UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

FEDERAL AVIATION ADMINISTRATION HONOLULU, HAWAII Respondent and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, HONOLULU CERAP LOCAL Charging Party	Case No. SF-CA-60475

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

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

Any such exceptions must be filed on or before **JUNE 30, 1997**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 30, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 30, 1997

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: FEDERAL AVIATION ADMINISTRATION
HONOLULU, HAWAII

Respondent

and Case No. SF-CA-60475

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, HONOLULU CERAP LOCAL

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

FEDERAL AVIATION ADMINISTRATION HONOLULU, HAWAII Respondent and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, HONOLULU CERAP LOCAL Charging Party	Case No. SF-CA-60475

Ms. Susanna Leon-Guerrero
For the Respondent

John R. Pannozzo, Jr., Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.* [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, *et seq.*, concerns whether the Federal Aviation Administration, Honolulu, Hawaii (Respondent), violated § 16(a)(1) of the Statute by directing the National Air Traffic Controllers Association, Honolulu CERAP Local (Union), to remove all copies of the April, 1996, issue of

[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, *i.e.*, section 7116 (a)(1) will be referred to, simply, as "§ 16(a)(1)."

The NATCA Voice from Respondent's facility and to refrain from distributing that issue on Respondent's premises thereafter.

This case was initiated by a charge filed on May 16, 1996 (G.C. Exh. 1(a)), but the Complaint and Notice of Hearing did not issue until December 31, 1996 (G.C. Exh. 1 (b)), and set the hearing for March 10, 1997, pursuant to which a hearing was duly held on March 10, 1997, in Honolulu, Hawaii, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence and testimony bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, April 10, 1997, was fixed as the date for mailing post-hearing briefs. Counsel for the Respondent and the General Counsel timely mailed briefs, received on April 14, 1997, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

A. Background Involving the Parties' Relationship

The essential facts in this case are not in dispute. The National Air Traffic Controllers Association (NATCA) is the certified exclusive representative of a nationwide consoli-dated unit of employees--air traffic controllers--of the Federal Aviation Administration appropriate for collective bargaining (G.C. Exhs. 1(b) and (c)). The Union is NATCA's agent for representing the air traffic controllers located at Respondent Honolulu CERAP (G.C. Exhs. 1(b) and (c); Tr. 40). When the events involved in this case arose, Larry Anderson was the Air Traffic Manager at Respondent Honolulu CERAP (G.C. Exhs. 1(b) and (c); Tr. 103).

Honolulu CERAP is located within one of FAA's nine Regions, and is covered by a nationwide collective bargaining agreement negotiated between FAA and NATCA (Tr. 66, 132, R. Exh. 2). That agreement provides, in part, as follows:

ARTICLE 13

UNION PUBLICATIONS AND INFORMATION AND
USE OF EMPLOYER'S FACILITIES

> Section 2. The Union or any of its representatives/agents may distribute material to employees in non-work areas at non-work times. All non-Agency representatives/agents must adhere to facility access procedures.
>
> ARTICLE 4
>
> EMPLOYEE RIGHTS
>
> Section 12. Radios, television sets, and appropriate magazines/publications will be permitted in designated non-work areas at all facilities for use at non-work times.[2]

The undisputed evidence indicates that, in the past, copies of a union newsletter, entitled *The NATCA Voice,* has been distributed to all FAA facilities, including Respondent's, five times per year (Tr. 43-47, 56). *The NATCA Voice* is described as a "grassroots" publication which provides air traffic controllers an opportunity to communicate with each other on workplace and other issues of mutual interest, and is paid for very largely by NATCA at the national level (Tr. 43-44, 46, 51, 64). Thirty copies of each issue of *The NATCA Voice* are distributed to each FAA facility, where an employee representing NATCA places them in non-work areas during non-work time to be read or retained by interested employees during their non-work time (Tr. 51-53, 68-70). At Respondent's facility, an air traffic controller named Chuck Zapf distributes *The NATCA Voice* upon arrival by placing 3 or 4 copies in the Union office and the rest on a countertop near the employees' lounge (Tr. 52, 68).

B. Events Leading up to the May 6 Incident

According to the record, an article was published in the April, 1996, issue of *The NATCA Voice* by an air traffic

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[2] The negotiating parties, specifically Kenneth Brissenden for the Union and James Snow for Respondent, testified that the term "appropriate magazines/publications" was intended to mean materials that are not offensive by EEO standards (G.C. Exh. 8, R. Exh. 8; Tr. 41, 148-52, 175-79). Mr. Brissenden further testified that the parties intended *inappropriate* material to be limited to sexually explicit content (Tr. 182). Respondent contends that material may be deemed inappropriate if it is "scurrilous and inflammatory." This issue of contract interpretation will be discussed in the conclusions to the extent necessary to resolve the issues herein.

controller named Joseph M. Bellino, who, at that time, was NATCA's Executive Vice-President and was seeking to become NATCA's President (Tr. 51-52, G.C. Exh. 2). The Bellino article referred to a situation that arose in 1995 at the FAA's Indianapolis facility when a hangman's noose, displayed along with other Halloween decorations, was left hanging after the holiday was over and all the other decorations had been removed; referred to an African-American FAA employee who had filed a complaint over the "noose" incident as a "person of color;" indicated that the complaint had engendered an FAA investigation which resulted in the discipline of some 20 individuals; and suggested that the real reason why the employee had filed the complaint was not because he was offended by the noose as a symbol of racial oppression but because he wanted to use it as a bargaining chip to obtain a more favorably-located employee locker for himself (G.C. Exh. 2).

Even before the article appeared in the April, 1996, issue of *The NATCA Voice*, it created controversy within FAA. Thus, when the editor of *The NATCA Voice* sought a reaction to the Bellino article in March, 1996, from Ms. Evelyn Washington, Manager of FAA's Executive Resource Service Center and President of its National Black Coalition, Ms. Washington wrote a letter to FAA Administrator Daniel Hinson asking for assurance that, "the Administrator doesn't condone the posting of this . . . [Bellino] news article in FAA facilities." Ms. Washington received a reply from Mr. Hinson dated April 23, 1996, assuring her that he did not, "condone posting inflammatory and scurrilous articles in [FAA] facilities", and that if NATCA elected to, "post such articles on its bulletin boards, I will request that they be removed and appropriate action be taken, if necessary" (R. Exhs. 4 and 5; Tr. 74-77, 90-92).

As more directly relevant to the circumstances of this case, Respondent's Air Traffic Manager, Larry Anderson, attended a meeting in New Orleans during the week of April 2, 1996, at which FAA's head of Air Traffic mentioned that a "letter" was about to appear in *The NATCA Voice* that he felt was "scurrilous" and "inflammatory", and stated that if the letter were "posted", FAA managers should "have it removed" (Tr. 103, 105-06). That evening, after discussing the matter with his immediate superior, Mr. Anderson telephoned the Acting Air Traffic Manager at Honolulu CERAP and ordered him to have the Union remove the article if it were posted, before Mr. Anderson's return to the facility (Tr. 106, 108-09).

The Union never did post the Bellino article on its bulletin board at Respondent's facility, but distributed the

April issue of *The NATCA Voice* in the usual manner: almost all of the 30 copies were placed on the countertop outside the employees' lounge, and the remaining 3 or 4 copies were left in the Union office (Tr. 52-53, 68-69). The April issue of *The NATCA Voice* stayed in those locations for approximately 2½ weeks until Mr. Anderson returned to the Respondent's facility on May 6, 1996 (Tr. 30, 109-10).

C. The Events of May 6

Mr. Anderson first discovered the Bellino article during his routine walking tour of the facility on May 6, 1996 (Tr. 110). He found a stack of copies of *The NATCA Voice* on the countertop; noticed the article and surmised that it was the one referred to previously in New Orleans; and took a copy to his office where he read it and thought about it (Tr. 110). Mr. Anderson testified that his reaction to the article was "mixed", but that he felt the need to do something in light of how the article "demeaned the individual" employee complainant by quoting him in dialect and referring to him as a "person of color" (Tr. 110-12). Accordingly, he discussed the article with the Assistant Air Traffic Manager, Jocelyn Nakashima, and the two of them went in search of Chuck Zapf (who was not at the facility) but ultimately found Robert Canali in the Union office instead (Tr. 112-13). Mr. Canali is the Union's Treasurer and was in the process of balancing its checkbook when Mr. Anderson walked in with a copy of *The NATCA Voice*, accompanied by Ms. Nakashima (Tr. 18-20, 113).

Mr. Anderson and Mr. Canali described the conversation which ensued in essentially the same way. Mr. Anderson began by stating, "We've got a problem . . . with this article on the front page." When Mr. Canali asked what the problem was, Mr. Anderson replied, "I find it to be personally offensive and I want all the issues removed from the building." Mr. Canali asked for some time to read the article, at which point Mr. Anderson and Ms. Nakashima left the Union office. When they returned about 20 minutes later, Mr. Canali was just finishing the article and indicated that he found nothing offensive about it. Mr. Anderson disagreed and stated that all 30 copies had to be removed from the building immediately or he would do it (Tr.

22-24, 113-14).[3] At that point, Mr. Canali picked up the 4 copies in the Union office and, accompanied by Mr. Anderson and Ms. Nakashima, walked downstairs to the countertop outside the employees' lounge and retrieved the 23 copies stacked there (Tr. 23-25, 113-15).[4] When Mr. Canali's request to keep the copies in the Union office or in his locker were rejected by Mr. Anderson, Mr. Canali requested and received permission to remove them to his personal automobile, as long as they were removed from the premises at the end of the day and never brought back to the facility (Tr. 26-27, 113-15). Before taking the materials to his car, however, Mr. Canali asked whether Mr. Anderson was authorized to require the removal, to which Mr. Anderson responded, "It's my responsibility as Air Traffic Manager of this facility to ensure a proper work environment for all employees within the facility and this article, I feel, creates a hostile work environment, and as such, I have the authority to remove them" (Tr. 26).[5]

CONCLUSIONS

General Counsel contends that Respondent violated § 16 (a)(1) of the Statute when Mr. Anderson required the Union

[3] Although Mr. Anderson claimed that he merely requested rather than insisted that the Union remove the copies of *The NATCA Voice* from the facility (Tr.114-15), it is clear that he wanted the removal accomplished immediately because he admittedly rejected Mr. Canali's suggestions that all of the copies be gathered up and placed exclusively in the Union office or that they be stored in Mr. Canali's locker (Tr. 26-27, 113-14). As Mr. Anderson testified, he could not agree to those suggestions since the "tainted" articles would be, "still in the work environment" (Tr. 113-14). Accordingly, I conclude that Mr. Anderson insisted upon the removal of the Bellino article whether or not he used the word "insist" or "direct".

[4] Mr. Canali subsequently went to all the non-work areas at the facility to ensure that there were no additional copies of the April 1996 issue of *The NATCA Voice* remaining on the premises (Tr. 27, 115). The record does not indicate where the other 3 copies had gone, although Chuck Zapf testified that he generally took a copy of the newsletter home after distributing them at the facility (Tr. 68).

[5] Before removing the copies of the article to his car, Mr. Canali made a note that Mr. Anderson's justification for requiring such action was that the article was creating a "hostile work environment" (G.C. Exh. 3; Tr. 28-29).

to remove all copies of the April, 1996, issue of *The NATCA Voice* from Honolulu CERAP on May 6, 1996, because there is a protected right under the Statute to distribute union literature in non-work areas during non-work time, and because the newsletter in question did not lose its statutory protection in the circumstances of this case. Respondent asserts that certain provisions contained in the applicable collective bargaining agreement justified Mr. Anderson's actions and require that the complaint herein be dismissed. The parties' contentions will be considered below.

A. The Applicable Legal Principles

It is well established that the right to, "join, or assist any labor organization", encompasses the distribution of union literature in non-work areas during non-work time, *Internal Revenue Service, North Atlantic Service Center (Andover, Massachusetts)(IRS)*, 7 FLRA 596, 597 (1982); General Services Administration, 27 FLRA 643, 645-46 (1987). Accordingly, an agency's interference with the exercise of such protected right generally constitutes a violation of § 16(a)(1) of the Statute. *IRS*, 7 FLRA at 597 (agency's confiscation of union literature from cafeteria which referred to a supervisor as, "this season's holiday turkey", violated Statute); *Department of the Navy, Naval Facilities Engineering Command, Western Division San Bruno, California*, 45 FLRA 138, 156-57 (1992)(*NFEC*)(reprimand of union steward for letter criticizing management for conducting RIF and containing ethnic references violated Statute).

On the other hand, the right to distribute union literature in non-work areas during non-work time is not absolute. Thus, the content of such literature may justify its restriction. *See United States Forces Korea/Eighth United States Army*, 17 FLRA 718, 728-29 (1985)(union president's letter to foreign newspaper making derogatory and defamatory statements about U.S. Government officials was not protected); *Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Cincinnati, Ohio*, 26 FLRA 114 (1987)(*Veterans Administration*), *aff'd sub nom. American Federation of Government Employees, Local 2031 v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989)(union president's article disparaging a manager by using racial epithets and racial stereotyping was not protected).

As the Authority has recognized, however, merely because union literature contains offensive remarks does not mean that it loses the protection of the Statute, because such protection is not limited to comments that can be condoned. *NFEC*, 45 FLRA at 155. In the words of the

Supreme Court, ". . . federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." Old Dominion *Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1984). Accordingly, otherwise protected activity, such as the distribution of union literature in non-work areas during non-work time, does not lose its protection unless the content of the distributed literature constitutes "flagrant misconduct." *NFEC*, 45 FLRA at 156; *U.S. Department of the Air Force, Randolph Air Force Base, San Antonio, Texas*, 46 FLRA 978, 979 (1992).[6] The task in this case is to examine the Bellino article as a whole, in the totality of the facts and circumstances herein, to determine whether it is protected. *NFEC*, 45 FLRA at 156.

B. The Bellino Article Is Protected Activity

It is undisputed, and I find, that *The NATCA Voice* is union literature. It is published, paid for, and distributed by NATCA to all FAA facilities where air traffic controllers exclusively represented by NATCA are located. The Bellino article appearing in the April 1996 issue of *The NATCA Voice* was written by NATCA's Executive Vice President at a time when he was seeking the office of NATCA President, and concerned workplace issues of interest to air traffic controllers.

Moreover, the record establishes, and Respondent concedes, that *The NATCA Voice* is distributed at Respondent's facility by unit employees in non-work areas during their non-work time to be read by other interested employees in non-work areas, such as the employees' lounge, during their non-work time.

The main thrust of the Bellino article was to report the facts (as the author understood them) concerning events which occurred at FAA's Indianapolis facility and to criticize FAA management for its actions in responding to those events. Mr. Bellino's expressed concern was that FAA rushed to judgment by disciplining a total of 20 individuals at that facility based upon a complaint by one employee, described as a "person of color", that a noose had been displayed during and after the Halloween holiday as a symbol of racial oppression against blacks. Mr. Bellino accused

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In the private sector, as the Authority has noted, leaflets or publications are found to be unprotected *only* when they are disloyal to the employer's product or disruptive of discipline. *See IRS,* 17 FLRA at 728.

the complaining employee of ulterior motives in making the allegation, claiming that the employee was angered at having his locker moved to a less advantageous location and was using his "noose" complaint as leverage in obtaining a more favorable arrangement. While it is clear that the employee complainant has been portrayed in an unflattering light as a manipulative troublemaker, there is no basis on this record to conclude that Mr. Bellino's presentation and conclusions falsely stated or recklessly disregarded the actual facts and circumstances which occurred in Indianapolis. *See Randolph Air Force Base*, 46 FLRA at 993, and cases cited. Nor can it be said that calling the complaining employee a "person of color" was an opprobrious racial epithet or constituted improper "racial stereotyping" as the Respondent asserts. Accordingly, I find that the instant case is readily distinguishable from the article involved in *Veterans Administration*, which referred to a specifically named manager as a "spook" and an "Uncle Tom." 26 FLRA at 115.

Moreover, it is noted that the April, 1996, issue of *The NATCA Voice* had been distributed at Respondent's facility more than two weeks before Mr. Anderson ordered it removed on May 6, 1996, and that there is not even a hint in the record of any disruption to agency operations as a result. Rather, it appears that of the 30 copies of *The NATCA Voice* distributed at Honolulu CERAP, 27 still remained on the countertop and in the Union office where they had been placed originally, thus suggesting that the Bellino article was not even read by the vast majority of employees at the facility. Accordingly, it is clear that Respondent's insistence on the removal of the Bellino article cannot be--and was not--as asserted necessary to maintain discipline. *See IRS*, 17 FLRA at 728; *Great Lakes Steel, Division of National Steel Corporation v. NLRB*, 625 F.2d 131, 132-33 (6th Cir. 1980), *enforcing* 236 NLRB 1033 (1978).

C. Respondent's Contractual Defenses Are Without Merit

As previously stated, the Respondent seeks to justify Mr. Anderson's actions and thereby defend against the instant unfair labor practice complaint on the basis of certain provisions in the parties' agreement. Accordingly, it is necessary to interpret those terms, raised as an affirmative defense to the unfair labor practice allegation, as the Authority has directed. *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091, 1103 (1993).

1. Article 13, Section 2

Respondent's first argument is that Article 13, Section 2 of the applicable agreement states that the Union "may" distribute material to employees in non-work areas at non-work times, thereby subjecting the Union's right to distribute literature to management's determination under Article 4, Section 12 that the material is "appropriate," *i.e.*, does not offend EEO standards. I conclude that this argument must be rejected for several reasons. First, the right to distribute union literature is statutory rather than contractual, so that even if Article 13, Section 2 of the agreement meant what Respondent says it means, the Union could not bargain away the employees' statutory right. *See Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base*, 13 FLRA 239, 244 (1983)(*Homestead AFB*). Second, as I interpret Article 13, Section 2, it merely codifies the statutory right to distribute union literature. That is, the use of the word "may" simply means that "[t]he Union or any of its representatives/agents" are authorized to distribute union literature but only in non-work areas at non-work times, and also are subject to the stated limitation that "non-Agency representatives/agents [i.e., non-employees] must adhere to facility access procedures." In other words, the use of "may" limits when and where--but not what--union literature can be distributed. Last, and contrary to Respondent's assertion, I find no cross-reference to Article 4, Section 12 in Article 13, Section 2 of the agreement and Respondent has referred to no bargaining history in support of its interpretation.

2. Article 4, Section 12

The Respondent's other contractual argument involves Article 4, Section 12 of the agreement, which provides that,

". . . appropriate magazines/publications will be permitted in designated non-work areas at all facilities for use at non-work times." It is asserted that the bargaining history of the quoted provision establishes that the parties intended "appropriate" to mean publications that do not offend EEO standards. In support of this assertion, Respondent introduced contemporaneous bargaining notes and testimony from James Snow, one of management's negotiators (*supra*, n.2). While the Union's bargaining notes and testimony from Kenneth Brissenden confirm the parties' intentions concerning the standard to be applied in determining whether particular "magazines/publications will be permitted" at FAA facilities, Mr. Brissenden also testified that the *scope* of the material subject to the standard of appropriateness was limited to sexually explicit magazines (*supra*, n.2). I conclude that while the parties

discussed such literature as an *example* of a magazine or publication which would not be "appropriate" by EEO standards within the meaning of Article 4, Section 12, there was no meeting of the minds that *only* sexually explicit magazines would fail to meet the appropriateness test.

Having found that the parties intended to limit employee access at FAA facilities to magazines/publications that were appropriate by EEO standards, I nevertheless conclude, for the reasons stated in connection with Article 13, Section 2, that the Union could not bargain away unit employees' rights to distribute union literature in non-work areas during non-work time except where the literature distributed would constitute "flagrant misconduct." Since union literature that might offend EEO standards could still be protected because it did not rise to the level of flagrant misconduct, I find that Respondent could not rely on Article 4, Section 12 of the national agreement between FAA and NATCA to prevent the distribution of the April 1996 issue of *The NATCA Voice* at Honolulu CERAP.

Moreover, even if the contractual standard were applied to the Bellino article, I would conclude that it did not offend EEO standards and therefore was appropriate for distribution. Thus, as previously stated, the Bellino article simply did not contain the type of racial epithets or racial stereotyping that the Authority found to be unprotected in the *Veterans Administration* case. Furthermore, there is no evidence whatsoever to support Mr. Anderson's fear that the Bellino article would, or did, create at Respondent's facility a "hostile work environment." As the EEOC recently stated in reconsidering a claim that a hostile work environment had been created, *Cobb v. Department of the Treasury*, EEOC Request No. 05970077 (March 13, 1997), quoting *Rideout v. Department of the Army*, EEOC Appeal No. 01933866 (November 22, 1995), slip op. at 9-10:

> In determining whether an objectively hostile or abusive work environment existed, the trier of fact should consider whether a reasonable person . . . in the circumstances would have found the alleged behavior to be hostile or abusive. . . .
>
> To determine whether a work environment is objectively hostile or abusive, the trier of fact must consider all of the circumstances, including the following: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating,

> or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris* [*v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)].

Applying the foregoing factors to the Bellino article in this case, I conclude that a reasonable person at Honolulu CERAP would not find the article hostile or abusive. Thus, the Bellino article was a one-time-only event; it merely called an unnamed employee at FAA's Indianapolis facility a "person of color"; while it portrayed that employee's motives in an unflattering and, to some, offensive way, it certainly was not *physically* threatening or humiliating; and there was absolutely no showing that the article had, or would, interfere with any employee's work performance. Accordingly, I conclude that even under EEO standards, Mr. Anderson was not justified in removing the Bellino article from Respondent's facility.[7]

D. Respondent's Other Defenses Also Must Be Rejected

1. Citing *General Services Administration*, 27 FLRA 643 (1987), Respondent notes that the Federal Property Management Regulations (FPMRs), administered by GSA, contain certain restrictions on the ability to distribute materials in federal buildings and that the Authority will consider whether any particular application of the FPMRs constitutes an unfair labor practice. However, Respondent concedes that in this case the Union was not required to obtain authorization under the FPMRs to distribute *The NATCA Voice*, and it is clear from the record that Respondent did not raise the FPMRs as a basis for keeping the Union from distributing the Bellino article. As a consequence, I find that *General Services Administration* is inapplicable.

2. Next, Respondent asserts that "General Counsel argues that Article 13, Section 2 of the Parties' Agreement grants the right to distribute any material to employees in non-work areas" and cites *Homestead AFB*, 13 FLRA at 246, for the proposition that, "where a union's right of access to

[7] It may be that Mr. Anderson overreacted to the Bellino article because he was present at a meeting in New Orleans when higher level FAA officials strongly objected to the article, and, therefore, he took action to remove it from Honolulu CERAP while at almost all other FAA facilities no similar action was taken. Nevertheless, Respondent does not contend that it committed no unfair labor practice because Mr. Anderson was merely following orders from higher level FAA management by removing the Bellino article from its facility.

agency property is established through collective bargaining, the remedy for a violation of that right is contractual." The difficulty with Respondent's argument in this regard is that General Counsel is *not* relying on the parties' agreement as the basis for the Union's right to distribute *The NATCA Voice* at Respondent's facility. Rather, General Counsel has asserted that the right to distribute union literature in non-work areas during non-work time is a *statutory* right, and it is *Respondent* that raised Article 13, Section 2 of the agreement as a defense to the allegations of the complaint. Accordingly, Respondent's reliance upon *Homestead AFB* is misplaced.[8]

3. Finally, Respondent contends that General Counsel refused to issue a complaint in another case just like this case (R. Exh. 7), and that the reasoning in the dismissal of the other case should also be applied here. There are two responses to such assertion. First, General Counsel's decision to issue a complaint in one case and not in another, even if the circumstances are similar, is a matter of unreviewable prosecutorial discretion. *See U.S. Department of Veterans Affairs, U.S. Department of Veterans Affairs Medical Center, Veterans Canteen Service, Newington, Connecticut*, 47 FLRA 631, 633-34, n.2 (1993). *See also, Social Security Administration, Baltimore, Maryland and Social Security Administration, Area II, Boston Region, Boston, Massachusetts*, 39 FLRA 650, 655 (1991). As such, I must deal only with the case before me. Second, the two cases are distinguishable. The complaint in this case involves Respondent's action in restricting the Union's statutory right to distribute union literature in non-work areas during non-work time; the other case, as noted by General Counsel in refusing to issue a complaint, involved management's removal of the same material from the union bulletin board--a matter (as previously noted at n.8) that does not implicate statutory rights. *See also Department of*

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8 It should be noted that *Homestead AFB* involved an agency's restriction on the exclusive representative's access to bulletin boards pursuant to a provision of the parties' negotiated agreement. The Authority, following private sector precedent, concluded that there is no *statutory* right to bulletin boards, but that a union's access thereto is governed by an employer's rules or the terms of a collective bargaining agreement. *Homestead AFB*, 13 FLRA at 244. As such, it is unremarkable for the Authority to have stated that the agency's right to limit the posting or removal of union materials on its bulletin boards is a matter to be resolved through the parties' contractual grievance machinery rather than through the statutory unfair labor practice procedures.

the Air Force, Scott Air Force Base, Illinois, 34 FLRA 1129, 1137 (1990).

E. The Appropriate Remedy

Having found that Respondent violated § 16(a)(1) of the Statute, as alleged, by directing the Union to remove all copies of the April, 1996, issue of *The NATCA Voice* from Honolulu CERAP on May 6, 1996, and to refrain from distributing it on Respondent's premises thereafter, I must decide how to remedy the unfair labor practice. General Counsel has requested, in addition to the customary cease and desist order and posting of notices, an order requiring Respondent to permit the Union to distribute copies of the April, 1996, issue of *The NATCA Voice* at its facility. Respondent has not addressed the issue of an appropriate remedy. I conclude that the General Counsel's request is appropriate to remedy the unfair labor practice found herein and, accordingly, recommend that the Authority issue the following:

ORDER

Pursuant to § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, and § 7118 of the Statute, 5 U.S.C. § 7118, the Federal Aviation Administration, Honolulu, Hawaii, shall:

1. Cease and desist from:

(a) Interfering with employees' protected right under the Statute to distribute union literature in non-work areas, during non-work time, by requiring the National Air Traffic Controllers Association, Honolulu CERAP Local, to remove all copies of the April, 1996, issue of *The NATCA Voice* from the Honolulu CERAP.

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

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

(a) Permit the National Air Traffic Controllers Association, Honolulu CERAP Local, to distribute copies of the April, 1996, issue of *The NATCA Voice* at the Honolulu CERAP in non-work areas, during non-work time, in accordance with the existing practice for distributing such union literature at the facility.

(b) Post at the Honolulu CERAP 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 Air Traffic Manager 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 § 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 30, 1997
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Federal Aviation Administration, Honolulu, Hawaii, 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 interfere with employees' protected rights under the Statute to distribute union literature in non-work areas during non-work time by requiring the National Air Traffic Controllers Association, Honolulu CERAP Local, to remove all copies of the April, 1996, issue of *The NATCA Voice* from the Honolulu CERAP.

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

WE WILL permit the National Air Traffic Controllers Association, Honolulu CERAP Local, to distribute copies of the April, 1996, issue of *The NATCA Voice* at the Honolulu CERAP in non-work areas during non-work time, in accordance with the existing practice for distributing such union literature at the facility.

_____
(Activity)

Date: _____ 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 its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: (415) 356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. SF-CA-60475, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

John R. Pannozzo, Jr., Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103-1791
P 600 695 270

Ms. Susanna Leon-Guerrero
Agency Representative
Federal Aviation Administration
Western Pacific Region
P.O. Box 92007
Worldway Postal Center
Los Angeles, CA 90009-2007
P 600 695 271

REGULAR MAIL:

Chuck Zapf, Local President
National Air Traffic Controllers Association
Honolulu CERAP Local
4204 Diamond Head Road
Honolulu, HI 96816

Dated: May 30, 1997
Washington, DC