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

MEMORANDUM DATE: June 14, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF DEFENSE
UNITED STATES AIR FORCE
325TH FIGHTER WING
TYNDALL AIR FORCE BASE, FLORIDA

Respondent

and Case No. AT-CA-05-0292

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1113, 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 t he above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF DEFENSE UNITED STATES AIR FORCE 325TH FIGHTER WING TYNDALL AIR FORCE BASE, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1113, AFL-CIO Charging Party	Case No. AT-CA-05-0292

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 **JULY 17, 2006**, and addressed to:

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

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PAUL B. LANG
Administrative Law Judge

Dated: June 14, 2006
Washington, DC

OALJ 06-18

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

DEPARTMENT OF DEFENSE UNITED STATES AIR FORCE 325TH FIGHTER WING TYNDALL AIR FORCE BASE, FLORIDA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1113, AFL-CIO Charging Party	Case No. AT-CA-05-0292

Brent S. Hudspeth, Esquire
For the General Counsel

Major Robert M. Gerleman
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

BENCH DECISION

This is a Bench Decision which I am rendering pursuant to §2423.31(d) of the Rules and Regulations of the Authority which allows for such a decision upon agreement by both parties.

This case arises out of a Complaint and Notice of Hearing which was issued by the Regional Director of the Atlanta Region of the Authority on December 28, 2005. That's General Counsel's Exhibit 1(c). It alleges that the Respondent committed an unfair labor practice by failing to afford Richard Cantu his right of representation under the Statute. These are sometimes known as *Weingarten* rights after an NLRB case which says, in general, that an employee is entitled to have Union representation upon his request in any situation where he reasonably believes a meeting may lead to discipline. See *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959 (1975).

I have heard the evidence and considered the credibility of witnesses and their demeanor. This Decision is based upon consideration of that evidence and of my understanding of the controlling law. I make the following findings of fact:

The Respondent is an Agency or a portion of an Agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute. Richard Cantu is an employee as defined in §7103(a)(2)(a) of the Statute. Mr. Cantu was, at all times pertinent to this case, employed by the Respondent and a member of the bargaining unit represented by the Charging Party Union.

On December 30, 2004, Mr. Cantu was scheduled to have started work at 6:30 a.m. He, according to his testimony, got up at about 3:00 o'clock that morning and felt too sick to come into work. It was too early for him to call in. He then fell asleep and overslept and at around 10:30 called in to speak to his supervisor, Timothy Collins. Mr. Collins was not available and he was told to call later.

At all times pertinent to this case the Respondent had a policy which required people who were coming in, who were going to be absent because of illness, to call within two hours of their reporting time and give their supervisor some notice. Whether or not there was an exception for emergency situations is not clear and is not crucial to this Decision.

At any rate, Mr. Cantu called back at around 11:30. Mr. Collins told him that it was too late to call in sick and that he was at that time absent without leave or AWOL. He also told him that the extent of his discipline was to be determined at a later time.

Mr. Cantu returned to work on his next scheduled work day, which was January 3, 2005. At about 1:00 p.m. Mr. Collins called him to the office and at this point there is divergence of the testimony. Mr. Cantu has stated that, when Mr. Collins told him to come into his office for the meeting, that at that time he said well, I want to run this by the Union. Mr. Collins said that he did not mention the Union until the end of the meeting when Mr. Collins told him that he would be placed on eight hours of AWOL. This, incidentally, was later changed to four and a half hours of AWOL and three and a half hours of sick leave.

Both Cantu's and Collins' testimony is consistent in saying that when Mr. Cantu was asked to initial his Personal Data Form 971, which was Respondent's Exhibit 1, he refused to do so because he wanted to talk to the Union. The

witnesses also agree that when Mr. Cantu told Mr. Collins that he wanted to talk to the Union, run all this by the Union, Mr. Collins voiced no objection nor did he try to hinder him at any time. He told him that that was fine.

Having considered the testimony, I credit the testimony of Mr. Collins over that of Mr. Cantu in that Mr. Cantu did not mention anything about talking to the Union until the end of the meeting.

As to conclusions of law, the General Counsel has correctly argued that, in order to invoke so-called *Weingarten* rights, it is not necessary, would not have been necessary, for Mr. Cantu to specifically say I want a Union representative here to represent my interests; there's no formalistic requirement. All he would have had to do was say something that would reasonably put the Respondent, in this case Mr. Collins, on notice that he wanted Union representation at that time. I find as a fact that he did not do so, did not even meet that flexible standard.

However, I do find peripherally that the meeting, the circumstances leading to the meeting, were such that Mr. Cantu could reasonably have assumed that the meeting would have resulted in discipline. At one point the Respondent seems to have argued that it really, *Weingarten* rights, consideration of *Weingarten* rights don't even come to the fore because the Respondent had made up its mind before the meeting as to Mr. Cantu's punishment and that the Union wouldn't have done any good. That's unpersuasive and, in effect saying, even if the Union were here we wouldn't have listened to them. So I don't give any credence to that.

But again, I find that Mr. Cantu did not, although he had his *Weingarten* rights, he did not invoke them. Therefore, I will recommend that the Authority issue an Order indicating that the Complaint in this case be, and hereby is, dismissed. I should say parenthetically that in reaching this decision I had made no judgment, and it should not be construed as any judgment, on the merits of the disciplinary action against Mr. Cantu. That is simply not part of the case.

Issued, Washington, DC, June 14, 2006

PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-05-0292 were sent to the following parties:

_____

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

Brent S. Hudspeth, Esquire — **7004 2510 0004 2351 0293**
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Major Robert M. Gerleman — **7004 2510 0004 2351 0309**
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REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: June 14, 2006
Washington, DC