two-week notice of its representative. Joint Ex. 2.

Mercado responded by letter of the same date, rejecting Painter's designation of Harris and contending that it did not comply with Article 4 of the LMA, because it was not directed to the appropriate management officials and was not made with sufficient advance notice. Joint Ex. 3. At the hearing in this case, Mercado stated that the Union did not indicate in its e-mail of June 12 that Harris was being

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It is not clear from the record when Pender had this discussion with an Agency official about Harris attending the orientation, since Pender did not testify and Mercado did not refer to it. It is clear, however, that Painter wrote to Mercado on July 24 and named Harris to attend the orientation (Joint Ex. 2), and I use that date as the reference point for the alleged unfair labor practice.

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In his letter, Painter referred to the orientation session as being scheduled for August 4; in fact, he was referring to the orientation scheduled for July 28-30.

designated as a Union representative for general purposes, nor did it provide any reason for the need to substitute Harris as its representative to the July orientation with less than two weeks' notice. Tr. 75-76.

In his testimony, Painter recalled that Pender had some sort of conflict that prevented him from attending the July employee orientation but couldn't remember exactly what it was. Tr. 99. Painter stated that he had a telephone conversation with Mercado after Painter received Mercado's letter, and that Mercado advised him that the problem with releasing Harris was that there was not sufficient time to arrange alternative staffing for Harris's scheduled inspection assignment.[9] Tr. 82. Painter recounted that he and Mercado also discussed the reasons that the designation was made less that two weeks prior to the orientation (i.e., Painter's computer problems and vacation). According to Painter, despite the explanation, Mercado would not permit Harris to attend the orientation. Tr. 82-83.

Painter also insisted in his testimony that he had listed Harris as one of the Union officials designated to represent the Union prior to the e-mail exchange regarding the June employee orientation. Tr. 100-03. Painter acknowledged, however, that he did not have any correspondence documenting his designation of Harris. Tr. 103. I do not credit Painter's testimony that he had submitted a designation of Harris as a Union representative pursuant to Article 4, Section 3 of the LMA prior to June 12.[10] Most significantly, Painter could not support his claim with written documentation. Additionally, Painter's claim of a prior designation is not reflected by

[9] In his brief, the General Counsel requests that I disregard this testimony because it is inconsistent with the theory of the case that the parties agreed to and was set forth in Respondent's prehearing disclosure. General Counsel's Brief at 9 n.2. In making this request, the General Counsel relies on section 2423.24(e)(2) of the Authority's regulations, which allows Administrative Law Judges to impose sanctions on a party for failure to comply with regulatory provisions that apply to post-complaint and hearing procedures. This testimony was, however, provided by the General Counsel's own witness in response to questioning initially by the General Counsel and then by myself. The General Counsel's request that I disregard this evidence is denied.

[10] The legal significance of the June 12 e-mail designation of Harris, for purposes of this case, will be addressed further below.

his communications immediately prior to the June and July employee orientation meetings. In neither instance did Painter cite or even allude to any previously submitted written designation of Harris, as would seem likely if such a prior communication had occurred.

The Agency conducted the new employee orientation session on or about July 28. As stipulated by the parties, the meeting was formal in nature, and no Union representative attended the meeting. Stipulation of Facts at ¶¶ 13-15.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel alleges that the Respondent violated section 7116(a)(1) and (8) of the Statute when it refused to allow Union Vice President James Harris to attend the July 28 employee orientation session as the Union's representative. In support, the General Counsel cites *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 29 FLRA 594, 606 (1987) (*McClellan*), in which the Authority emphasized that a significant component of a union's "opportunity to be represented" is the union's ability to name a representative of its own choosing. Here, while the Agency gave the Union ample advance notice of the orientation session, it is argued that the Agency nonetheless deprived the Union of its right to send Harris to this particular meeting.

The Respondent defends its rejection of Harris for the July 28 meeting, arguing that its action was justified based on the language of Article 4, Section 3 of the parties' collective bargaining agreement. In light of this defense, both parties agree that the applicable legal framework is set forth in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091 (1993) (*IRS*).

The Respondent does not dispute that the orientation session was a formal discussion, within the meaning of section 7114(a)(2)(A). The General Counsel, in turn, does not dispute that the Agency notified the Union of this orientation nearly a month in advance. Thus the real question posed in this case is whether the Union waived its "opportunity to be represented" by insisting on sending Harris as its representative.

The General Counsel argues alternatively: first, that the Union complied with the contractual notice requirements concerning Harris; second, that even if the Union didn't

satisfy the contractual requirements fully, the LMA didn't authorize the Agency to refuse to recognize Harris as the Union representative at the orientation. With regard to the first point, the G.C. contends that in the absence of any change in Harris's status, the notice sent by Painter to Lalicker and Dunham on June 12 -- that Harris was the Union's 1st Vice President for North and South Carolina -- remained valid for purposes of the July meeting. On the second point, the General Counsel maintains that Article 4, Section 3 is silent as to what are the consequences of failing to comply with the notice obligation, and that the bargaining history sheds no light on the consequences of noncompliance. The General Counsel contends further that the parties had no established practice that effectively defined the consequences of noncompliance. Since the contract cannot be interpreted to justify the Agency's refusal to recognize Harris, the G.C. argues that the Agency has failed to sustain its affirmative defense, and that the Agency committed an unfair labor practice.

As a remedy, the General Counsel seeks an order requiring the Respondent to cease and desist its actions and to post a notice to employees.

The Respondent, however, argues that the express terms of Article 4, Section 3 of the LMA require the Union to provide written notice of changes in its list of representatives two weeks in advance of performing representational duties, and that it provide such notice to specified management officials. The Agency says the Union failed to satisfy the time deadline for notifying management that Harris would be serving as its representative at the July employee orientation and also failed to distribute its notice to all of the required management officials. It further argues that the Union had no valid excuse for its failure to abide by these contractual requirements; consequently, pursuant to the terms of Article 4, Section 3, Harris was not an authorized representative of the Union for purposes of "performing representational duties."

The Agency distinguishes its actions from a refusal to allow the Union to be represented at all at a formal discussion. Rather, it claims that its actions were limited to not accepting a particular representative who had not been designated in the manner required by the collective bargaining agreement.

Analysis

Based on the description of the July 28 new employee orientation session in paragraphs 13 and 14 of the

Stipulation of Facts, I find that it constituted a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute. The crucial issue is whether the Agency's refusal to allow Harris to represent the Union at that session deprived the Union of its "opportunity to be represented" or whether it was permissible under the LMA.

The Authority has long held that agencies and unions have the right to designate their own representatives when fulfilling their responsibilities under the Statute. *See, e.g., American Federation of Government Employees, AFL-CIO*, 4 FLRA 272, 274 (1980) (parties are not required to bargain over proposals specifying who can represent them); *Food and Drug Administration, Newark District Office, West Orange, New Jersey*, 47 FLRA 535, 565-67 (1993) (agency cannot refuse to recognize attorneys as union representatives). Consistent with that principle, the Authority construes section 7114(a)(2)(A) as including the right of a union to be represented by a person of its own choosing at meetings that come within the ambit of that section. *See, e.g., McClellan*, 29 FLRA at 605-06. In our case, however, the Agency claims that the Union accepted restrictions on that otherwise-unfettered right by accepting the language of Article 4, Section 3 of the LMA.

In *IRS*, the Authority held:

> [W]hen a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.

47 FLRA at 1103. The Authority further stated:

> [O]nce the General Counsel makes a *prima facie* showing that a respondent's actions would constitute a violation of a statutory right, the respondent may rebut the General Counsel's showing . . . by establishing by a preponderance of the evidence that the parties' collective bargaining agreement allowed the respondent's actions.

47 FLRA at 1110.

In interpreting the meaning of the parties' collective bargaining agreement to determine whether it permitted a respondent's action, the same standards and principles as used by arbitrators are applied. *Id.* The goal in this process is to determine the intent of the parties themselves, and the tools used include the language of the disputed provision and the contract as a whole, as well as extrinsic evidence such as bargaining history and past practices of the parties in administering the agreement. 47 FLRA at 1110-11.

As noted above, the Respondent does not dispute the General Counsel's *prima facie* case, i.e., that Respondent refused to recognize the Union's representative of choice to attend the employee orientation held in July 2003. Indeed, putting aside temporarily the disputed contract language, I find that the Union had a statutory right on July 24, to select Harris as its representative at the July 28 orientation session. Unless the Respondent can show by a preponderance of the evidence that the LMA permitted its action, its refusal to allow Harris to represent the Union constitutes an unfair labor practice.

Article 4, Section 3 of the LMA establishes a procedure for the Union to notify Agency officials of the identity and jurisdictional areas of its representatives: the provision identifies several management officials who are to receive this notice, as well as a time frame for doing so. The Union is supposed to provide this notice within 30 days after the date of the new LMA, and changes in representatives are to be provided "normally two (2) weeks in advance of performing representational duties." The Agency is required to provide the Union with an updated copy of its Meat and Poultry Inspection Directory within 30 days of the agreement, and annually thereafter, but it is not specifically required to notify the Union of management changes. Article V, Section A of the prior LMA reciprocally required both parties to notify each other of changes in representatives "within two (2) weeks of such change." Joint Ex. 4, p. 32.

The textual change strongly suggests that a purpose of the new provision was to give the Agency advance notice of changes in Union representatives, but the Respondent argues that the purpose was even broader: not only should its managers receive advance notice of new Union representatives, but those Union officials cannot begin serving as representatives until the required notice is given. The LMA does not, however, contain any language (either in this section or elsewhere in the contract) that

specifies what consequence will befall the Union if it fails to adhere to the requirements specified in Section 3.

The phrase "two (2) weeks in advance of performing representational duties" can be interpreted as a condition precedent to the representative being authorized to function, as the Respondent urges, but it can just as logically be interpreted as one of many time deadlines imposed by the contract. Indeed, the contract contains numerous requirements that one party or the other perform an act by a certain time, and in most of these instances the contract does not specify the consequences of a violation. In two areas, however, the parties did specify the consequences of failing to meet a deadline. In Article 31 (the grievance procedure), Section 9 specifically provides that if a grievant fails to meet any time limit for filing or escalating a grievance, "the grievance shall be deemed rejected." If a manager fails to respond within the contractual time limits, the grievant is entitled to escalate the grievance to the next step.

In Article 6, Section 1, the LMA requires the Agency to provide the Union with "reasonable advance written notice" of intended changes in conditions of employment, and the Union to submit a request to bargain within ten calendar days thereafter. The text goes on to provide, "If the Union does not exercise its option to request bargaining as stated, the Agency shall implement the change(s) on the proposed date." Here, the contrast is particularly illuminating: the consequences of a Union failure to request bargaining in a timely manner are expressly stated, but the consequences of the Agency's failure to provide advance written notice of proposed changes are not stated. I seriously doubt that the Respondent would interpret this provision to automatically render a proposed change in conditions of employment null and void due to a lack of advance written notice, but that is precisely what it is arguing for a Union violation of Article 4, Section 3. This suggests to me that the parties to the LMA consciously expressed the consequences of failing to meet time deadlines when they wished to do so, and they intentionally left the language vague when they could not mutually agree on the appropriate penalty. Thus the ambiguity in Article 4, Section 3 weighs against the Respondent's argument that the notice requirements of that section are a condition precedent for a Union representative becoming eligible to serve.

Neither the bargaining history nor the parties' past practice sheds any light on the meaning of the disputed language in Article 4, Section 3. Witnesses at the hearing

testified that during the 2002 contract negotiations, the parties discussed the need for the Union to notify the Agency in advance of the identity of its representatives, and they further discussed which managers needed to receive such notice, but nobody described any bargaining discussion (much less agreement) about the consequences of the Union's failure to properly notify the Agency. Moreover, while different witnesses ascribed differing purposes to the advance notice requirement, none of this testimony was based on actual bargaining history.[11]

As to the parties' practice in administering this provision, the evidence shows that while the Agency viewed fulfillment of the requirements of Section 3 as a condition precedent to individuals being allowed to function as Union representatives, the Union never acquiesced in or followed such an interpretation. The contract provision itself was less than a year old when the instant dispute arose, so there is not much history to examine in this regard. It appears that Agency officials communicated to the Union their position that they would not recognize Union representatives unless the notice requirements were met, and Lalicker told Pender on June 9 that Harris would not be allowed official time for the June orientation because proper notice had not been given. But this does not demonstrate any mutual past practice of the parties; rather, it reflects an Agency interpretation of the rule that was not shared or acquiesced in by the Union. It is also interesting that Lalicker's complaint on June 9 was that Harris was not on the list of Union officials "designated for official time" and his response was to deny Harris official time for the orientation session. G.C. Ex. 2. Lalicker did not refuse to allow Harris to attend the session entirely. There is no evidence in the record of any instance in which the Agency actually refused to recognize a Union representative based on its view of Article 4, Section 3 and the Union effectively accepted that interpretation. This does not constitute a past practice that supports the Agency's interpretation of the disputed LMA provision. *See, e.g., United States Department of the*

[11] The suggestion by some management officials that the notice provision was necessary to allow supervisors to find replacements for the Union representatives (Tr. 36, 82) is simply illogical. Article 4, Section 3 only requires the Union to notify the Agency of its representatives once (i.e., when they are first appointed), not every time a representative wishes to perform representational duties. Thus, while supervisors may indeed need time to find replacements, this contract provision does nothing to advance that purpose.

Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pennsylvania, 57 FLRA 852, 855 (2002).

To review, I find that the express language of Article 4, Section 3 is ambiguous as to the consequences of the Union's failure to provide proper notice of a new representative; the context of the LMA as a whole suggests t hat the notice requirement is not a self-regulating provision automatically resulting in the ineligibility of the representative; and both the bargaining history and practice of the parties shed no light on the meaning of the provision. In light of these factors, the evidence does not establish that there was any mutual understanding as to what would occur in the event of noncompliance with the notice requirements.

Arbitrators in the federal government and in the private sector are generally reluctant to interpret agreements in a manner that results in the forfeiture of rights. *See* Elkouri & Elkouri, *How Arbitration Works* 500-01 and cases cited therein (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (arbitrators are not inclined to interpret ambiguous language in a manner that would work a forfeiture of a right). I believe that such reluctance is warranted here in particular, as the forfeiture involves a statutory rather than simply a contractual right. Adding to my reluctance is the fact that although refusing to allow Harris to attend the July orientation was one of the actions the Agency could have taken in the face of a perceived failure by the Union to observe the notice requirement, it was not the only one. For example, another response might have been to deny Harris official time, which seems to have been the approach the Agency took for the June orientation. Alternatively, the Agency could have filed a grievance over the perceived improper notice. Pursuant to the grievance procedure, the parties might have been able to collectively agree on a long-term resolution of the issue, absent which the Agency could have asked an arbitrator to craft an appropriate remedy. By imposing its interpretation of the contract on the Union and denying recognition to the Union's chosen representative, the Agency in effect took the

contract into its own hands and forced a confrontation, at the expense of the Union's statutory right.[12]

For all these reasons, I find that the Respondent has failed to meet its burden of establishing that the collective bargaining agreement permitted it to refuse to allow James Harris to attend the July 28, 2003 orientation session.

I want to emphasize that I am making no determination as to whether the Union actually violated Article 4, Section 3 of the LMA, because such a determination is not necessary to the disposition of this case. It is arguable whether Council President Painter's June 12 letter to Lalicker and Dunham, advising them that Harris was the 1st Vice President for North and South Carolina, constituted adequate notice under Article 4, Section 3, and it is also unclear whether these circumstances qualified for an exception to the "normal" rule of two weeks' notice. But even if the Union failed to comply with the contractual notice requirements, I conclude that the Agency was not justified in refusing to recognize Harris as the Union's representative at the July 28 orientation.

I find that the Respondent violated section 7116(a)(1) and (8) when it conducted a formal discussion within the meaning of section 7114(a)(2)(A) without affording the Union the right to have the representative of its choice present. I therefore recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S.

[12] Compare my decision to that of Judge Jelen in another case involving the same national agency and union, *United States Department of Agriculture, Food Safety and Inspection Service, Field Operations, Washington, D.C. (Jackson, Mississippi)*, Case No. AT-CA-03-0580 (2005), ALJ Decision Reports, No. 194 (August 31, 2005). In that case, the Agency refused to grant official time to certain Union representatives because of allegedly inadequate notice, but it permitted them to use annual leave to attend the meeting. In ruling that no unfair labor practice had been committed, the ALJ noted that there is no statutory right to official time. *Slip op.* at 10-11, 13. In the case at bar, we are dealing with the denial of the statutory right to attend a formal discussion.

Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., Raleigh, North Carolina District (the Agency) shall:

1. Cease and desist from:

(a) Failing or refusing to afford the American Federation of Government Employees, AFL-CIO, (the Union) the opportunity to be represented by an individual of its own choosing at formal discussions between one or more representatives of the Agency and one or more employees in the bargaining unit concerning any grievance or personnel policy or practice or general condition of employment.

(b) In any like or related manner, interfering with, restraining or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

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

(a) Provide the Union with the opportunity to be represented by an individual of its own choosing at formal discussions between one or more representatives of the Agency and one or more employees in the bargaining unit concerning any grievance or personnel policy or practice or general condition of employment.

(b) Post at its facilities in its Raleigh, North Carolina District Office 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 Director of that facility 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 these Notices are not altered, defaced, or covered by other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Authority's Atlanta Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, February 9, 2006

_____

RICHARD A. PEARSON

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., Raleigh, North Carolina District (the Agency) violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to afford the American Federation of Government Employees, AFL-CIO (the Union) the opportunity to be represented by an individual of its own choosing at formal discussions between one or more representatives of the Agency and one or more employees in the bargaining unit concerning any grievance or personnel policy or practice or general condition of employment.

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

WE WILL afford the Union the opportunity to be represented by an individual of its choosing at formal discussions between one or more representatives of the Agency and one or more employees in the bargaining unit concerning any grievance or personnel policy or practice or general condition of employment.

_____
(Respondent)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is:

285 Peachtree Center Avenue, Suite 701, Atlanta, GA 30303-1270 and whose telephone number is: 404-331-5300.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. AT-CA-03-0800, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

Brent S. Hudspeth **7004 2510 0004 2351 0200**
Counsel for the General Counsel
Federal Labor Relations Authority
285 Peachtree Center Ave. Suite 701
Atlanta, GA 30303-1270

Clifton L. Rowe, Esquire **7004 2510 0004 2351 0217**
USDA, FSIS, LERD
1400 Independence Ave., SW, Room 3175-S
Washington, DC 20250-3700

Charles S. Painter **7004 2510 0004 2351 0224**
American Federation of
Government Employees
4673 County Road 24
Crossville, AL 35962-9514

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: February 9, 2006
Washington, DC