FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL, EL PASO SECTOR

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 1929, AFL-CIO

CHARGING PARTY

Case No. DA-CA-11-0169

James P. Hughes
For the General Counsel

Bryan K. Luby
For the Respondent

James A. Stack
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (Charging Party/Union), a Complaint and Notice of Hearing was issued on January 31, 2012, by the Acting Regional Director of the San Francisco Regional Office. The Complaint alleged that

the Department of Homeland Security, U.S. Customs and Border Protection, U.S. Border Patrol, El Paso Sector (Respondent) violated § 7116(a)(1) and (5) of the Statute by refusing to execute a document embodying an agreement providing for a six week shift rotation for Border Patrol agents of the Alamogordo Station, refusing to implement the agreement, repudiating the agreement, and failing to comply with § 7114(b)(5) of the Statute. (G.C. Ex. 1(d)). The Respondent timely filed an Answer in which it denied violating the Statute as alleged in the Complaint. (G.C. Ex. 1(h)).

A hearing in this matter was held on April 11, 2012, in El Paso, Texas. All parties were represented and afforded an opportunity to be heard, to produce relevant evidence, and to examine and cross-examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I find that there was neither collective bargaining under § 7103(a)(12) of the Statute, nor an agreement under § 7114(b)(5) of the Statute. Therefore, the Respondent did not fail to comply with § 7114(b)(5) of the Statute and did not violate § 7116(a)(1) and (5) of the Statute. Moreover, because there was no agreement, there is no basis for the General Counsel's repudiation claim. In support of these determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Department of Homeland Security, U.S. Customs and Border Protection, U.S. Border Patrol, El Paso Sector (Respondent/Agency) is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Ex. 1(d)). The American Federation of Government Employees, National Border Patrol Council, AFL-CIO (Council), is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at Respondent's El Paso Sector. (G.C. Ex. 1(d)). The American Federation of Government Employees, Local 1929, AFL-CIO (Charging Party/Union) is an agent of the Council for the purpose of representing employees within the Respondent's El Paso Sector. (G.C. Ex. 1(d)).

This dispute arose at the Alamogordo Border Patrol Station, one of twelve stations in the Agency's El Paso Sector. (Tr. 96). The Alamogordo station is led by Patrol Agent In Charge (PAIC) Steven Higgs. Higgs has served as the Alamogordo PAIC for four and a half years. (Tr. 200). The Union, led by President James Stack, represents all bargaining unit employees within the El Paso Sector. (Tr. 24). Stack has served as the Union president for more than twelve years. (Tr. 24).

In the fall of 2009, Stack emailed Higgs asking for a meeting to discuss polling the Union had done with regard to employees' shifts. (Jt. Ex. 2 at 2). Higgs replied to Stack (copying Union stewards Dennis Lefand and Jose Cotto), saying that he would be happy to meet. (*Id.*). Higgs did this even though changing shifts was something that "fell within [Higgs'] purview". (Tr. 203). That is, under Article 28 of the parties' agreement, Higgs had

the authority to change employees' work assignments and shifts. (Jt. Ex. 1 at 41; Tr. 134, 241, 299). Nevertheless, Higgs welcomed the opportunity to receive polling data about agents' concerns, because he generally couldn't poll bargaining unit employees himself, and because such data could help him "do something that the agents want to do". (Tr. 203-04).

While agreeing to the meeting, Higgs advised Stack that the meeting would be "very preliminary as you know that I can't enter . . . any new agreements at this point[.]" (Jt. Ex. 2 at 2). Higgs testified that in making this statement, he was trying to "remind[Stack]" that Higgs "I [could not] enter into bargaining[ ]" and "I [could not] do agreements. That [wasn't] within the purview of my . . . authority in Alamogordo[.]" (Tr. 204-05). Stack responded to Higgs by stating that "all the guys want[ed]" was an "opportunity to present you with some concerns and desires on behalf of the employees." (Jt. Ex. 2 at 2).

On October 15, 2009, Stack and Lefand met with Higgs and Assistant Patrol Agent In Charge Beda Prieto in Higgs' office. (Tr. 206-07). Higgs started the meeting by saying that the meeting was "very preliminary." (Tr. 207). Higgs added that "[w]e're not going to be doing any bargaining," and stated that he could not "bargain on shifts[.]" (Tr. at 207). With that said, Higgs told Stack and Lefand that he wanted to hear the Union's views. (Tr. 207). Lefand presented polling data reflecting agents' views regarding shifts, and he told Higgs that the agents were interested in extending the amount of time between shift rotations, as well as discussing things like shift bidding and permanent shifts. (Tr. 123, 207, 284). Higgs stated that he could talk about extending the amount of time between shift rotations to eight weeks. (Tr. 245-46). Higgs added that he could not do anything at that moment, but that there might be something that could be done in the future, and he adjourned the meeting. (Tr. 207).

After the October meeting, Higgs and Prieto talked off and on about extending the amount of time between shift rotations. (Tr. 284). In July 2010, Higgs determined that it would be possible to extend the amount of time between shift rotations. (Tr. 208). After consulting with Prieto on the matter and determining that extending the time between shift rotations would be a feasible, Higgs sought input from the Union. (Tr. 209, 272, 285). Higgs approached Lefand and asked if he was still interested in extending the time between shift rotations. (Tr. 209). Lefand said that he was, and he set up a meeting. (Tr. 127, 209). The meeting was held on August 20, 2010, in Higgs' office. (Tr. 249). There, Stack, Lefand, and Cotto met with Higgs and Prieto. (Tr. 210). I credit Higgs' account of what took place at the August 20, 2010, meeting.

The meeting began with Higgs "reminding everybody [that] it was going to be an informal meeting". (Tr. 210). Stack replied that the meeting was Lefand's show and that Stack was "just going to be . . . a fly on the wall" and take a few notes. (Tr. 210). Lefand discussed his polling data regarding shift rotations. (Tr. 213-14). Higgs stated that he could not go past an eight week interval, and that longer, quarterly rotations were certainly "off the table." (Tr. 36, 234). Lefand's data indicated that employees wanted a six week interval between shift rotations. (Tr. 36-37). Higgs said, "I think we can do the [six] week rotation." (Tr. 38). In addition, October 10, 2010, was listed as a possible start date for extending the time between shift rotations, but Higgs also suggested starting the change in January 2011. (Tr. 221). Lefand said he would conduct further polling to see what their preference was.

After Lefand was finished presenting his polling data, Stack asked Higgs about shift bidding and permanent shifts. (Tr. 218). Higgs refused to entertain those matters, and Stack became "vociferous," asking why they couldn't discuss those matters. (Tr. 218). Higgs wouldn't say anything further. (Tr. 218). At that point, five minutes before the end of the meeting, Stack told Higgs that he wanted Higgs to sign a memorandum of understanding (MOU). (Tr. 219-20). Higgs responded by telling Stack that he "couldn't sign an MOU" and that "we [weren't] bargaining here". (Tr. 219). Stack responded, "What do you think we've been doing?" Higgs replied, "Well, not bargaining." (Tr. 219). In response, Stack told Higgs "about Article 3(D)" of the parties' agreement and the Statute which, according to Stack, required a written agreement. (Tr. 236). On that note, the meeting ended. (Tr. 219-20).

Although I credit Higgs' version of his response to the MOU, I note that Stack, Lefand and Cotto testified that Higgs' rejection of the MOU was not as direct, asking if they "really need[ed] to put this in writing[,]" and saying that putting it in writing "might delay things". (Tr. 43). However, even their version of his rejection reflects that Higgs did not believe he was bargaining or that he was obligated to reduce an agreement to writing. Stack, Lefand, and Cotto left the meeting thinking the Agency had agreed to extend the length of shift rotations to six weeks and discussed what had happened, however, Lefand and Cotto did not read, Stack's notes. (Tr. 43, 112, 133, 161, 166-67).

Hours later, Lefand emailed Higgs and Prieto to say that he had informed agents that "as a result of this meeting[ ]" management had agreed to extend shift rotations to six weeks. (R. Ex. 5 at 2). Higgs did not object to the email, because he figured that the Union was going to "back off on the demand for an MOU" and that it would "still be within [Higgs'] purview to go ahead and do this under [Higgs'] own authority to conduct operations at [his] station." (Tr. 219-20). Higgs thought that the MOU might have "just [been] a bluff." (Tr. 220). Such conclusions are consistent with Lefand saying the parties "met" rather than saying they bargained, and characterizing the change as one resulting from a meeting and not as one produced through negotiation. On August 31, 2010, Lefand informed Higgs and Prieto that agents wanted the extension to begin on October 10, 2010. (R. Ex. 5 at 1). At that time, Stack had not sent Higgs an MOU, and Higgs believed that the matter did not involve bargaining or signing an MOU. (Tr. 265).

At some point between August 20 and September 8, 2010, Stack turned his handwritten notes from the August 20, 2010, meeting into formal meeting minutes, and he posted the minutes on the Union's bulletin board shortly thereafter. (Tr. 29, 79). Neither Higgs nor Prieto saw the minutes until preparing for this case. (Tr. 216, 293).

Stack then forwarded a draft MOU to Higgs on September 8, 2010. (Tr. 83, 93). Upon receiving the proposed MOU, Higgs called Lefand to say that he could not sign it. (Tr. 255). Higgs then notified his chain of command that the Union was now seeking an MOU to which he had not agreed and forwarded a copy of the proposed MOU submitted by Stack. (Tr. 255).

Subsequently, Lefand met with Higgs to discuss the proposed MOU. (Tr. 114). Lefand asked Higgs what about the MOU he objected to, and Higgs "just said he wasn't going to sign any MOU." (Tr. 114). Lefand asked Higgs if there was something in the language of the proposed MOU he had a problem with and, if so, Lefand "indicated to [Higgs] that that language could be changed[.]" (Tr. 114). But Higgs declined Lefand's offer. (Tr. 114). In October 2010, Higgs told Lefand that he wasn't going to implement the change extending the length of shift rotations and six week rotations were not implemented by the Respondent. (Tr. 114).

A number of factual issues arose at the hearing, and I make the following findings with regard to those issues. I find that there was no reasonable expectation that the August 20, 2010, meeting would involve collective bargaining or result in an agreement that had to be memorialized in a written MOU. In this regard, there was a consensus that both the October 15, 2009, and the August 20, 2010, meetings were labor management relations (LMR) meetings – informal meetings in which representatives of the Union and management discuss issues and resolve problems without bargaining or formal written agreements. (Tr. 58, 67-68). Certainly, Higgs did not expect the August 20, 2010, meeting to involve bargaining or an MOU, as earlier LMR meetings with Stack in 2008 and 2009 had not involved bargaining or MOUs. That is why Stack's last-minute insistence on Higgs entering into an MOU left Higgs "surprised." (Tr. 207, 228-29, 256). Moreover, there does not appear to have been an expectation on the part of the Union that there would be an MOU. In this regard, Lefand and Cotto testified that Stack had not told them that he intended to pursue an MOU at the August 20, 2010, meeting. (Tr. 128, 190). And Stack himself acknowledged that he was unsure whether he had mentioned that he was going to pursue an MOU on August 20, 2010. (Tr. 63). Most importantly, the entire course of events was initiated by the Union's request for "an opportunity to present you with some concerns and desires on behalf of the employees. Sort of like an old LMR meeting, **nothing more**." (*Emphasis added*). (Jt. Ex. 2). This expressed interest in presenting concerns and desires and nothing more, was never modified by a written or oral demand to bargain, nor were ground rules and proposals ever exchanged by the parties. It was only after Higgs heard the bargaining unit employee's concerns and desires and elected to exercise the right granted by the collective bargaining agreement (CBA) by deciding to extend the length of shift rotations to six weeks, that the Union decided to try and trans morph a meeting for nothing more than a presentation of employee interests into an agreement achieved through collective bargaining.

Article 28 of the parties' CBA empowered the Agency to "establish, maintain, and change . . . shifts, tours of duty and hours of work . . . ." (Jt. Ex. 1 at 41). Consistent with Article 28, Higgs had the authority to change employees' work assignments and shifts. (Jt. Ex. 1 at 41; Tr. 134, 241, 299). In this regard, Higgs explained that he had "a lot of leeway in operational matters and [he could] do a lot of things with respect to assigning work shifts, where to put the agents, whether to assign a lot of agents to one area or concentrate – you know, operational authority." (Tr. 220). Similarly, Prieto stated that "under Article 28, . . . management has the right to assign tours of duty." (Tr. 299). Further, Lefand acknowledged that it was Higgs' prerogative to change or not change shifts. (Tr. 134). Had Higgs told the Union that he appreciated their information but nothing was going to change,

there was nothing the Union could have done as he would have been within the rights established by Article 28. The thanks he got for understanding and appreciating the concerns and desires of the bargaining unit employees was a backdoor attempt by the Union to erode the right established by Article 28. In contending post exercise of the right that the decision by the Respondent's agent, who was not authorized to bargain, amounted to his giving away that right via negotiation when the Union had initiated the process under the guise of nothing more than a partnership discussion was reprehensible. Furthermore, it worked to the detriment of the bargaining unit employees who never got to see the benefit of a change that a substantial majority of the unit desired.

Higgs did not say anything prior to, or during the meeting that indicated he would or could elect to engage in permissive bargaining, including bargaining over shift changes already covered by Article 28 of the parties' agreement. Higgs was well aware that electing to bargain over such a matter would, from a management perspective, be odd. "Article 28 gives pretty explicit instructions" Higgs stated. "[I]t was bargained over previously that the [PAIC] has wide discretion and flexibility in assigning work . . . I don't know why you would enter another MOU to amend that." (Tr. 238).

Stack also admitted that he "[a]dded terms [in the MOU] for the sake of embodying what was said into a more precise like legal thing." (Tr. 93). Specifically, Stack added a provision to the MOU that barred changing the length of shift rotations in the future without notice and an opportunity to bargain over the change. (Jt. Ex. 3 at 3; Tr. 223-24). Higgs testified credibly that this was counter to what he had envisioned, as he had told Stack that the extension of shift rotations would have to be unilaterally terminable without a need to bargain at the completion of one full rotation. (Tr. 223-24). Prieto and Lefand testified credibly that there had been no discussion of requiring notice and an opportunity to bargain over future changes to the length of rotations at the August 20, 2010, meeting. (Tr. 135-36, 315). While I do not credit Stack's claim that this was discussed at the meeting, I find it notable that an experienced Union officer like Stack acknowledged that he did not use "those precise terms" of notice and an opportunity to bargain (Tr. 93), thus, demonstrating the duplicitous nature of his endeavor. Accordingly, I find that Stack added a material provision to the MOU that had not been discussed on August 20, 2010.

Furthermore, Higgs lacked authority to bargain or enter into a written agreement. Higgs informed the Union of this in the email leading up to the October 15, 2009, meeting, and he reiterated this at that meeting. Higgs' statement that he could not enter into an agreement "at this point" meant that he could not enter an agreement unless the Chief Patrol Agent (CPA) who headed the El Paso Sector authorized him to do so. (Tr. 205). Higgs never sought or received such authority as there was no reason for him to do so when the subject was already covered by the CBA and he already had the authority to extend the length of shift rotations unilaterally. (Tr. 205). Higgs again reminded the Union that he lacked authority to sign an MOU at the August 20, 2010, meeting. (Tr. 219). I credit Higgs' statements expressing his lack of authority in this regard. Higgs testified:

> I don't have authority to enter into contracts. . . . If I want to do bargaining, I've got to run that up the – up my [chain] of command and let them know that there's been a demand to bargain or there's an issue that needs to be bargained over. And then the [CPA] decides if that is something that's in the interest of the [S]ector or not and he'll yea or nay me and he'll send the word back down. (Tr. 220-21).

Higgs also testified:

> If an MOU's going to be signed, it's going to be [signed by] the [CPA]. I don't have the authority to do that. [The CPA] didn't delegate me the authority to sign [the MOU] and I . . . don't have the authority to bargain on behalf of the [CPA]. He didn't give me that. He didn't delegate that or designate me as . . . his bargaining person to bargain on his behalf. (Tr. 275).

Further, when asked how the Agency would react to Higgs entering into an MOU, Higgs stated:

> They wouldn't be happy. If I asked them – if I told them after the fact [that I entered into an MOU], no, they wouldn't be happy about that. They know that I'm not authorized to do that. Anytime I enter into a situation where bargaining is required, I have to get approval and let [S]ector – the [CPA] know about that. (Tr. 230).

I note that while the General Counsel entered other MOUs into the record, none of those MOUs involved Higgs, and none demonstrate that Higgs had the authority to bargain or enter into an MOU over this matter. Article 3(D) of the CBA provides for bargaining at the Sector level and higher, (Jt. Ex. 1 at 3) and there is no indication that the CBA permits bargaining below that level, i.e., at the Station level, without authorization from the Sector CPA. (*Id.*). Further, the General Counsel did not cite a provision of the parties' agreement authorizing Station level bargaining.

While Stack's minutes are long and detailed, they were written up to nineteen days after the August 20, 2010, meeting, and refer to a provision – requiring notice and an opportunity to bargain before further changing the length of shift rotations – that the parties did not discuss at the meeting. (G.C. Ex. 3 at 2). I view the minutes as the work of a self-interested party preparing for potential litigation, and I accord them little weight.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that on August 20, 2010, the parties engaged in bargaining and agreed to increase the length of shift rotations from four weeks to six weeks. (G.C. Br. at 9-10). Further, the General Counsel claims that the parties ultimately agreed that the extension would begin on October 10, 2010, and the General Counsel maintains that the parties reached a final, binding agreement on August 20, 2010, even if some of the details had not been resolved. (*Id.* at 10-11, 14). Further, the General Counsel argues that the bargaining that took place involved "permissive" matters and Higgs elected to bargain over

such matters because he "approach[ed] the Union" and "actively participat[ed] in . . . bargaining." (*id.* at 11-12). In response to a claim that Higgs lacked authority to enter into an agreement, the General Counsel maintains that Higgs "held himself out to have the authority to bargain". (*id.* at 14).

Respondent

The Respondent contends that the parties did not engage in bargaining. (R. Br. at 1, 8). In this connection, the Respondent asserts that Higgs advised the Union that their discussions would not lead to a collective bargaining agreement. (*Id.* at 13). Further, the Respondent argues that if the parties bargained, such bargaining was merely permissive, and Higgs withdrew from such bargaining before an agreement was reached. (*id.* at 5, 8, 10). In this regard, the Respondent argues that the parties did not reach an agreement on August 20, 2010, because the MOU, which the Union delivered to the Agency weeks later, contained a substantive provision that the parties had not previously discussed. (*id* at 10). The Respondent also notes that there can be no agreement under § 7114(b)(5) of the Statute without the assent of "authorized representatives." (R. Br. at 11 n.33). And the Respondent contends that the parties' agreement precludes collective bargaining agreements below the Sector level. (*Id.* at 11).

DISCUSSION AND CONCLUSION OF LAW

In proving the unfair labor practice allegations set forth in a complaint, the burden of proof is on the General Counsel to demonstrate by a preponderance of the evidence that a respondent committed the violations alleged. 5 C.F.R. § 2423.32.

The Parties Did Not Engage in Collective Bargaining

Section 7103(a)(12) of the Statute defines collective bargaining as follows:

> "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]

A collective bargaining agreement is "an agreement entered into as a result of collective bargaining." 5 U.S.C. § 7103(a)(8).

A determination of whether parties engaged in collective bargaining is based on the "totality of the circumstances". *U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 320 & n.8 (1997) (*FAA*). In *FAA*, the Authority cautioned that although it had found collective bargaining to have occurred in a partnership

environment under the totality of the circumstances of that case, the Authority's conclusion was "not intended, and should not be construed, as a general pronouncement that all discussions" in a partnership environment "constitute collective bargaining within the meaning of the Statute." (*Id.* at 320 n.8).

Further, permissive subjects of bargaining are bargainable only at the "mutual election of the parties"; absent such an election, there is no obligation to bargain over permissive matters. *AFGE, Local 32*, 51 FLRA 491, 497 n.11 (1995). Here, as the General Counsel appears to acknowledge, (G.C. Br. at 11), the subject matter in dispute – the length of shift rotations – is a permissive subject of bargaining. The matter is permissive for several reasons. First, the matter pertains to shift changes and is therefore covered by Article 28 of the parties' agreement. *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 126 (2011). Second, the matter pertains to staffing patterns under § 7106(b)(1) of the Statute. *Nat'l Ass'n of Agric. Employees., Branch 11*, 57 FLRA 424, 426-27 (2001). Third, the matter involves discussions below the lowest level of recognition, that is, below the Sector level. *NATCA, AFL-CIO*, 62 FLRA 174, 182 (2007). There is no evidence that the Respondent elected to bargain over such matters, either through contract or through the Respondent's actions. Certainly, Higgs, who had no authority to bargain or enter into an MOU, could not bind the Agency into bargaining over permissive matters. Further, even if Higgs had such authority, he had no intention to do so. In this regard, Higgs explained that Article 28 was "bargained over previously [so] that the [PAIC] has wide discretion and flexibility in assigning work . . . I don't know why you would enter another MOU to amend that." (Tr. 238). The General Counsel's claim that a manager like Higgs could bind an agency merely by "approaching" a union and "actively participating" in "bargaining," (G.C. Br. at 12), fails to recognize that every discussion that occurs between Management and a Union does not constitute bargaining under the Statute. The fact that there was no election to bargain with the Union over permissive matters indicates that Higgs and Stack were engaged in discussions during the August 20, 2010, meeting and "nothing more" as described by the Union.

Moreover, additional factors indicate that the parties did not engage in collective bargaining, specifically: (1) there were no discussions between the Union and Agency representatives at the Sector level, and no authorization from the Sector for Station level bargaining; (2) the meeting was not attended by an agency representative authorized to bargain or enter into an MOU; (3) no ground rules were established and no proposals were exchanged; (4) Higgs repeatedly told Union representatives that he was not engaging in bargaining and could not sign an MOU; (5) Union president Stack told Higgs that he wanted nothing more than to present him with the concerns and desires of bargain unit employees; (6) the parties previously had partnership-style meetings like the one on August 20, 2010, without any bargaining or demands for MOUs; (7) Union representatives entered the August 20, 2010, meeting without any expectation that there would be a subsequent demand for Higgs to sign an MOU; (8) and finally, I find that Stack would not have assumed the role of "fly on the wall" had he truly believed the parties were at the meeting for the purpose of negotiating a local agreement that would erode rights previously ceded to management in the national CBA.

Furthermore, the General Counsel fails to demonstrate that Higgs' actions constitute collective bargaining. The fact that Higgs asked Lefand about his polling data does not indicate that there were "[negotiations through] a 'back and forth' discussion." (G.C. Br. at 10). Although Higgs did state that certain rotations were "off the table," and indicated that the Agency could implement a new schedule for rotating shifts, Higgs was talking about what he could do under his own authority under Article 28 and he refused to discuss other topics raised by the Union. Any belief on the Union's part that Higgs was going to bargain over changes in shift assignments should have ended when Higgs advised the Union from the start that it was an informal meeting and that he was only willing to consider some of their ideas.

Finally, the circumstances at issue in *FAA* – an unfair labor complaint alleging that the agency was refusing to negotiate with the union; subsequent assurances by management that it would meet with the union's president to resolve issues in dispute; the union's withdrawal of its complaint based on those assurances; and "numerous" union-management meetings over the course of eight months – are not present in this case. *FAA*, 53 FLRA at 314, 318-320. Unlike the agency's representative in *FAA*, no one from higher management assured the Union that Higgs had "full authority to bargain." (*Id.* at 320).

Under the circumstances of this case, I find that the parties did not engage in collective bargaining under § 7103(a)(12) of the Statute and, thus, did not enter into a collective bargaining agreement under § 7103(a)(8) of the Statute. The parties engaged in partnership-style discussions aimed at influencing management in the exercise of rights previously established by the national CBA and they were neither authorized nor attempting to alter Article 28 of the CBA through bargaining conducted at the station level. *FAA*, 53 FLRA at 320 & n.8. In trying to turn a discussion that prompted the Respondent to exercise its right in a manner desired by the bargaining unit into an agreement that would erode that right, the Union not only reduced the incentive of management to engage it in similar discussions in the future when exercising such rights, but also acted to the detriment of bargaining unit employees who would have achieved their desire had the Union simply acknowledged that the Respondent was exercising a right previously ceded to it by the Union during national negotiations.

There Was No Agreement Between the Parties

Even if the parties engaged in collective bargaining, the parties did not enter into a collective bargaining agreement. Under § 7114(b) of the Statute, the duty of an agency and an exclusive representative includes the obligation to negotiate with a sincere resolve to reach a collective bargaining agreement. If an agreement is reached, the parties are obligated, on the request of any party to the negotiations, to execute a written document embodying the agreed-to terms. *FAA*, 53 FLRA at 317. An agreement, for purposes of § 7114(b)(5) of the Statute, is one in which "*authorized representatives* of the parties come to a meeting of the minds on the terms over which they have been bargaining." (*Id.* at 317) (emphasis added). The Authority has held that the question of the existence of a collective bargaining agreement

is a question of fact, not a question of law. *U.S. Dep't of Commerce, PTO, Arlington, Va.*, 60 FLRA 869, 880-81 (2005). In determining whether a party has fulfilled its bargaining obligation, the Authority considers the totality of the circumstances in a given case. *FAA*, 53 FLRA at 317.

In addition, the Authority has indicated that there is no meeting of the minds when parties fail to reach agreement on a material term. *IRS, N. Fla. Dist., Tampa Field Branch, Tampa, Fla.*, 55 FLRA 222, 222 (1999) (*IRS*). While the General Counsel cites *Bobbie Brooks, Inc. v. Int'l Ladies' Garment Workers Union*, 835 F.2d 1164 (6th Cir. 1987), for the proposition that parties can "form a binding agreement which they intend to be final, despite leaving certain terms for future bargaining[,]" (G.C. Br. at 9), *Bobbie Brooks, Inc.*, states that a contract does not arise if the union and management "have not resolved a dispute over a substantive term," (*Id.* at 1168).

At the August 20, 2010, meeting, Higgs believed that by stating that he would extend the length of shift rotations, he was merely expressing a decision under his own authority, not bargaining. Even if Higgs' initial statements had been construed by the Union as an agreement, Higgs demonstrated that was not what he had meant. The moment Stack insisted on an MOU, Higgs told Stack that he "couldn't sign an MOU" and that the two "[weren't] bargaining". (Tr. 219). The fact that Higgs and Stack disagreed on whether they were even bargaining, and whether an MOU was required, indicates that the August 20, 2010, meeting ended without a meeting of the minds.

While the Respondent expressed a willingness to extend the length of shift rotations during the August 20, 2010, meeting, the parties did not at that time, negotiate or agree upon terms as basic as when such a change would take effect. (R. Ex. 5). Further, the MOU that Stack ultimately sent to Higgs contained a new, material provision requiring notice and an opportunity to bargain before changing the length of shift rotations. That addition indicates that any agreement reached on August 20, 2010, was not final. *IRS*, 55 FLRA at 222. Also, Lefand "indicated to [Higgs] that . . . language could be changed," which further supports a conclusion that the parties had not reached a final agreement. (Tr. 114). For these reasons, I find that there was no meeting of the minds between the Union and the Respondent.

Moreover, there could be no agreement under § 7114(b)(5), because Higgs lacked authority to bargain or enter written agreements on behalf of the Agency. Higgs' unrebutted testimony on this is clear: "If an MOU's going to be signed, it's going to be [signed by] the [CPA]. I don't have the authority to do that." (Tr. 275). In addition, Higgs repeatedly told the Union that he could not bargain and could not enter into written agreements. Furthermore, Higgs lacked actual authority to bargain and enter into agreements, and he lacked apparent authority, as Higgs did not hold himself out as having this authority, and the Respondent did not hold Higgs out as having this authority. *See AFGE, Local 2207*, 52 FLRA 1477, 1480 (1997). Because Higgs had no authority to bargain or enter into an MOU, Higgs was not an authorized representative of the Agency, and he could not enter into an agreement for the purposes of § 7114(b)(5). *FAA*, 53 FLRA at 317. Given his experience

as Union president, Stack had to understand that Higgs was not authorized to negotiate at the station level in contravention of Article 3(D) of the CBA without express approval from superiors which Higgs never sought nor claimed, and Stack was never told by someone capable of authorizing such activity that Higgs was so authorized.

Because there was no meeting of the minds between authorized representatives of the parties, there was no agreement. Therefore, the Agency did not fail to comply with § 7114(b)(5) of the Statute. *See U.S. Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 44 FLRA 205, 206-08 (1992). As there was no agreement, there is no basis for the General Counsel's repudiation claim. For all of the reasons outlined above, I find that the Agency did not violate § 7116(a)(1) and (5) of the Statute.

CONCLUSION

I find that the General Counsel did not establish that the Respondent failed to comply with § 7114(b)(5) of the Statute and violated § 7116(a)(1) and (5) of the Statute as alleged. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., June 23, 2014.

Charles R. Center

CHARLES R. CENTER
Chief Administrative Law Judge