

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

MEMORANDUM

DATE: June 14, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
LEWISBURG, PENNSYLVANIA

Respondent

and

Case No. BN-CA-04-0410

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 148, AFL-CIO

Charging Party

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

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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| FEDERAL BUREAU OF PRISONS U.S. PENITENTIARY LEWISBURG, PENNSYLVANIA Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 148, AFL-CIO Charging Party | Case No. BN-CA-04-0410 |

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 Federal Labor Relations Authority (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 Authority pursuant to 5 C.F.R. § 2423.34 (b).

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

Any such exceptions must be filed on or before **JULY 17, 2006**, and addressed to:

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

RICHARD A. PEARSON
Administrative Law Judge

Dated: June 14, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

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| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 148, AFL-CIO <p style="text-align: center;">Charging Party</p> | Case No. BN-CA-04-0410 |

David J. Mithen, Esquire
For the General Counsel

Nicole Hogan, Esquire
Ly T. Nguyen, Esquire
For the Respondent

Tony J. Liesenfeld
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, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

The American Federation of Government Employees, Local 148, AFL-CIO (the Charging Party or Union) initiated this case on June 2, 2004, when it filed an unfair labor practice charge against the U.S. Penitentiary, Lewisburg. After investigating the charge, the General Counsel of the Federal Labor Relations Authority (the General Counsel) issued a complaint on September 27, 2004, against the Federal Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pennsylvania (the Respondent or Agency). The complaint

alleges that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(A) when it conducted a formal discussion without affording the Union the opportunity to be present.

A hearing was held in Harrisburg, Pennsylvania, on February 2, 2005, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Background

The American Federation of Government Employees, Council of Prison Locals, AFL-CIO, (AFGE) is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a nationwide bargaining unit of employees of the Federal Bureau of Prisons. The Charging Party is the agent of AFGE for the purpose of representing the bargaining unit employees at the Respondent.

The Respondent in this case is a high security facility within the Bureau of Prisons system. Tr. 14-15. The penitentiary at Lewisburg includes units in which inmates are housed. Tr. 15-16. At the time of the events in this case, one of those units, "G" block or Special Management Unit (SMU), was used for a pilot program designed to correct gang activity within the prison system. Tr. 16, 129. Bruce Heiser was one of eight correctional officers assigned to SMU and was designated as the Officer in Charge (OIC).¹ Tr. 42. Heiser was a member of the bargaining unit represented by the Union. At the time of the incident, Lieutenant Rios served as the first-line supervisor of the correctional officers assigned to SMU.² Tr. 42. Their second-line supervisor was Captain Rebecca Clay and their

1

Although not explicitly stated in the record, it appears that there were eight correctional officers assigned to the SMU during the day shift. It is not clear how many were assigned during the other shifts.

2

Rios had been preceded in this position by Lt. Knox. Tr. 248.

third-line supervisor was Associate Warden of Custody Troy Levy. *Id.* The Associate Warden, in turn, reported to Warden Joseph Smith, who at the time of the incident in this case had been at Lewisburg for a little over two months. Tr. 43, 126.

The focus of the complaint in this case was a meeting that occurred between Heiser and Clay on Monday, April 5, 2004. Prior to that meeting, Heiser had a conversation with Warden Smith and raised a number of issues relating to the operation and staffing of the SMU. Tr. 47, 130-31. According to Heiser, his fellow staff on SMU had encouraged him to act as their spokesperson and to discuss these issues with Smith. Tr. 45-46. Although the witnesses did not offer uniform accounts as to the circumstances under which this conversation occurred, both Smith and Heiser indicated that it was Heiser who approached Smith and initiated the discussion. Tr. 44-45, 130. The witnesses offered varying accounts of the date on which Heiser talked to Smith. Heiser testified that it occurred the Friday before his meeting with Clay. Tr. 43, 78. Warden Smith did not really recall when it happened. Tr. 135, 176-77. Captain Clay thought it occurred a week or two prior to her meeting with Heiser. Tr. 233. On this point, Heiser's testimony was the most precise. In view of the fact that it was probably a more significant event from Heiser's perspective than that of Smith or Clay, I find he would be more likely to have a better recollection of the date. Also, as will be addressed in greater detail shortly, the fact that Heiser came to think that his meeting with Smith placed him in jeopardy of disciplinary action (a view that neither Smith nor Clay shared) made it more likely that he would remember the general chronology, although not necessarily all the details, better than either of them.

The witnesses also gave different accounts as to where the meeting between Heiser and Smith occurred. Smith recalled that Heiser approached him while he was making his rounds and was in the SMU. Tr. 130, 136, 178. Heiser alluded to going to Smith's office after calling to inquire whether the Warden did, in fact, have an open door policy. Tr. 45, 78, 106. I find that it is unnecessary to the disposition of this case to reconcile the discrepancies in the accounts of the two men as to where their meeting occurred. What is significant is that Heiser clearly initiated it.

During his meeting with the Warden, Heiser raised several concerns and suggestions that he had with respect to the way in which the program in SMU was being run. Tr. 47. According to Heiser, he discussed security issues,

recreational and educational programs being provided for the inmates, inadequate staffing, and the lack of post orders or program statements.³ Tr. 47-48. Although Smith remembered that Heiser raised a number of issues, he could only recollect one specifically: whether a property officer was needed on SMU. Tr. 130, 157. By Smith's account, because of his recent arrival at Lewisburg, he was unsure he sufficiently grasped what Heiser was talking about. Tr. 130-31, 134. He recalled telling Heiser that he (Smith) needed to talk to the Captain and Lieutenant and hear what they had to say about the issues Heiser was raising. Tr. 134. According to Smith, he spoke to Clay sometime within the next couple of days and told her that Heiser had brought up some points he was unsure of. Tr. 135. Smith asked her to meet with Heiser, listen to what he had to say, and give Smith an assessment of Heiser's suggestions. Tr. 135. Both Smith and Clay denied that Smith provided her with a list of topics, either orally or in writing, to discuss with Heiser. Tr. 139-40, 193-94, 215.

The April 5, 2004 meeting

Heiser testified that when he arrived at work at 7:30 on Monday morning, April 5, 2004, his co-workers informed him that Lt. Rios had complained during the weekend that he had gone over her head to the Warden, and they said that Cpt. Clay was going to discipline him for it. Tr. 43. According to Heiser, Rios called him at approximately 9:30

3

At the hearing, Heiser characterized "post orders" as descriptions of each staff member's assignments and responsibilities in the unit, and "program statements" as agency policies for how a unit is to be operated. Tr. 48, 61-62.

a.m. and told him to go see Clay, but she didn't tell him what it was about.⁴ Tr. 44.

Believing that he was facing discipline, Heiser contacted Union steward Tony Liesenfeld, and asked that a Union representative accompany him to his meeting with Clay. Tr. 52. Liesenfeld phoned Clay, who told him that Heiser was not in any trouble and would not need a Union representative. Tr. 26-27, 195. Liesenfeld also spoke to Assistant Chief Steward David Clark to explain the situation; Clark called Clay and received the same answer. Tr. 27-28, 196. Heiser then spoke to Clark himself, who told him to go see the Captain, ask for a Union representative, and if it became a disciplinary action, to walk out. Tr. 52-53. During the time that he was trying to obtain a Union representative, Heiser received a call from Clay, telling him to report to her office immediately. Tr. 53. When he said that he didn't want to come without a representative, Clay told him he wasn't facing any discipline and that she just wanted to talk to him. Tr. 53, 195.

Clay testified that although she did not view her meeting with Heiser as mandatory, Heiser had no choice but to comply with her request, as his supervisor, to come to her office. Tr. 220-21. Clay maintained the reason she held the meeting in her office rather than in Heiser's work area was to afford privacy, as the offices in SMU are small with a lot of staff and inmate activity in and around them. Tr. 197, 222.

The accounts given by Heiser and Clay of their meeting agreed in only a few respects. The meeting began at approximately 10 a.m. Clay told Heiser again that he was not facing discipline, and that the reason he was there was

4

While Rios did not testify at the hearing, Clay did. Clay's testimony did not indicate whether she made the initial contact with Heiser through Rios; she only mentioned calling Heiser directly. Tr. 194-95. While Clay may have phoned Heiser directly at some point that morning, I find it most likely that the initial call to Heiser came from Rios. Particularly in view of the paramount importance of security at a correctional institution, it is unlikely that Clay would pull Heiser away from his post without coordinating his absence first with his immediate supervisor. Additionally, other testimony of Clay reflects that she valued the concept of chain of command and, consequently, was likely to have worked through Lt. Rios. Tr. 254-55. Thus I credit Heiser's testimony that he was first told to go see Cpt. Clay by Lt. Rios.

because the Warden had asked her to meet with him about the matters Heiser had previously raised in his conversation with Smith. Tr. 55-56, 198. Nobody other than Heiser and Clay was present at the meeting. Beyond these details, the descriptions of the meeting provided by Clay and Heiser conflict significantly.

Clay thought Heiser's belief that he was facing discipline stemmed from existing problems between him and the lieutenants (apparently both Rios and Knox) in his unit. Tr. 196, 237, 250. She also stated that Heiser, early in their meeting, told her that the main reason he had gone to Warden Smith was to intercede on behalf of a fellow employee whose action in placing two inmates together, when they were supposed to be kept separated, had resulted in a fight. Tr. 199, 228-29. According to Clay, in addition to talking for about five minutes about how unfair it would be to discipline that officer, Heiser spent the meeting talking about his back problems and his problems with how the lieutenants ran things on SMU. Tr. 199-201, 229. Clay testified that Heiser's complaints about the lieutenants and their management of SMU were a rehash of things she had already heard from him three or four times before. Tr. 200-02, 225, 230. By Clay's account, she did not attempt to guide the conversation, but simply listened to Heiser with little or no comment. Tr. 201-02, 225, 238, 252-53. Clay said she took no notes, and if she was writing anything, she was just doodling. Tr. 202. Clay estimated the meeting's length at about 30 to 40 minutes. Tr. 201. In this regard, she recalls that the meeting ended before "mainline," a term used for the inmates' lunch period, which starts at 10:45 a.m. Tr. 203. The Warden wants his staff to attend mainline every day, and Clay testified that she believed she was at mainline on time that day.⁵ Tr. 203-04, 253.

Heiser, on the other hand, described a meeting in which Clay, working from what appeared to him to be a list on a pad in front of her, led the discussion from topic to topic and checked things off on the list as the discussion progressed. Tr. 70, 96, 114-16. Heiser asserted that on a number of occasions during their meeting, he expressed the desire to be excused to return to his unit, but Clay kept talking about things pertaining to SMU. Tr. 70-71. In his account, both he and Clay participated fairly equally in the discussion (Tr. 114), and he estimated the meeting lasted

5

The Warden testified it was very important to him that the executive staff, of which Clay was a member, be present at mainline. Tr. 149. Consequently, it is clear that attending mainline was a priority to Clay.

more than two hours, as he didn't return to his unit until 12:15 p.m. Tr. 70. According to Heiser, their discussion covered the following topics: a change that involved the removal of keys from the key rings carried by correctional officers and other security issues; staffing and the lack of adequate staff to run the SMU program; the need to assign a property officer who would be responsible for monitoring and inventorying property of inmates who were entering or leaving SMU; staff evaluations and performance awards; and the need for post orders and program statements. Tr. 57-63.

I find it highly unlikely that Clay came to the meeting with a list of topics she intended to discuss with Heiser. I credit Warden Smith's testimony that he neither absorbed all of the subjects Heiser raised with him nor provided Clay with any sort of list of topics she was to cover with Heiser. More than likely, when talking to Heiser, Smith quickly decided to refer him to a subordinate who could filter Heiser's issues and concerns for him, and it follows that he wouldn't have attempted to master the details of what Heiser was saying to him. This is also consistent with the Warden's acknowledgment that he was relatively new at the institution and was still in his learning curve. Also, I doubt that Smith intended his open door policy to encourage employees as a matter of course to bring issues and concerns to him without working through his subordinates.⁶

I also find persuasive Clay's testimony that she had a pretty good idea of what Heiser raised with Smith based on her own prior conversations with Heiser, rather than from any information Smith gave her.⁷ I seriously doubt Clay bothered to prepare a list of what she suspected she would be hearing from Heiser. Although Clay may have had a pad of paper in front of her during the meeting with Heiser, I do not believe it contained any sort of agenda for the meeting. I also credit Clay's account that Heiser determined the course of the meeting. This is consistent with the view, shared by both the Warden and Clay, that her role was to

6

In view of the short period that Smith had been at Lewisburg at that point, it is unlikely he would have known that Heiser had already raised the issues with Clay. It is clear from Clay's testimony that she thought Heiser's ideas had little merit, and it is unlikely that she would have informed Smith of her prior conversations with Heiser.

7

That Heiser often discussed issues with senior management at the penitentiary was corroborated by Warden Smith's recollection that Heiser had come into his office to talk several times previously. Tr. 152, 177-78.

listen to what Heiser had to say, and to advise the Warden what she thought of Heiser's ideas. Given her suspicion that Heiser was going to rehash topics he had already raised a number of times with her, Clay would have been unlikely to want to encourage him by taking the lead in bringing topics up; she no doubt wanted to keep the meeting short and the number of issues discussed to a minimum. In other words, taking the lead in bringing subjects up would have projected a level of interest Clay just didn't have. The picture that emerges from the record is that Clay was going through the motions of hearing Heiser out, in response to and out of respect for Smith's wishes, and she had no desire to invest a lot of time or energy in the effort. I also have no doubt it was more important to Clay to attend mainline than to sit and listen to Heiser for a long period of time. It is impossible for me to believe that Clay would have allowed Heiser to take up two hours of her time on issues and ideas she was already well aware of. Given the importance the Warden placed on his staff attending mainline, I credit Clay's testimony that her meeting with Heiser ended before 10:45, and I find the length of the meeting was closer to the estimate provided by Clay rather than by Heiser.

Both Smith and Clay were vague as to what, if any, type of report Clay gave Smith after her meeting with Heiser. Smith recalled that Clay spoke with him, and he remembered that both Clay and Knox told him they didn't think a property officer in SMU was necessary, but he didn't recollect any other specifics of what Clay told him. Tr. 158, 179-80. Clay asserted that the controversy over whether the Union should have been represented at her meeting with Heiser served to inform the Warden that she had carried out his instructions and met with Heiser, and consequently no report on her part was necessary. Tr. 231. Also, what emerged from Clay's testimony was that she viewed Heiser's ideas as unworthy of further action and related to his discontent with the lieutenants assigned to SMU. It would have been unlikely that Clay was eager to elevate the details of Heiser's disputes with the lieutenants to Smith's level. Clay would more likely have seen it as her responsibility to handle those matters rather than passing them to the Warden. I find that whatever report Clay gave Smith following her meeting with Heiser was minimal.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel

The General Counsel contends that the meeting between Clay and Heiser constituted a formal discussion within the meaning of section 7114(a)(2)(A) and alleges that the Respondent violated section 7116(a)(1) and (8) when it failed to provide the Union notice and an opportunity to be represented.

Initially, the General Counsel notes that in determining whether a meeting satisfies the requirements of section 7114(a)(2)(A), the totality of the circumstances are examined. According to the General Counsel, both the totality of the circumstances and an application of the statutory elements support a conclusion that the meeting between Clay and Heiser was a formal discussion.

In applying the statutory elements of a formal discussion, the General Counsel asserts that the meeting between Clay and Heiser constituted a discussion, regardless of whether Clay's or Heiser's description is accepted. More specifically, the General Counsel maintains that the term "discussion" is synonymous with "meeting" and no actual dialogue need occur for there to be a discussion within the meaning of the Statute. Thus, while Clay asserted that she let Heiser do all the talking and that she didn't respond to Heiser's comments, the General Counsel submits that even this minimal conversation constituted a discussion. The G.C. also urges that Heiser's version of the meeting be credited, in which Clay did engage in a lengthy exchange of views.

Turning to the element of formality, the General Counsel contends the meeting satisfied many of the criteria the Authority typically looks for in ascertaining whether a meeting is formal. In this regard, the General Counsel points to the fact that it was held away from Heiser's worksite, in Clay's office, and that Clay was Heiser's second-line supervisor and a member of the executive staff at Lewisburg. The General Counsel argues that although Heiser was given no advance notice of the meeting, it was not a casual encounter or spontaneous shop floor discussion but rather a meeting Heiser was ordered by Clay to attend. The General Counsel asserts that whether the meeting lasted 40 minutes or over 2 hours, it was of a length sufficient to indicate formality. Regardless of whether Clay came to the meeting with a written agenda, the G.C. submits that she indeed had a clear one, which was to discuss Heiser's ideas for the SMU, and Clay conceded that she knew in advance the issues Heiser would raise. The G.C. further argues that Heiser's account of the meeting should be credited; that Clay indeed had a written list of topics she worked from

during the meeting, and the topics she raised in the meeting mirrored those Heiser had discussed with Smith.

The General Counsel maintains the meeting was between a bargaining unit employee (Heiser) and representative of the Respondent (Clay) and concerned personnel policies and practices as well as general conditions of employment. In this latter regard, the General Counsel asserts Heiser and Clay discussed a number of concerns the officers assigned to SMU shared with respect to their working conditions.

As remedy, the General Counsel seeks a cease and desist order along with the posting of a notice to employees signed by the Warden.

The Respondent

The Respondent denies the alleged violation. It argues that the General Counsel failed to establish by a preponderance of the evidence that Clay held a formal discussion with Heiser.

With regard to the statutory elements of a formal discussion under section 7114(a)(2)(A), the Agency focuses on the lack of formality surrounding the Heiser-Clay meeting; it does not dispute (at least in its brief) that the meeting constituted a discussion between a management representative and an employee, or that it concerned a grievance, personnel practice or general condition of employment. In arguing that the meeting was not formal, the Respondent contends that Clay's relationship with correctional officers at the penitentiary was atypical of second-line supervisors and more akin to that of a first-line supervisor. In support of this claim, the Agency asserts that Clay was a highly visible supervisor who interacted daily with the correctional officers over many routine matters. Additionally, it cites the fact that correctional officers frequented Clay's office and the area immediately outside it, as it was adjacent to the lieutenants' office. The Respondent further notes that the meeting between Heiser and Clay was a one-on-one meeting, and because Heiser often had such conversations with Clay and Smith, he was unlikely to find it intimidating.⁸

8

This point ties into the Respondent's reliance in its brief on the test applied in analyzing alleged independent violations of section 7116(a)(1) of the Statute, which relies on determining whether, among other things, conduct might reasonably tend to intimidate employees. However, the complaint in this case alleges only a derivative, and not an independent, violation of section 7116(a)(1).

The Agency urges that Clay's account should be credited over that of Heiser, with respect to the circumstances such as the length of the meeting and what took place there. The Respondent asserts that Clay did not require Heiser to remain at the meeting, and it characterizes the meeting between the two as an informal encounter that lacked an agenda or the creation of any notes or minutes on Clay's part. Thus, in the Agency's view, the element of formality was not satisfied, and the Union did not need to be afforded the opportunity to attend the meeting.

Analysis

The general issue presented by this case is whether the meeting between Clay and Heiser constituted a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute.

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[.]

In order for a union to have the right to representation under section 7114(a)(2)(A), all the elements of that section must be met. There must be: (1) a discussion; (2) that 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) (GSA). 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.

With respect to the first element, the evidence establishes that the meeting between Clay and Heiser constituted a "discussion" within the meaning of section 7114(a)(2)(A). It is well-established in Authority precedent that the term "discussion" within the meaning of 7114(a)(2)(A) is synonymous with "meeting," and no actual dialogue or discussion need occur for the meeting to constitute a discussion under that section. *See, e.g., U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 51 FLRA 1339, 1343 (1996) (*FCI, Bastrop*). Here, there was clearly a meeting between Clay and Heiser. Even if it was somewhat one-sided with Heiser doing most of the talking, the amount of dialogue that may have taken place during that meeting is irrelevant to the determination of whether the meeting constituted a discussion under section 7114(a)(2)(A).

Neither party disputes that the meeting was between a bargaining unit employee and a representative of the Agency. It is clear from the record Heiser was a member of the bargaining unit and Clay was a second-line supervisor at the penitentiary.

With respect to the fourth statutory element, I find that some of the matters discussed at the meeting between Heiser and Clay did concern general conditions of employment within SMU.⁹ In particular, the issues of security; staffing and the lack of adequate staff to run the SMU program; the need to assign a property officer who would be responsible for monitoring and inventorying property of inmates entering or leaving the SMU; staff evaluations and performance awards; and the need for post orders and program statements, were matters affecting working conditions and were not limited in relevance to Heiser but extended to the other employees assigned to SMU as well. Thus, regardless of whether Heiser raised them purely on his own or with the endorsement of his fellow employees, the issues he presented concerning the working conditions in SMU had more general application within the SMU than just himself. *Cf. American Federation of Government Employees, Council 214 and U.S. Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 38 FLRA 309, 330 (1990) (the phrase "any personnel policy or practices or other general condition of employment" in section 7114(a)(2)(A) involves matters of more general scope than a discrete

9

While the Agency's post-hearing brief did not address this issue, its answer to the complaint denied the allegation.

action relating to an individual employee). The fact that the matters discussed were limited to SMU do not mean the meeting did not concern "general" conditions of employment. Authority precedent indicates that even though a meeting concerns a relatively small component of a bargaining unit or organization, it still meets the fourth element of section 7114(a)(2)(A). See *GSA*, 50 FLRA at 405 (discussions concerned conditions in a single office); *U.S. Department of Defense, Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 37 FLRA 952, 960 (1990) (*DLA, Tracy*) (meeting concerned general condition of employment of all warehouse employees); *Veterans Administration, Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts*, 37 FLRA 747 at 748, 753 (1990) (*VA, Brockton*) (meeting concerned changes in work schedules of certain employees in Dietetic Service of medical center).

This brings me to the question of whether the meeting was "formal," and this is indeed the central issue of this case. In determining whether a meeting is "formal," the Authority has identified the following factors as relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussion; (4) how the meeting was called; (5) how long the discussion lasted; (6) whether a formal agenda was established; and (7) the manner in which the discussion was conducted. See, e.g., *FCI, Bastrop*, 51 FLRA at 1343. However, as noted in *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 157 n.7 (1996), the enumerated criteria have varied at times. In some cases an eighth factor has been added: whether attendance at the meeting was mandatory. See *Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California*, 10 FLRA 115, 118 (1982). Indeed the list is intended merely to be illustrative, as the totality of the facts and circumstances of a case must be considered. *F.E. Warren, supra*, 52 FLRA at 157.

In this case, some of the facts point to formality. Specifically, Clay was Heiser's second-line supervisor, the meeting was conducted in her office, and it lasted for a significant period of time -- at least 30 to 40 minutes. See, e.g., *DLA, Tracy*, 37 FLRA at 961 (fact that supervisor conducting the meeting was the second-level supervisor of most of attendees was a circumstance that can indicate formality); *VA, Brockton*, 37 FLRA at 754 (fact that meeting is held in second-level supervisor's office away from workplace is a circumstance that can indicate formality); *FCI, Bastrop*, 51 FLRA at 1343, 1356 (fact that meeting lasted 25-30 minutes was a circumstance that can indicate

formality). Respondent's counsel engages in undue hair-splitting by suggesting that Captain Clay was more like a first-line supervisor because she spoke to correctional officers frequently, and that her office was close to an area frequented by employees. While Clay may have talked with employees frequently, she was nonetheless the supervisor of their supervisor, and a meeting with her was not a casual event. Moreover, her office was away from where Heiser normally worked, and it had a door separating it from the area where lieutenants and employees gathered. However, as I will discuss more fully below, other circumstances of this meeting do significantly mitigate the formality that is superficially suggested by the discrepancy between Heiser's and Clay's rank.

Although the fact that Clay called the meeting and required Heiser to attend would tend to suggest formality, I find the circumstances present in this case dilute their effect as indicators of formality. As I discussed earlier, Clay called the meeting only because Heiser had initiated a meeting with the Warden and raised issues that the Warden asked Clay to follow up on. It was Heiser who believed that the SMU could be managed better and who had suggestions for doing so; it was Heiser's ideas which the Warden asked Clay to listen to and evaluate. Although Clay called Heiser and his lieutenant on the morning of April 5 and told Heiser to come to her office, she was only doing so to give him the opportunity to be heard, as he had sought. Moreover, while Heiser initially resisted coming to Clay's office and sought a Union representative, it was only because he mistakenly believed he was in some sort of trouble. Once Clay made it clear to Heiser that she simply wanted him to explain the ideas he had presented earlier to the Warden, it was Heiser, not Clay, who determined the course of the remainder of the meeting. In other words, this was not a meeting called by management for a management-driven purpose. In this regard, the circumstances here are distinguishable from those present in *FCI, Bastrop*, in which the warden directed a subordinate manager to meet with an employee and his first-level supervisor to resolve a conflict between the two. At that meeting, the manager then counseled both the employee and the supervisor concerning their behavior. In *FCI, Bastrop*, therefore, the meeting was called to resolve a disciplinary problem as identified by the warden. In our case, in comparison, neither Clay nor Smith had any direct motivation to meet with Heiser, except to allow Heiser to express his concerns and ideas. Heiser's earlier meeting, with the Warden, would not be considered a formal discussion within the meaning of 7114(a)(2)A). And the meeting called by Clay on April 5 was essentially a continuation of that initial meeting between Heiser and the Warden.

Although Clay did have a purpose for the meeting (to listen to the ideas that Heiser had sought to convey to Warden Smith), she did not have an agenda. Under Authority precedent, "purpose" is distinguishable from "agenda," and the existence of the former does not establish the existence of the latter. See, e.g., *United States Department of Veterans Affairs, Northern Arizona Veterans Affairs Healthcare, Prescott, Arizona*, 61 FLRA 181, 185 (2005) (VA, Prescott). Rather, the "agenda" followed was that of Heiser. Although the meeting was not impromptu, neither was it called in advance. The meeting was premeditated to the extent Clay was acting in response to Smith's direction that she meet with Heiser and listen to his ideas; however, the actual calling of the meeting was not planned in advance by Clay but occurred when she heard Heiser on the radio and remembered the Warden's request.

As for the circumstances of the meeting itself, I have credited Clay's testimony that no notes were taken or minutes prepared. As I have noted, after reassuring Heiser that he was not at risk of disciplinary action and advising him she was there to hear the ideas Heiser had previously tried to present to the Warden, Clay played a largely passive role at the meeting and mainly listened to Heiser. While the meeting did last for a rather long time (30 to 40 minutes), this was due to the issues that Heiser wished to pursue, not due to any action on the part of Clay, who wished to keep it as short as possible. Moreover, the meeting was a one-on-one session attended only by Heiser and Clay, a factor that generally (although not always) suggests lack of formality. See VA, Prescott, 61 FLRA at 185; *Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II*, 29 FLRA 1205, 1208-09 (1987) (SSA, Region II). Finally, it appears that any report Clay made to Smith regarding the meeting was minimal, and verbal in nature rather than written.

The Authority has recognized that discussions having some of the indicia of formality are not necessarily formal. See, e.g., VA, Prescott, 61 FLRA at 186. In this case, although there were some factors present that suggest formality, I find when the totality of the facts and circumstances are considered, the meeting was essentially an unstructured, one-on-one meeting that occurred primarily at the initiative of Heiser himself. I put particular significance on Heiser's initiating the prior meeting with the Warden, as this frames the context of the later meeting with Clay, and it further reflects that Heiser had no hesitation about expressing his views privately, even with

the highest authority in the penitentiary. This dilutes the formality otherwise suggested by the fact that he was meeting with his second-level supervisor in her private office. The Authority has similarly given significant weight to the fact that the employee initiated the meeting; see *VA Prescott*, 61 FLRA at 185; *United States Department of Energy, Rocky Flats Field Office, Golden, Colorado*, 57 FLRA 754, 755 (2002); *Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region*, 9 FLRA 48, 50 (1982).

The distinction between employee-initiated and management-initiated meetings is relevant to the "intent and purpose" of section 7114(a)(2)(A), a "guiding principle" in deciding such cases. When managers initiate meetings with employees (other than routine "shop floor" conversations), they are more likely to be considering taking a specific personnel action, and it is in those situations that a union has an important role to play. But when an employee enters a manager's "open door" to make suggestions, the likelihood of agency action is more remote, as is the union's role. This is not, of course, a rigid rule, but simply a factor to be considered among the other formality criteria.

Viewing all the facts and circumstances as a whole, I find the discussion between Clay and Heiser on April 5, 2004, was not a formal one. Because the discussion was not formal, the meeting does not satisfy all of the elements necessary to constitute a formal discussion within the meaning of section 7114(a)(2)(A) of the Statute. Accordingly, there was no obligation on the part of the Agency to afford the Union the opportunity to be represented, and I conclude that the Respondent did not violate the Statute as alleged. I recommend that the Authority adopt the following order:

ORDER

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

Issued, Washington, DC, June 14, 2006

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RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. BN-CA-04-0410, were sent to the following parties:

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