UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547 Charging Party	Case No. DE-CA-03-0605

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to 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 **JUNE 13, 2005**, and addressed to:

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

____

RICHARD A. PEARSON
Administrative Law Judge

Dated: May 13, 2005
Washington, DC

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

MEMORANDUM DATE: May 13, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

and Case No. DE-CA-03-0605

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1547

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 Stipulation of Facts, exhibits, motions and related pleadings, and any briefs filed by the parties.

Enclosures

OALJ 05-30

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547 Charging Party	Case No. DE-CA-03-0605

Hazel E. Hanley, Esquire
For the General Counsel

Phillip Gary Tidmore, Esquire
Maj. Larry E. Lynch
For the Respondent

Brock V. Henderson
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 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. Chapter XIV, Part 2423. The case was submitted to me in accordance with section 2423.26(a) of those Rules and Regulations, based on a waiver of a hearing and a stipulation of facts by the parties.

On February 4, 2004, the Authority's General Counsel issued an unfair labor practice complaint, alleging that the Respondent violated section 7116(a)(1) and (8) of the Statute, when it conducted a formal discussion regarding a bargaining unit employee's Equal Employment Opportunity (EEO) complaint, without affording the Charging Party an opportunity to be represented at the discussion, as required by section 7114(a)(2)(A) of the Statute. The Respondent

filed an answer admitting some of the factual allegations but denying that its conduct violated the Statute.

A hearing was scheduled, but prior to the hearing the parties entered into a Stipulation of Facts and agreed that a hearing was not necessary. The hearing was therefore canceled. The parties have agreed that the Stipulation of Facts and the exhibits attached thereto constitute the entire record in this case. The General Counsel and the Respondent each filed a brief. Based on this record, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Paragraphs 1 through 15 of the Stipulation of Facts are hereby set forth verbatim:

1. Luke Air Force Base (Respondent) is an activity of the United States Department of the Air Force, an agency under 5 U.S.C. § 7103(a)(3).

2. The American Federation of Government Employees, Local 1547 (Local 1547) is a labor organization under 5 U.S.C. § 7103(a)(4).

3. Local 1547 is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

4. Harry C. McMillen is an employee under 5 U.S.C. § 7103(a)(2) and a member of the bargaining unit described in paragraph 3.

5. The charge in Case No. DE-CA-03-0605 was filed by Local 1547 with the Denver Regional Director on August 15, 2003. [Exhibit 1(a)].

6. A copy of the charge described in paragraph 4 was served on the Respondent.

7. The Regional Director for the Denver Region issued a Complaint and Notice of Hearing in this case on February 4, 2004. [Exhibit 1(b)].

8. The Respondent filed an Answer to the Complaint, described in paragraph 7, on February 26, 2004. [Exhibit 1 (c)].

9. On or about April 26, 2001, Respondent and McMillen entered into a settlement agreement of his formal Equal

Employment Opportunity (EEO) complaint. The parties agree that due to McMillen's rights under the Privacy Act, the settlement agreement is not an exhibit in this matter. The circumstances leading to the execution of the settlement agreement are addressed and described in *Department of the Air Force, Luke Air Force Base, Arizona*, 59 FLRA 16 (2003) [*Luke III*].

10. On or about July 11, 2003, Respondent through Davene Harris, Equal Employment Opportunity (EEO) Director, orally notified Brock V. Henderson, President of Local 1547, in order to give Local 1547 the opportunity to be represented at a meeting to be held on July 22, 2003, at 9:00 a.m. in Building 1150 in the EEO conference room. The meeting was scheduled to address McMillen's allegations that the Respondent had breached the EEO Settlement Agreement, described in paragraph 9, and to discuss McMillen's allegations of discrimination including reprisal.

11. On or about July 22, 2003, at about 9:00 a.m., Henderson reported to the meeting, described in paragraph 8.

12. In addition to Henderson, present at the July 22, 2003, meeting were the following:

Harry McMillen	Bargaining unit employee
John A. Conley	McMillen's privately retained counsel
Lt. Charlton J. Meginley	56th Fighter Wing/Assistant Judge Advocate
Lt. Col. Linda McCourt	Commander, 944th Maintenance Group
Pedro Ledezma	Discrimination Complaints Investigator, Department of Defense, Office of Complaint Investigations

13. The parties to this Stipulation of Facts agree that the meeting among the persons described in paragraphs 10 through 12 constituted a formal discussion within the meaning of 5 U.S.C. § 7114(a)(2)(A).

14. Prior to Henderson's arrival at the July 22, 2003, meeting, Meginley, McCourt, McMillen and Conley discussed whether the Union, through Henderson, should be allowed to be represented at the discussion. When Henderson arrived, Meginley told Henderson that McMillen did not wish the Union

to be present, and Henderson had no right to be in that discussion if McMillen did not want him there. Henderson stated that FLRA case law gave the Union the right to be represented. McMillen asked Henderson about his rights, and he stated that he had his own lawyer and was paying a lot of money for Conley to represent him, and he did not want any other representative. Meginley left the conference room to research Henderson's assertions about case law. While Meginley was gone, Henderson explained the Union's rights to Conley. McMillen interrupted a couple of times to ask about his rights. For most of Meginley's absence, Henderson engaged in small talk with Mediator Ledezma and McCourt. When Meginley returned to the conference room perhaps after fifteen minutes, he informed Henderson that McMillen had asked that the Union not participate in his EEO discussions or even to be present, and Meginley told Henderson that he would have to leave. Henderson argued about the Union's institutional right to be represented. Meginley repeated that because McMillen did not wish to have him in the meeting, Henderson would have to leave. After Meginley's repeated request, Henderson left at about 9:30 a.m.

15. The parties agree that Local 1547 was unrepresented when on July 22, 2003, McMillen and the Respondent discussed his complaint concerning his EEO Settlement Agreement, described in paragraph 9, and his EEO complaint alleging discrimination and reprisal, described in paragraph 10.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

At paragraph 16 of the Stipulation of Facts, the parties characterize the issues in this case as follows:

> The parties to this Stipulation of Facts agree that this case presents the yet unresolved issues set forth in note 5 of the D.C. Circuit's decision in *Department of the Air Force, 436th Airlift Wing, Dover Air Force Base v. Federal Labor Relations Authority*, 316 F.3d 280 (D.C. Cir. 2003) [*Dover*] and note 12 of the D.C. Circuit's decision in *National Treasury Employees Union v. Federal Labor Relations Authority*, 774 F.2d 1181 (D.C. Cir. 1985). Those issues are as follows:
>
> a. Whether McMillen's objection to Local 1547's presence, through Henderson, during the EEO discussion constituted a "direct conflict" between the rights of the exclusive representative under

section 7114(a)(2)(A) of the Statute and the rights of McMillen, the EEO Complainant?

b. If such a "direct conflict" existed in the July 22, 2003, discussion, should the conflict be resolved in favor of the exclusive representative of the employees or in favor of McMillen, the EEO Complainant?

With respect to the first issue posed, the General Counsel argues that the facts of this case do not present a direct conflict between the rights of the EEO complainant and those of the Union. The stipulated facts indicate only that when the Union representative entered the meeting room on July 22, Mr. McMillen indicated that he had his own lawyer and was paying him a lot of money, and therefore he did not want any other representative. In the G.C.'s view, McMillen provided no factual basis on which to conclude that McMillen's "rights" conflicted with Local 1547's. Because McMillen did not suggest (for instance) that there was personal information he wished to keep confidential from the Union, or that the Union had previously opposed him regarding his EEO claim, there is nothing in the record to support a finding of the type of "direct conflict" required by the D.C. Circuit to override the normal application of section 7114(a)(2)(A). Indeed, in the G.C.'s view, the fact that McMillen had his own private lawyer to represent him is evidence that the presence of Local 1547 would not have harmed him in any way. Rather, this case is similar to *United States Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA 528 (2003) (*Luke II*), where the union's presence at the EEO meetings was found to create only hypothetical conflicts that were not supported by the facts of record. *Id*. at 535.

Even if a direct conflict existed between the rights of McMillen and the Union, however, the General Counsel argues that the conflict should be resolved in favor of the Union's right to attend the July 22 meeting. Quoting from the D.C. Circuit's opinion in *NTEU v. FLRA*, it is asserted that mediation and settlement conferences in EEO cases can significantly affect other bargaining unit employees' rights, and the presence of the EEO complainant alone, even with his personal attorney, cannot protect those interests and rights. It is to represent those interests that the Union's presence is required. In the G.C.'s view, an EEO complainant must not be given veto power over the separate and broader rights of the bargaining unit as a whole, especially in the facts of this case, where McMillen offered no specific facts or reasons to demonstrate how his own

Title VII rights would have been harmed by the Union's attendance.

As a remedy for the Agency's unfair labor practice, the General Counsel requests that Respondent be ordered to provide Local 1547 with an opportunity to attend meetings to mediate or settle EEO complaints, and to post a Notice to Employees at Luke Air Force Base that is signed by the base commander.

The Respondent argues, however, that McMillen did expressly object to the Union attending the July 22 meeting, even if he did so without elaborating. Since he stated his preference that the Union not attend, he was in direct conflict with Local 1547. According to the Agency, this was precisely the sort of objection to union participation that the Authority and the court have suggested would justify the subordination of the Union's section 7114(a)(2)(A) right. In such situations, the Authority and the court have indicated that a complainant's rights take precedence. Citing Supreme Court cases such as *Franks v. Bowman Transportation Co.*, Inc., 424 U.S. 747 (1976) (*Franks*), and *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), Respondent asserts a Congressional preference for the rights of individual victims of discrimination over the collective and institutional rights of a union or a bargaining unit, and it submits that the Authority implicitly recognized this in *Luke II*, 58 FLRA at 538 (Member Armendariz, concurring). The Agency argues that when McMillen objected to the Union's presence at the meeting, he invoked an individual right that outweighed the Union's right to be there, and consequently Respondent did not violate the Statute by telling Henderson that he could not attend.

<u>Analysis</u>

Since both parties premise their arguments on citations to two decisions of the U.S. Court of Appeals for the D.C. Circuit, it seems logical for me to begin by laying out the text and context of those passages. *NTEU* involved an MSPB case in which a federal employee challenged his dismissal for misconduct, and in preparation for which the agency interviewed another employee scheduled to testify. The Authority, relying in part on the Ninth Circuit's decision in *Internal Revenue Service, Fresno Service Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983), *rev'g* 7 FLRA 371 (1981), had ruled that statutory appeals such as EEOC and MSPB complaints were not "grievances" within the meaning of section 7114(a)(2)(A), and that unions were not entitled to be represented at discussions related to such appeals. *Bureau of Government Financial Operations, Headquarters*, 15 FLRA 423 (1984). The D.C. Circuit reversed the Authority and expressly disagreed with the narrow interpretation of "grievance" adopted by the Ninth Circuit. Viewing "the interest of unions under the [Statute] as potentially far broader" than simply disputes arising out of a collective bargaining agreement and the negotiated grievance procedure, the D.C. Circuit reasoned that many other types of disputes have significant consequences on employee working conditions and on the CBA itself. It therefore held that unions are entitled to participate in discussions concerning statutory appeal procedures such as EEO and MSPB complaints, "so long as the statutory criteria of § 7114(a)(2)(A) are met." 774 F.2d at 1189. The court then added this footnote:

> This case does not require us to decide what the union's rights would be where an employee opts to pursue a grievance outside of the negotiated grievance procedure because the union thinks that prosecution of this specific grievance is not in the interest of the bargaining unit as a whole. In the present case, Murphy requested NTEU to represent him at the MSPB hearing, and NTEU accepted. We do note, however, that in the case of grievances arising out of alleged discrimination on the basis of race, religion, sex or national origin, Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. *See, e.g., Franks v. Bowman*

> *Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (awarding retroactive seniority to individual employee victims of race discrimination). Similarly, a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter. *Cf. IRS, Fresno Service Center*, 706 F.2d 1019.

774 F.2d 1181, 1189 n.12 (emphasis in original).

Eighteen years after *NTEU*, the D.C. Circuit revisited its earlier holding and explicitly applied it to agency-employee discussions of EEO complaints in *Dover.* Again rejecting the Ninth Circuit's narrow view of "grievances" and the responsibilities of unions under the Statute, the court found that neither Title VII of the Civil Rights Act, EEOC regulations, nor other statutes directly conflicted with the Authority's expansive interpretation of a union's right to participate in settlement discussions of individual employee EEO complaints, even though the complainant had not named the union as his EEO representative. 316 F.3d 280, 286-87. The Air Force in *Dover* reminded the court of its statement in footnote 12 of *NTEU* that the rights of an aggrieved employee under Title VII take precedence over the general interests of a union or a bargaining unit, but the *Dover* court stated:

> [T]he point we made in footnote 12 of *NTEU* is that "a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should . . . presumably be resolved in favor of the latter." *Id.* Such a direct conflict is not present here.

316 F.3d at 286 (emphasis in original). However, the court went on to foreshadow our current situation by stating:

> It is important to note one other reason why there is no direct conflict in this case. As the Air Force conceded, there is no evidence that Jones (the employee) objected to union presence at the mediation proceeding. We do not foreclose the possibility that an employee's objection to union presence could create a "direct" conflict that should be resolved in favor of the employee as described in footnote 12 of *NTEU*, 774 F.2d at 1189 n.12.

316 F.3d at 287.[1]

The case at bar presents us with a situation in which Mr. McMillen, the EEO complainant, did object to the Union's presence at his meeting with Agency officials. Although he did not explain why he objected (other than that he was paying his own lawyer a lot of money), it is clear that he preferred to meet with the Agency to try to resolve his complaint without Local 1547 present. The question now is whether the presence of the Union so threatened his Title VII rights as to require that the Union's (and the bargaining unit's) 7114(a)(2)(A) rights be negated.

In order to answer this question, the competing rights must be identified and compared. On the one hand, the Union's right under the Statute has been extensively litigated and explained. Section 7114(a)(2)(A) provides:

(2) 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[.]

[1] Although paragraph 16 of the Stipulation refers to "note 5 of the D.C. Circuit's decision" in *Dover*, that decision contains no footnote 5. I cannot read the parties' minds, but it may be that they were intending to cite footnote 5 of the Ninth Circuit's opinion in *Department of Veterans Affairs Medical Center, Long Beach, California v. FLRA*, 16 F.3d 1526 (9th Cir. 1994). In this case, the Ninth Circuit limited its earlier holding in *IRS Fresno* to EEO discussions and held that unions are entitled to participate in formal discussions concerning MSPB appeals. In a footnote, it then stated (16 F.3d at 1534 n.5):

> The Hospital additionally argues that a union has no right to be present while management discusses an upcoming Board hearing with an employee because it has no obligation to represent the employee before the Board. We reject this argument. The right of the union is independent of that of the employee, whether or not the employee is represented by the union. As long as no conflict exists between the union's right and that of the employee, the union may not be barred.

A union is entitled to representation under section 7114(a)(2)(A) only if all elements of the statutory language are met. There must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *See, e.g., Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 29 FLRA 594, 597-98 (1987). In examining these elements, the Authority is guided by the intent and purpose of section 7114(a)(2)(A), which is to provide a union with an opportunity to safeguard its interests and the interests of bargaining unit employees, as viewed in the context of the union's full range of responsibilities under the Statute. *General Services Administration*, 50 FLRA 401, 404 (1995). This is not a separate element of the statutory analysis, but rather a "guiding principle that informs our judgments in applying the statutory criteria." *Id.* at 404 n.3.

It is unnecessary to examine the facts of this case to determine whether the statutory requirements of a formal discussion have been met, because the parties have stipulated that the July 22, 2003 meeting "constituted a formal discussion within the meaning of 5 U.S.C. section 7114(a)(2)(A)." Stipulation at paragraph 13. This concession by the Respondent is particularly interesting, because in other EEO cases involving the Air Force in general and Luke Air Force Base in particular, the Agency has steadfastly insisted that a meeting with an EEO complainant "does not fall within the parameters of a formal discussion under 5 U.S.C. § 7114(a)(2)(A)." *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304, 312 (2001) (Chairman Cabaniss, dissenting); *see also Luke II*, 58 FLRA at 530-31. I find, accordingly, that all of the statutory elements of a formal discussion existed with regard to the July 22, 2003 meeting between representatives of the Agency and McMillen and his attorney, and that it concerned a grievance. Thus the Statute clearly gave the Union the "right," through its designated representative, Mr. Henderson, to attend and participate at the meeting -- not as McMillen's representative, but to represent the Union's institutional interests and the interests of the entire bargaining unit under the collective bargaining agreement.

On the other hand, what are the "rights" of the individual employee, insofar as they relate to meetings with an agency concerning the employee's EEO complaint? The

Statute itself, at § 7114(a)(5), guarantees employees the right to choose a representative other than the union in a statutory appeal such as an EEO complaint outside of the negotiated grievance procedure; *see, e.g., American Federation of Government Employees, AFL-CIO, Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987). In our case, McMillen clearly understood and exercised this right, having retained a private attorney to help him negotiate his initial EEO settlement in 2001 (*Luke III*) and a second attorney to assist him in enforcing that agreement in 2003. Henderson, however, was not attending on July 22, 2003 as McMillen's representative, but the Union's. McMillen's right under 7114(a)(5) to have his own representative does not necessarily involve a right to exclude other parties' representatives, and 7114(a)(5) exists in conjunction with 7114(a)(2)(A). Thus the Statute gives both the employee and the union the right to have a representative at a formal discussion concerning a statutory appeal. The question still lingers, then, as to what other rights the employee has that might entitle him to exclude his union from a formal discussion.

In prior cases such as *Luke I* (54 FLRA 716 (1998)) and *Dover*, the Air Force has argued that Title VII, EEOC regulations and other statutes such as the Privacy Act and the Alternative Dispute Resolution Act bar unions from appearing on their own behalf in settlement discussions or mediation sessions on EEO complaints. The Authority rejected this argument in *Luke I* (54 FLRA at 732-33) and in *Dover* (57 FLRA at 310), and the Court of Appeals echoed the Authority's reasoning on appeal in *Dover*, 316 F.3d at 286-87. While both the Authority and the D.C. Circuit have left open the possibility of restricting the union's right to participate where there is a "direct conflict" between the employee and union, they clearly reject the notion that Title VII or EEOC regulations prohibit union involvement in the resolution of EEO complaints.

The Supreme Court's opinion in *Franks*, which was the primary source cited in footnote 12 of the *NTEU* decision, provides the best key to understanding the "conflict" of "rights" that has been repeatedly invoked but rarely analyzed in the 30 years since the *Franks* decision. In *Franks*, a group of black employees sued their employer under Title VII, and after a hearing the district court found that the company had engaged in a pattern of racially discriminatory hiring and transfer practices; the court further found that the discrimination was perpetuated in the company's collective bargaining agreement with the union. The main issue before the Supreme Court concerned the relief to be awarded to the plaintiffs. The plaintiffs sought, and

the Supreme Court found it appropriate to award, retroactive seniority, over the objections of the union, which argued that such a remedy contravened seniority provisions of the CBA and harmed other, arguably innocent, employees. The Court stated that a primary purpose of Title VII was to make victims of discrimination whole and that CBA provisions can be modified by statutes (such as Title VII) furthering a strong public policy interest. 424 U.S. at 775, 778. Quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2nd Cir. 1971), it held:

> If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

424 U.S. at 775.

It was with this principle in mind that the D.C. Circuit wrote its oft-cited footnote 12 in *NTEU*. The Court of Appeals held there that section 7114(a)(2)(A) gives unions the right to be present at *any* formal discussion in a statutory appeal (emphasis in original), "[i]n the absence of congressional intent to the contrary", and it cited Title VII as just such a congressional mandate. Citing the *Franks* interpretation of Title VII, the NTEU court stated that if there were a "direct" conflict between the rights of "identifiable victims of discrimination and the interests of the bargaining unit", the conflict should "presumably" be resolved in favor of the victims. 774 F.2d at 1189 n.12. The court reiterated this point in *Dover* and emphasized that the conflict of rights must be a direct one; 316 F.3d at 286.

What was the "conflict" between employees and union in *Franks* which caused the Supreme Court to balance the scales in favor of the employees? It certainly was not a conflict over the <u>procedural</u> right of the union to object to retroactive seniority. The union was a full-fledged party to the *Franks* case, and it had the right to advocate on behalf of the perceived contractual seniority interests of the nonminority employees. The "conflict" there was over <u>substantive</u> legal rights to seniority: the nonminority employees based their seniority claims on the CBA, while the plaintiffs based their claims on Title VII, after they had proved at a hearing that they had been discriminated against. While the union had the right to <u>argue</u> against retroactive seniority, Title VII gave the plaintiffs a superior right to that seniority over the "innocent" members of the bargaining unit.

This is also what the Court of Appeals was referring to in *NTEU*. Section 7114(a)(2)(A) gives unions a right to participate and be heard in formal discussions of EEO complaints, but their right to participate does not mean they have a right to prevail. Unions can advocate on behalf of the bargaining unit (at EEO mediation or settlement discussions or in court), but they will not be permitted to defeat the right of an EEO disciminatee to obtain full relief. The mere presence of a union at an EEO discussion does not "directly conflict" with the rights of the EEO complainant; rather, it is the union's potential assertion of contractual CBA rights at the expense of the employee's Title VII statutory rights that the Supreme Court in *Franks* and the Circuit Court in *NTEU* were concerned about. The courts were seeking to ensure that even if the union participates in the discussion, the substantive Title VII rights of discriminatees will prevail.

This principle is best illustrated in federal court Title VII litigation in which unions have intervened to protect negotiated contract benefits. When employee rights under a collective bargaining agreement would be adversely affected by an EEO settlement, unions have been permitted to intervene as parties to the litigation. *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. 501, 508 (1986); *Howard v. McLucas*, 782 F.2d 956, 958-59 (11th Cir. 1986); *EEOC v. American Telephone & Telegraph*, 506 F.2d 735, 741-42 (3rd Cir. 1974) (the *Howard* case specifically involved a Federal employee union). Moreover, the objections raised therein by unions have at times been sufficient to convince the courts to disapprove consent decrees negotiated by employers and complainant employees. *U.S. v. City of Hialeah*, 140 F.3d 968, 980, 983 (11th Cir. 1998); *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1337-39 (7th Cir. 1992). But in other cases, courts have heard the unions' objections and overruled them, approving settlements that modified union-negotiated rights. *Local No. 93, supra*, 478 U.S. at 529; *EEOC v. AT&T*, 556 F.2d 167 (3rd Cir. 1977). In all these cases, the mere presence of the union was not considered inimical to the rights of the Title VII claimants; instead, the unions were entitled to a role in the proceedings in order to make their views heard. It was then the role of the courts to weigh the competing substantive legal interests of the parties and to give appropriate weight to the rights of discriminatees to be made whole, if the unions argued to the contrary.

Similarly, it is not necessary to exclude unions from all EEO "formal discussions" (or all discussions where the complainant objects to the union) in order to protect the complainant's substantive Title VII rights. The mere presence of the union does not pose a "direct conflict" to the substantive rights of the complainant, absent some extraordinary factual circumstances that McMillen did not raise and that are not evident in the case at bar. Indeed, in many (if not most) EEO cases, the union is likely to side with the employee over the agency, although there are certainly situations where that will not be true. Even when (as here) the complainant has his own attorney, the union may well be familiar with prior cases that are analogous to the complainant's or with bargaining history that would support the complainant's case. Precisely because the union is the representative of the larger bargaining unit, it will have a broader perspective than any single employee on the facts and on the legal consequences of a specific grievance, and it was for just that reason that the *NTEU* court viewed the union's statutory interests as encompassing EEO and MSPB appeals outside the negotiated grievance procedure. For the same reasons, the union should be entitled to the procedural right to participate in the formal discussion, even over the complainant's objection. Although the union does not have the absolute right to veto an EEO settlement proposed by the other parties, it does have the right to participate and make its views known to the other parties – whether those views are supportive of the complainant or not.

As Member Armendariz noted in his concurring opinion in *Luke II*, "a direct conflict [between the 7114(a)(2)(A) rights of a union and the Title VII rights of a complainant] might arise in a variety of situations," but a resolution of that conflict "requires an assessment of the facts presented in each case." 58 FLRA at 538. One such hypothetical conflict was cited by Member Armendariz in *Luke II*, and another possibility was suggested by the D.C. Circuit in its now-famous footnote 12. The Circuit Court cited a situation "where an employee opts to pursue a grievance outside of the negotiated grievance procedure because the union thinks that prosecution of this specific grievance is not in the interest of the bargaining unit as a whole." 774 F.2d at 1189 n.12. Member Armendariz refers to "an employee's right to confidentiality in mediation and settlement discussions" and suggests that this right would prevail over a union's 7114(a)(2)(A) right, if the two came into direct conflict. 58 FLRA at 538. In my view, the limited, stipulated facts of the case at bar do not present either of these scenarios for overriding the Union's right to participate in the July 22 meeting.

First, there is no evidence in the record to find, as hypothesized by the *NTEU* court, that McMillen opted to file an EEO complaint rather than a contractual grievance because the Union had opposed his claim. Neither McMillen nor the Union said or did anything to suggest that the Union opposed his EEO claim in any way. McMillen's statement on July 22 that he was paying his own lawyer a lot of money and didn't want any other representative reflects no substantive disagreement between him and the Union on the merits of his EEO case; if anything, it simply reflects a misunderstanding on McMillen's part that the Union would participate at the meeting as his representative, and that the Union's presence would therefore be duplicative. Moreover, the many Luke cases involving formal discussions make it clear that the CBA governing Luke Air Force Base and the Union expressly excluded EEO claims from the negotiated grievance procedure (*see, e.g., Luke I*, 54 FLRA at 720); thus McMillen had no choice but to file his EEO complaint under 29 C.F.R. Part 1614 rather than under the CBA. Once the General Counsel has demonstrated, as here, that the Union was excluded from a formal discussion, the Respondent has the burden of affirmatively showing that the Union's presence would have conflicted with McMillen's ability to pursue his discrimination claim or to obtain relief. There is no factual basis for finding such a conflict here.

Even if I were to find that McMillen's bare, unexplained objection to the Union's presence constituted a "conflict" between him and the Union, I would not interpret *Franks* and its progeny as requiring the exclusion of the Union from the July 22 meeting. As I have already explained, *Franks* stands for the principle that the Title VII rights of discriminatees to make-whole relief cannot be defeated by pre-existing terms of a CBA. *NTEU* reaffirmed that principle by noting that the Title VII "rights" of an employee victim of discrimination take precedence over the section 7114(a)(2)(A) right of a union in cases of direct conflict.[2] But in order for the Authority or a court to justify excluding a union from a formal discussion, it must conclude that the union's presence would impermissibly

[2] It should also be noted that McMillen (unlike the plaintiffs in *Franks*) has never proven his allegations of discrimination, in either his 2001 or 2003 complaint. Thus in asserting his Title VII rights vis-a-vis the Union's, he is not in the position of an "identifiable victim of discrimination" as described by the *NTEU* court in its footnote 12. Given his lesser legal status, I would not "presume," in the words of the *NTEU* court, that he should have the right to exclude the Union, even if he believed the Union opposed his EEO complaint.

interfere with the employee's Title VII rights. And as I have tried to explain, the mere presence of the Union at the July 22 meeting would not have significantly prevented McMillen from pursuing his Title VII claims (whatever they were). As in the court decisions I cited, such as *Local No. 93* and *AT&T*, allowing a union to express its views (even its objections) does not mean the union will prevail. It will initially be up to the employer at a settlement discussion to evaluate the employee's Title VII claims, along with its own possible defenses and the union's possible objections, in order to determine whether to settle with the employee and on what terms. The Union's presence at the formal discussion on July 22 would not have substantively interfered with McMillen's claims, even if it were assumed that the Union would have disagreed with McMillen. Therefore, the Respondent was not justified in excluding the Union.

With respect to Member Armendariz's suggestion that a direct conflict between a union's right to attend a formal discussion and "an employee's right to confidentiality in mediation and settlement discussions" should be resolved in favor of the employee (58 FLRA at 538), I similarly find no basis to find the existence of such a conflict in this case. McMillen articulated no confidentiality concerns, the Respondent did not seek a confidentiality promise from the Union representative, and the Union gave no reason to believe it would have violated McMillen's confidentiality if it had been sought. Although the record does not reveal whether the terms of McMillen's 2001 settlement agreement were known to the Union, Local 1547 was at least aware that he had filed and settled an EEO complaint at that time, and that he had filed a new EEO complaint in 2003 relating to the earlier settlement. The Union had also been advised of the purpose of the July 22 meeting and invited to attend. Thus the record tends to minimize the degree of confidentiality issues existing in this case, and there is nothing to suggest that the Union would have violated McMillen's confidentiality. Since the General Counsel has established that the July 22 meeting was a formal discussion, the Respondent has the burden of demonstrating that McMillen's confidentiality rights were directly threatened by the Union's presence at the meeting. The record in this case contains no basis for such a finding.

Finally, the facts of this case suggest the dangers of giving an EEO claimant an absolute veto on the attendance of his union at a settlement discussion. First, there is the danger of collusion between an agency and its employee, or the inducement by the agency of the employee's request to exclude the union. By virtue of the very fact that a union

is responsible for the concerns of the entire bargaining unit and consistent application of the CBA, the union may well raise objections that the other parties would prefer to avoid, or even to keep secret. Just as the City of Cleveland and the plaintiffs in the *Local No. 93* case tried to negotiate a consent agreement of the plaintiffs' claims without involving the employees' union (478 U.S. at 508), and just as the City of Rockford was quite willing to bargain away its teachers' seniority rights in order to appease the plaintiffs (*People Who Care*, 961 F.2d at 1336), it is much easier to craft a settlement at the expense of an absentee party. While it may be a legitimate purpose of Title VII and EEOC regulations to encourage the voluntary settlement of EEO claims, such settlements should be negotiated through the participation of all parties adversely affected. While settlements may still be approved over a union's objections, as in *AT&T* and other court cases, the union should not be denied the opportunity to raise its objections. If the right of an EEO claimant to appropriate relief truly conflicts with the interests of the bargaining unit or the union, the merits of the competing rights can only be articulated and understood after both the employee and the union have had an opportunity to express their views. Allowing any employee to have an absolute veto over a union's participation at a settlement discussion would deprive the Authority or a court of the ability to understand the factual basis for the exclusion. Instead of the Authority determining whether there was an actual, direct conflict between the rights of the employee and the union, the employee's mere assertion of his rights would defeat the union's assertion of its right. Although there is no reason to believe, from the stipulated facts in this case, that the Respondent colluded with McMillen or induced him to object to the Union, acceptance of the Respondent's position here would make it all too easy for such actions to occur.

Addressing the issues as phrased originally by the parties, I conclude that there is no factual basis in the record on which to find that the presence of the Union at the July 22 meeting would have "directly conflicted" with McMillen's Title VII rights. Moreover, even if his unexplained request to exclude the Union is construed as a "direct conflict," the mere presence of the Union at the meeting would not have sufficiently interfered with his substantive legal rights to obtain relief under Title VII to justify the exclusion of the Union. I therefore conclude that by excluding the Union from the July 22 meeting, the Respondent violated section 7116(a)(1) and (8) of the Statute, as alleged.

Based on the above findings and conclusions, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Air Force, Luke Air Force Base, Arizona (Respondent), shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Local 1547, AFL-CIO (Union), with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to discuss settlement of formal EEO complaints.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Provide the Union with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning settlement of formal EEO complaints.

(b) Post at its Luke Air Force Base facilities, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Luke Air Force Base, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, in writing, within 30 days

from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 13, 2005.

____

_

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 Department of the Air Force, Luke Air Force Base, Arizona, violated the Federal Service Labor-Management Relations 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 provide the employees' exclusive representative, the American Federation of Government Employees, Local 1547, AFL-CIO (the Union), with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to discuss settlement of formal EEO complaints filed by bargaining unit employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide the Union with advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning settlement of formal EEO complaints.

____
(Respondent/Activity)

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, Denver Regional Office, Federal Labor Relations Authority, whose address is:

1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581 and whose telephone number is: 303-844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-03-0605, were sent to the following parties:

____

CERTIFIED MAIL: ___ **CERTIFIED NUMBERS:**

Hazel Hanley, Esquire **7000 1670 0000 1175 5561**
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

Phillip Tidmore, Esquire **7000 1670 0000 1175 5578**
Larry E. Lynch, Major, USAF
Dept. of the Air Force
AFLSA/CLLO, 7th Floor
1501 Wilson Boulevard
Arlington, VA 22209

Brock Henderson, President **7000 1670 0000 1175 5585**
AFGE, Local 1547
7275 N. Fighter Country Avenue
Luke AFB, AZ 85309

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: May 13, 2005
Washington, DC