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

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547, AFL-CIO Charging Party	Case Nos. DE-CA-00721 DE-CA-00767

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 12, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

RICHARD A. PEARSON
Administrative Law Judge

Dated: February 10, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: February 10, 2003

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

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

Respondent

and Case Nos. DE-CA-00721
DE-CA-00767

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1547, 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 transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-19
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1547, AFL-CIO Charging Party	Case Nos. DE-CA-00721 DE-CA-00767

Phillip G. Tidmore, Esq.
For the Respondent

Paul Bell, Representative
For the Charging Party

Hazel E. Hanley, Esq.
For the General Counsel, FLRA

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Statement of the Case

On December 21, 2000, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of the Denver Region, issued a Consolidated Complaint and Notice of Hearing alleging that the Department of the Air Force, Luke Air Force Base, Arizona (the Agency/ Respondent) violated section 7116(a)(1), (2) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by making a coercive statement to an employee, discriminating against employees for protected activity, and changing employees' conditions of employment without bargaining to the extent required by law.

A hearing was held at Luke Air Force Base, Arizona on February 21 and 22, 2001. The parties were represented and

afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Respondent and the General Counsel filed timely briefs. 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.1

Findings of Fact

The American Federation of Government Employees, Local 1547 (the Union), is the exclusive representative of a unit of employees at Luke Air Force Base. The Union and the Agency are parties to a collective bargaining agreement (CBA) that has been in effect at all relevant times. Brock Henderson, a fire inspector and unit employee, has been the Union president at all times relevant herein. Robert Smith is Assistant Fire Chief and Mr. Henderson's first-line supervisor; Hoyd Sanders is the Fire Chief and Mr. Smith's supervisor; and Lieutenant Colonel David Brewer is the Commander, 56th Civil Engineering Squadron, and Mr. Sanders' supervisor. The Civilian Personnel Office (CPO) provides labor relations advice and support to the Agency's supervisors and management officials.

Underlying the events of this case is a long-running dispute between Mr. Henderson and Mr. Smith over how official time is requested, granted and used. Article V of the CBA is titled "Union Representation," and Section B of that article addresses the subject of official time for Union representatives. Paragraphs 1, 2 and 9 of Section B explain the types of situations in which official time is authorized, and Paragraph 3 specifies the number of representatives authorized. The following additional portions of Article V, Section B are quoted in their entirety, as they are most closely applicable to the instant case:

> 4. The Union representative must provide to their supervisor information identifying the purpose of the request (i.e., consultation, grievance, etc.) and location (organization) to be visited and the actual amount of official time spent upon return

1 The day before the hearing, the Respondent filed a motion to dismiss portions of the complaint, contending that the charges were filed outside the six month limit of § 7118 of the Statute. The motion was discussed at the opening of the hearing and I withheld ruling on the motion. For reasons discussed later in this decision, Respondent's Motion to Dismiss is denied.

to their work area. In addition, when a Union representative desires to visit a unit employee or a management official on official Union business, the Union representative must secure advance permission from the employee's immediate supervisor, or arrange a mutually agreeable time to meet with the management official, prior to entering either individual's work area.

5. The time period requested by the employee or the Union representative must not adversely impact the accomplishment of their organization's operations. If the granting of such requests would result in such a situation, the employee and their immediate supervisor will attempt to mutually agree to a time period as close as possible to the one originally requested. Absent mutual agreement, such requests will be granted no later than 24 hours from the time of the original request except when extenuating circumstances would adversely impact the organization's operations and prevent their release.

6. Denial of official time will be based on mission requirements or in accordance with applicable law. Upon request, the Labor Relations Officer or designee will provide the Union the reason for denial in writing.

. . .

8. The Union president and treasurer will be granted official time as follows:

a. The Union president will be allowed 50 percent official time during any pay period; such official time will be used only during the time the employee otherwise would be in a duty status. The following will not be charged toward the president's allotment of official time:

1) Preparation for and participation in negotiations
2) Participation in local wage survey
3) Union-sponsored training
4) Labor-Management training
5) Preparation for third-party proceedings
6) Participation in third-party proceedings
7) Management-sponsored meetings

b. Official time for preparation will be granted in any amount the parties agree to be reasonable, necessary, and in the public interest.

. . .

10. It is agreed that Union representatives will guard against the use of excessive time in performing duties considered proper by this Agreement. [Jt. Exh. 1 at 8-9]

A. **Events Prior to August 2000**

In order to effectuate Article V, Section B(8) of the CBA, Henderson's workday was structured so that he reported for work at 7:00 a.m. on most days, performed his duties for the Respondent until 11:00 a.m., and then performed his Union duties the remainder of the day.[2] While he did not have to account for his activities during the latter half of the day, he was required to obtain permission and account for his use of official time in the morning for the additional purposes listed in Paragraph 8(a)(1)-(7) and Paragraph 9. In actual practice, Mr. Henderson's use of official time steadily increased above the 50% threshold from January 1998 (when Henderson became Union president) to August 2000; at the hearing, he testified that he had been spending nearly 100% of his time on official time. (Tr. 42). This resulted in numerous conflicts with his supervisor, Mr. Smith, who felt that Henderson's increasing use of official time was preventing him from performing his duties as a fire inspector.

A.A **Discussions of Henderson's Performance**

One example of this conflict was a Performance Discussion Record issued by Smith on October 19, 1999, documenting that he advised Henderson that "due to outside influences and other responsibilities for which he is charged," Henderson was "not performing all required duties within his performance plan." (G.C. Exh. 32). Henderson objected to the issuance of this document and cited other work that he had been performing, but Smith did not relent. Smith issued another Performance Discussion Record on February 7, 2000, similarly citing several areas in which Henderson was not fully meeting his performance objectives.

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2 Henderson and other fire inspectors work a 56-hour work week. Thus, Henderson's additional 16 hours a week were divided evenly between his regular work duties and union work.

(G.C. Exh. 6). The February 7 meeting was highly contentious. When called to Mr. Smith's office, Mr. Henderson entered, shut the door, and said to him, "between me and you and the walls, 'fuck you.'" (Tr. 289). Smith made a note of Henderson's profanity in the supervisory file he keeps on each employee, but he took no disciplinary action. On the Performance Discussion Record, Henderson noted his disagreement and wrote that "[m]y supervisor[']s lack of knowledge and acceptance of the obligations I have toward Labor/management is the only issue that inhibits the execution of my responsibilities." (G.C. Exh. 6).

Mr. Henderson filed a grievance over the February 7, Performance Discussion Record and related matters. At the first step of the procedure, Smith agreed to remove some older documentation from Henderson's file, but did not agree to remove the Performance Discussion Records of October 19, 1999 and February 7, 2000, or the notation regarding Henderson's use of profanity. Mr. Smith did, however, issue a corrected version of the February 7, 2000 memorandum in order to address certain issues. Among other things, Mr. Smith changed the language that indicated that Mr. Henderson would only be rated on duties performed to read that Mr. Henderson would only be rated on duties which he is actually assigned.

After receiving Mr. Smith's first step response, Mr. Henderson elevated the grievance to Colonel Brewer. Colonel Brewer's response provided no substantive relief but could be appropriately characterized as conciliatory. The response recognized that Henderson had been granted official time and that he could not be held responsible to perform mission related tasks during those times. Colonel Brewer further stated that Henderson's performance "will be based on a reasonable expectation of work you should have performed during the hours that you are present for Air Force duty." (G.C. Exh. 10). However, Colonel Brewer also emphasized that management's primary goal was to execute mission requirements. Colonel Brewer closed his response by stating that it was his "desire . . . to resolve issues in a work environment that promotes the best interest of all parties while executing our mission" and that he "look[s]

forward to developing workable solutions that are equitable to all parties." (*Id.*)[3]

2. Official Time Discussions

As discussed above, Mr. Smith was concerned that Mr. Henderson's extensive use of official time was adversely affecting the operation of the fire inspection office. According to Smith, he frequently reminded Henderson of the need to follow the contractual provisions for requesting official time in advance; such reminders often occurred in conjunction with Henderson's regular performance reviews. The first such meeting occurred on September 3, 1998, about 8 months after Henderson became Union president, and subsequent meetings were held in October 1998, April 1999 and May 1999. Although Smith did not testify that he specifically referred to the CBA *per se* in these meetings, he stated that they covered "essentially the information [in Article V, Section (B)(4)]." (Tr. 280)[4]

These discussions reflected a disagreement between Smith and Henderson concerning the interpretation and application of Article V, Section B to Henderson's situation. Smith and the Agency insisted that when Henderson sought to use official time in excess of the 50% automatically allotted to him by Section B(8)(a), he must follow the procedures specified in Section B(4), (5) and (6). Henderson and the Union insisted that the restrictions of Paragraphs (4)-(6) were inapplicable to the Union

[3] These Performance Discussion Records are not formal performance appraisals; rather, they are used to inform employees how they are doing throughout the course of the year. G.C. Exh. 11, the annual appraisal of Henderson's performance prepared by Mr. Smith for the year ending June 1, 2000, reflects that Henderson was rated as "exceeding" the requirements of three performance elements and was not rated in the other elements.

[4] To the extent Mr. Smith's and Mr. Henderson's testimony differ with respect to these meetings, I credit Mr. Smith. Smith's testimony about his meetings with Henderson was detailed and consistent throughout, while Henderson's was at times evasive, especially when it dealt with management's attempts to impose the procedural requirements of the CBA on him. When asked whether Smith had discussed the CBA provisions, Henderson replied, "The answer to the question is 'no'. Mr. Smith has never taken and agreed with me to take the contract out and talk about it." (Tr. 201). Only when pressed, did Henderson concede that Smith had discussed the substance of the relevant CBA provisions. (Tr. 201-02).

president, and that he could use official time whenever he felt it was necessary, absent a mission-related emergency. (Compare Tr. 202, 209 and 276-78, 287.) More fundamentally, Smith and Henderson disagreed as to whether Henderson's use of more than 50% official time excused him from performing his fire inspection duties. Smith expected Henderson to fit his additional Union work, above the 50% threshold, so that he could perform his regular work duties. Henderson believed that his performance of legitimate Union work (as specified in paragraphs 8(a)(1)-(7) and 9) excused him from performing his fire inspection duties, even if he spent 100% of his work week on official time (as he has indeed done).

Nonetheless, by his own admission, Smith did not consistently enforce the contractual requirement that official time be requested and approved in advance. Both Henderson and Smith described how the procedures for obtaining approval of official time changed on numerous occasions between January 1998 and August 2000. At some point prior to January 2000, a practice developed that, when Mr. Smith was not in his office, Mr. Henderson would leave a yellow post-it note on Smith's computer, informing him that he was using official time and of the nature of his work. According to Smith, that procedure became unsatisfactory because Henderson would not even attempt to personally contact him to request official time, but instead would leave notes before Smith's arrival in the morning. According to Smith, in these instances Henderson was "essentially granting his own official time." (Tr. 282).

On January 31, 2000, Smith met with Henderson and informed him that he would no longer accept post-it notes regarding official time. He also told Henderson that all requests for official time above the threshold 50% must be made at least 24 hours in advance and must be made in person to Smith. No mention was made as to what Henderson was to do if Smith was unavailable to answer Henderson's requests for official time. At that meeting, Henderson was also informed that he was expected to perform his duties as a fire inspector. Further, in the event Henderson was not able to complete his duties in a timely manner, he was to inform Mr. Smith in order to develop alternate plans. These matters were confirmed in a memorandum for record prepared by Smith and received by Henderson that same day. (G.C. Exh. 29).

According to Smith, after the January 31, 2000 meeting, he went out of his way to make himself available to Henderson at the start of the morning shift to discuss official time requests. Subsequently, finding that this caused him to miss several staff meetings, Smith told

Henderson that if Smith was out of the office, Henderson could request official time by phoning him. Sometime before August 2000, according to Smith, he and Henderson agreed on an arrangement whereby Henderson would be granted official time as needed, but Henderson would have to keep him informed by e-mail each day of his whereabouts. Smith testified that Henderson also agreed to arrange the use of official time in a manner that would allow him to complete his assigned fire inspection tasks, which at that time primarily involved work related to an upcoming Inspector General (IG) audit. (See G.C. Exh. 13). Henderson denied making such agreements. According to Henderson, after January 31, 2000, he stopped using post-it notes to inform Smith of his activities; instead, he telephoned Smith when the supervisor was not in the office, and if Smith was not reachable by telephone, he simply left the office on his own and notified Smith subsequently in writing. (Tr. 127-29).

B. The Events of August 2000

On August 3, 2000, Smith e-mailed Henderson to remind him that he needed the information on Henderson's official time use and that he needed to know the status of Henderson's work assignments. Smith closed the e-mail by saying, "I'm following my end of our agreement, you need to make arrangements to meet your end. Step up to the plate!!!" (G.C. Exh. 13). Smith sent a copy of the e-mail to the Fire Chief, his first-line supervisor.

Mr. Henderson responded in a lengthy and sarcastic e-mail. Initially, he denied that he had made "[any] agreement accept [sic] the General Agreement." (G.C. Exh. 14). To the extent that there was a verbal agreement, Henderson stated that it was only to inform Smith of his official time use, by e-mail or post-it note, in time for the completion of time cards. He accused Smith of rarely being available at the start of the workday and that this was "not an acceptable practice if you expect me to report my Union activities to you. **'I will NOT chase you down.'**" *(Id.)* (emphasis in original). With regard to his work assignments, Henderson claimed that he had agreed to complete them, "time permitting[.]" He claimed that he had not had time to perform his fire inspection duties because of Union business, specifically negotiation of revisions to instructions issued by the Department of the Air Force. "If your requirements for my services are greater than those of the United States Air Force, please officially inform your superiors and myself so all the parties may be aware of your demands. I'm sure the Air Force will postpone implementation of all the AFI's they wish to implement so I can get your work accomplished." With regard to Smith's

admonition that Henderson make arrangements to "meet [his] end" and "[s]tep up to the plate," Henderson claimed that he routinely put in more than a normal workday "based on the Union's requirements to react to Management's actions." Henderson further stated, "If you have given me an order, perhaps I missed, or misunderstood it. Please make yourself clear. Once your wishes are clear I and the Union will take appropriate action." In closing, Henderson asked Smith to stop harassing him for exercising what he has "a legal right and obligation to do (REPRESENT THE BARGAINING UNIT EMPLOYEES)." *(Id.)* (Emphasis in original). Mr. Henderson sent a copy of this e-mail to the Fire Chief, as well as Colonel Brewer, his third-line supervisor, and the base's labor relations staff in the CPO.

On Saturday, August 8, 2000, Henderson sent Smith another e-mail with measurements of the buildings for which he had been asked to calculate occupant load. In the e-mail, Henderson stated that he had not had time to calculate the occupant loads. He further stated that if he was required to work on Saturdays, he expected to be paid overtime. Asking Smith, "Is this what you want? Perhaps you have been successful in requiring the Air Force to postpone their changes?", Henderson closed by echoing Smith's words, "Step up to the plate!!!" (G.C. Exh. 15).

After receiving Henderson's August 3 e-mail, Smith had telephoned Henderson to set up a meeting for August 11, which a labor relations representative from CPO would also attend. On August 10, however, Smith went to Henderson's office and told him that the meeting had been cancelled, and that instead he would be given a memo the next day outlining the requirements for obtaining official time. At this time, Smith also said that if Henderson's e-mail of August 3 had not been copied to Lieutenant Colonel Brewer, "I would not be in a position to do what I was about to do[.]" (Tr. 301). In that regard, he told Henderson that they had always been able to work things out in the past, but this time he was going to put Henderson's reporting obligations in writing, to avoid any misunderstanding of the requirements. At some point in that conversation, Smith also stated that Henderson was receiving too many Union-related telephone calls at his workstation.

After this conversation, and in anticipation of Smith's memo concerning official time procedures, Henderson e-mailed the base labor relations staff on August 10, advising them that he viewed Smith's imminent action as a reprisal for Henderson's Union activity, and that he intended to file an unfair labor practice charge, unless they "do something far-reaching." (G.C. Exh. 17).

As expected, Smith called Henderson into his office on the morning of August 11, 2000, and handed him a letter outlining his expectations regarding duty assignments and official time. Specifically, the letter stated:

> 1. As a Fire Protection Inspector, you are expected to perform the primary duties within the fire department that I assign you.
>
> 2. Effective immediately you will report to the fire prevention office at the start of each day at 0700. Requests for official time in excess of the contract approved fifty percent (50%) must receive my approval. Your request can be made orally or in writing. I need to know the proposed time of departure, estimated time of return, where you can be reached and a brief description of the purpose of the additional official time. Upon your return, I will need an actual account of the official time used. Granting of additional official time will be evaluated on a case by case basis taking into consideration mission requirements as well as provisions of the approved union contract contained in Article V as they apply.
>
> 3. In the event I am conducting fire department business away from my office, you are to resume the performance of assigned duties until you receive my permission to depart the duty station for additional official time. In those instances that I am not available ie; leave, TDY, etc, you must submit your requests for official time to and receive approval from the fire chief. If the fire chief is unavailable due to annual or sick leave, you must submit your requests to his designated representative. [G.C. Exh. 18].

After reading the letter, Mr. Henderson attempted to present Smith with a demand to bargain, which Henderson had prepared in advance. Mr. Smith refused to accept the bargaining demand, saying that he was conducting a discussion with Henderson in his role as a fire inspector and not as Union president. According to Henderson, and not specifically denied by Smith, Smith also said that Henderson needed to understand where his paycheck came from and to set his priorities. Henderson responded by saying that he would file his bargaining demand with the labor relations staff and asked to be released to do so. The request was granted, and Henderson faxed the demand to the labor relations staff.

(G.C. Exh. 19). Henderson never received a response to this bargaining demand from Smith or any other management official.

Discussion and Conclusions

A. Positions of the Parties

1. The Motion to Dismiss

The Respondent moved to "dismiss for lack of jurisdiction" that portion of the complaint alleging a failure to bargain over changes in conditions of employment. According to Respondent, the General Counsel alleged that the Respondent unilaterally changed conditions of employment when Mr. Smith prohibited Mr. Henderson from using yellow "post-its" to inform him of his official time. Noting that this action occurred on January 31, 2000, the Respondent contends that the ULP charge filed on September 1, 2000, is outside the 6-month time limit found in § 7118(a)(4)(B) of the Statute. In response to the General Counsel's contention that the Respondent's motion should be rejected as untimely filed, the Respondent contends that the motion concerns the Authority's jurisdiction and may be raised at any time.

The General Counsel first contends that the issue of timeliness is an affirmative defense, not a jurisdictional matter; therefore, under the Authority's Rules and Regulations it should have been raised as a prehearing motion at least 10 days before the hearing. 5 C.F.R. § 2423.21(b)(1). In this regard the General Counsel states that the motion was filed on the first day of hearing, and it therefore urges that the motion be dismissed as untimely. In any event, the General Counsel argues that the motion is without merit. The General Counsel notes that the change in working conditions which forms the basis of the ULP complaint was not the January 2000 prohibition on post-it notes, but rather Mr. Smith's memorandum of August 11, 2000. Accordingly, the September 1, 2000 ULP charge was timely.

2. The Change in Working Conditions and Failure to Bargain Charge

The General Counsel contends that Mr. Smith's memorandum of August 11, 2000 effectuated a change in working conditions -- specifically, a change in the procedures relating to the use of official time. According to the General Counsel, matters relating to official time are fully negotiable, and by implementing new procedures without providing the Union an opportunity to bargain, the Respondent violated § 7116(a)(5) of the Statute. In response to the Respondent's argument that the August 11 memorandum merely restated the official time requirements of the CBA, the General Counsel first argues that Article V,

Section (b)(4) of the CBA does not apply to the Union president. Alternatively, the General Counsel contends that even if that provision applies here, the August 11 memorandum established procedures that were inconsistent with the CBA and with Smith and Henderson's existing practices regarding official time.

Citing the provisions of the CBA relating to official time for Union officials, the Respondent insists that Mr. Smith followed those provisions in dealing with Mr. Henderson, and that it therefore had no obligation to bargain over the August 11, 2000 memorandum. It further denies that the memorandum resulted in any change in conditions of employment. According to the Respondent, the August 11 memorandum was just one more in a series of attempts by Mr. Smith to enforce Article V of the CBA and to ensure that Henderson's use of official time did not interfere with the performance of Henderson's fire inspection duties.

3. The Discrimination Charge

The General Counsel also alleges that the Respondent violated § 7116(a)(2) of the Statute by changing Henderson's conditions of employment (i.e. procedures for requesting official time) in retaliation for activities protected by the Statute. In support of its position, the General Counsel relies not only on the Agency's awareness of Henderson's extensive activity as a Union representative, but also on Smith's statement that he would not have issued the August 11 memorandum if Henderson had not sent copies of his own August 3 and 8 e-mails to the Fire Chief and the Squadron Commander. In addition, the General Counsel contends that the August 11 memorandum was not a legitimate attempt to accommodate the conflict between an employee's entitlement to official time and an agency's need to manage its work effectively.

The Respondent denies that any action was taken in retaliation for Henderson's protected activity. In that regard, the Respondent contends that Smith has a history of accommodating Henderson's Union activity. However, Smith and the Agency had a legitimate, nondiscriminatory interest in requiring Henderson to perform his assigned fire inspector's duties, and the steps taken to regulate Henderson's official time were appropriate and necessary.

4. The Coercion Charge

The General Counsel alleges that Smith's refusal to recognize Henderson's role as Union president when Henderson

presented a demand to bargain over official time interfered with, restrained, or coerced Henderson in the exercise of his rights under the Statute. In addition, the General Counsel contends that Smith's statement that Henderson needs to understand where his paycheck came from also interfered with, restrained, or coerced Mr. Henderson in the exercise of his rights under the Statute.

The Respondent denies these allegations; it cites the lack of union animus on Mr. Smith's part and argues that his words, in proper context, did not have a coercive effect.

B. Analysis

1. The Motion to Dismiss

The General Counsel argues that Respondent's Motion to Dismiss was untimely. Although the General Counsel is correct that the six month time period for filing a ULP charge, prescribed in § 7118(a)(4) of the Statute, is not a jurisdictional requirement but rather a statute of limitations that must be raised as an affirmative defense, the General Counsel is incorrect in asserting that the defense must be raised in (or prior to) prehearing disclosure. In *U.S. Army Armament Research Development and Engineering Center, Picatinny Arsenal, New Jersey*, 52 FLRA 527, 534 (1996), the Authority held that affirmative defenses must be raised prior to the close of the hearing. The Respondent's motion, therefore, was timely.

On its merits, however, the Motion to Dismiss must be denied. As the General Counsel notes, the event that formed the basis for the refusal to bargain charge and the complaint was Mr. Smith's memorandum of August 11, 2000. Indeed, the Henderson-Smith meeting of January 31, 2000, concerning the use of post-it notes, was not even mentioned in either the Union's unfair labor practice charge (G.C. Exh. 1(b)) or the General Counsel's Consolidated Complaint and Notice of Hearing (G.C. Exh. 1(c)). Since the complaint focused on the events of August 11, 2000, and the charge was filed on September 1, 2000, the complaint was proper under § 7118(a)(4).

2. The Change in Working Conditions and Failure to Bargain Charge

It is well established that before implementing a change in conditions of employment affecting bargaining unit employees, an agency is required to provide the exclusive representative with notice of, and an opportunity to bargain over, those aspects of the change that are within the duty

to bargain. *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas,* 55 FLRA 848, 852 (1999). Parties must then "satisfy their mutual obligation to bargain before implementing changes in conditions of employment." *Id.* at 852.

Terms and conditions of employment are typically embodied in a collective bargaining agreement, but they may also be established by the parties' practice or other form of informal or tacit agreement. *Norfolk Naval Shipyard*, 25 FLRA 277, 286 (1987); *Department of the Navy, Naval Underwater Systems Center, Newport Naval Base*, 3 FLRA 413 (1980). Indeed, once a practice relating to a condition of employment has become established, it cannot be unilaterally changed, "even if the condition established by practice differs from the express terms of the parties' collective bargaining agreement." *U.S. Patent and Trademark Office*, 39 FLRA 1477, 1482-83 (1991). In order to find that a condition of employment has become established by a past practice, the General Counsel must show that the practice was "consistently exercised for an extended period of time, with the agency's knowledge and express or implied consent." *U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky*, 42 FLRA 137, 142 (1991).

Turning to the specifics of this case, all parties agree that procedures for the granting and use of official time are conditions of employment. *See, e.g., U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana*, 36 FLRA 567, 570 (1990). It is also undisputed that the Union requested to bargain over the official time procedures contained in the memorandum of August 11, 2000, and that the Respondent refused to do so. The Respondent defends its refusal to bargain on the ground that nothing had occurred to trigger an obligation to bargain. According to the Respondent, it had already negotiated rules for the use of official time in the CBA; Mr. Smith was merely following the CBA in his dealings with Henderson in August 2000; and thus no change in working conditions had been made.

Having reviewed the testimony of the witnesses, the pertinent exhibits, and the contractual provisions, I agree with the Respondent that Smith's August 11, 2000 memorandum did not change the terms or conditions of employment for Mr. Henderson or for Union officials, and that it did not violate section 7116(a)(1) or (5). By issuing the August 11 memo, Smith was not seeking to modify either the terms of the CBA or any established past practice; rather, he was seeking to apply and enforce the provisions of the contract

applicable to the use of official time, as he had been trying to do for the past two years. Therefore, the Respondent was not obligated to bargain over the contents of the August 11 memo.

First of all, the evidence amply demonstrates that for almost two years, Smith and Henderson had been engaged in a tug of war concerning both the procedures for Henderson to obtain permission for official time and the extent of Henderson's official time. On the latter issue, Smith and Henderson fundamentally disagreed as to whether the CBA gave priority to Henderson's official job duties or to his Union representational duties. The contract entitles Henderson to use official time to perform a wide range of Union duties, even in excess of 50% of his work time. On the other hand, the contract stipulates that the time requested for official time "must not adversely impact the accomplishment of their organization's operations", and that denial of official time "will be based on mission requirements or in accordance with applicable law." Henderson viewed these provisions as permitting him to use up to 100% of his time for Union functions, so long as this didn't prevent Luke Air Force Base from "flying airplanes" (Tr. 140), while Smith interpreted the contract as giving a supervisor much broader discretion to deny official time. On the procedures for using official time, Henderson felt he was entitled to simply leave the office on his own for Union business whenever he couldn't find Smith, and that he was not required to provide Smith with any advance notice of his departures. At times, Smith allowed Henderson to come and go as he pleased, as long as he left a note advising Smith of what he was doing, but at other times he imposed requirements on Henderson in order to use official time. Smith clearly felt that Henderson's use of official time was excessive and was adversely affecting his department's ability to perform its functions, but his methods for dealing with this problem fluctuated back and forth between 1998 and 2000. Henderson would sometimes comply with Smith's restrictions, but at other times he would simply ignore them, as he admitted in his own testimony.

In light of these facts, it is impossible to find that the parties ever established any "past practice" concerning the procedures for using official time. As I noted above, the case law on this issue requires that a practice must be consistently and mutually exercised over an extended period of time in order to become established as a condition of employment. The General Counsel argues that there was a three-year practice of Henderson being allowed to leave the office without permission, if Smith was unavailable, but the record belies this. The most obvious precedent to the

contrary is Smith's memo of January 31, 2000, in which Henderson was told that he could not take official time without making a face-to-face request to Smith at least 24 hours in advance. Additionally, Smith testified of several earlier meetings with Henderson in 1998 and 1999, in which he told Henderson that his excessive use of official time was interfering with the functioning of the fire inspection office, and in which he tried to set rules for Henderson to obtain permission before leaving the office. While Henderson initially denied that Smith restricted his use of official time in 1998 and 1999, his testimony here was inconsistent and less than credible. He conceded on further questioning that Smith tried to impose restrictions on him and said that he simply ignored those restrictions when they were inconvenient to him. While Smith's methods of dealing with Henderson between 1998 and 2000 were indeed inconsistent and likely encouraged Henderson to ignore rules he didn't like, this only underscores the lack of any consistent "past practice" on which the Union can rely as a condition of employment.

Moreover, it is evident that both Smith and Henderson viewed the CBA provisions on official time as the underlying basis for their respective actions. Henderson put this explicitly in his August 3 response to Smith's memo of that same date, when Henderson said, "We have no agreement accept [sic] the General Agreement." (G.C. Exh. 14). With respect to their earlier meetings in 1998 and 1999, Henderson denied that Smith had ever opened up the contract and cited the rules on official time to support his actions, but Henderson conceded that Smith had discussed the substance of the CBA provisions on several occasions. Thus, both men felt that the contract entitled them to pursue their respective courses of action, and neither man viewed his own position as an attempt to modify the contract.

The General Counsel argues that, even if Smith's August 11 memo didn't violate past practice, it modified the CBA by adding restrictions on official time use that are not explicitly contained in the CBA. In this regard, I note that there is a difference between violating a contract and modifying it. The Authority has long held that the mere violation of a contractual provision does not constitute an unfair labor practice, unless the violation is so significant that it represents a repudiation of the contract. *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218 (1991). However, the Authority has also held that it is sometimes necessary to determine the meaning of a CBA provision when a respondent claims, as a defense to its alleged interference with a statutory right, that the

CBA provision permitted its actions. *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091, 1103 (1993)(*IRS*). In the case at hand, Mr. Smith and the Agency were not seeking to modify Article V of the CBA by imposing the rules for obtaining official time that were contained in the August 11 memo. They were simply seeking to apply the provisions of that article to the specific facts presented by Mr. Henderson's use of nearly 100% of his work time on Union matters, which they perceived as harmful to the functioning of the fire inspection office. While Henderson and the Union might argue that the August 11 memo exceeded the boundaries set out in Article V, the restrictions imposed on Henderson did not constitute a modification of the CBA or a change in overall working conditions.

Even applying the *IRS* analysis to the parties' opposing views of the official time provisions of the CBA, I conclude that the restrictions contained in the August 11 memo were a legitimate exercise of the Agency's rights under Article V, Section B. First, I note that traditional rules of contract interpretation require that the provisions of Article V, Section B be viewed as a whole. Contrary to the urging of the General Counsel, paragraph 8 (the portion specifying an automatic 50% official time for the Union president, plus additional official time for certain matters) cannot be read in isolation from the other paragraphs of Section B that address general rules for Union representatives. Therefore, paragraphs 4 (which sets rules for requesting and obtaining permission for official time in advance from a supervisor), 5 and 6 (which set limits on the amount of official time) are equally applicable to the Union president, at least as long as they don't contradict a more specific provision concerning the Union president in paragraph 8. Nothing in paragraphs 8 and 9 suggests that the president is immune from the specific rules of paragraphs 4-6.

It is true, as the General Counsel contends, that Smith's August 11 memo imposed specific requirements on Henderson that are not explicitly contained in the CBA. The portion of Section B that is applicable here is paragraph 4. The August 11 memo required Henderson to report for work at 7:00 a.m. before leaving on official time, and to continue working until he obtained permission to leave from either Smith or the fire chief. It also required Henderson to specify his proposed time of departure and estimated time of return, whereas the contract simply requires a Union official to specify the location he intends to visit and, upon return to work, the actual amount of official time used.

These differences, however, must be understood within the context of the Smith-Henderson relationship -- particularly the repeated attempts by Smith to prevent Henderson's official time from swallowing up his fire inspection duties, and Henderson's history of avoiding Smith and departing without explicit permission. Smith was not attempting to modify the CBA itself, but rather to apply the contractual limits on official time to Henderson's particular situation. The contract requires that Union representatives obtain advance permission from their supervisor before using official time, and it specifies that "[t]he time period requested . . . must not adversely impact the accomplishment of their organization's operations." Section B(5). Henderson had often left the office on official time before Smith arrived there in the morning, and since Henderson's official time was often 100% of his work time, this meant that Smith would never see him during the day. Smith imposed the restrictions of the August 11 memo to ensure that Henderson obtained express permission before taking official time and that he performed essential portions of his workload, not to change the rules for all Union officials.

I cannot accept Henderson's interpretation of the CBA, *i.e.*, that official time requests can only be denied when it would prevent the Air Force from performing its ultimate mission of "flying airplanes." Such a reading of Article V, Section B(5) and (6) would simply nullify the language of those provisions. A Union representative working in the bargaining unit has work duties that he must perform in order to accomplish his own job and to enable his unit to operate effectively. That employee's request for official time will almost never cause the Air Force to stop flying airplanes, but it may well cause his unit to fail in its own specific mission, and it is on the latter basis that the CBA entitled Mr. Smith to impose limits on Henderson's official time requests. In this context, I find that the August 11 memo was a reasonable application of Article V, Section B of the CBA. I therefore accept the Respondent's defense to the allegation that it unilaterally changed conditions of employment by issuing that memo.

An alternative ground for dismissing the § 7116(a)(5) allegation is that the alleged unfair labor practice was "covered by" the CBA. In fact, a different Administrative Law Judge made just such a ruling in another case involving the same parties and involving very similar facts and issues. *United States Department of the Air Force, Luke Air Force Base, Arizona*, Case No. DE-CA-01-0244 (2002), ALJ Decision Reports, No. 169 (July 23, 2002). In that case, a different supervisor notified a different Union official

that he would no longer respond to requests for official time until after the daily morning staff meeting. As this was a departure from their prior practice, and it was not explicitly specified in the CBA, the Union alleged a unilateral change in working conditions and filed a ULP charge. After first finding that the "covered by" defense had been raised in a timely manner, albeit ambiguously, through the agency's prehearing statement of the theory of its case, Judge Jelen went on to rule that "the matter of when a supervisor will respond to requests [for official time] is inseparably bound up with and plainly an aspect of the provisions of Article V. This is particularly true where, as here, the timing of the response is tied to a desire to reconcile official time use with the work needs of the organization." *Id.* at 17.

In the case at bar, as in the above-cited case, the Respondent did not explicitly argue that the restrictions imposed on Henderson's use of official time were "covered by" the CBA. It did, however, articulate its theory of the case in its prehearing disclosure precisely as it had in the other case: "The Respondent was following the parties' collective bargaining agreement on official time for union officials and no requirement existed to negotiate." (G.C. Exh. 1(h)). As noted by Judge Jelen, this language is fundamentally the same as that used by the Court of Appeals in explaining the "covered by" doctrine, and by the Authority in its case law on the subject. *See*, *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA*, 962 F.2d 48, 62 (D.C. Cir. 1992). Therefore, the issue is properly before me to decide.

The Authority uses a two-part analysis for determining whether a matter is contained in or covered by a collective bargaining agreement so as to obviate the duty to bargain. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1017-18 (1993) (*SSA*). The first question is whether the matter is expressly contained in the CBA. If not, the next question is whether the matter is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." *C & S Industries, Inc.*, 158 NLRB 454, 459 (1966), cited with approval by the Authority in the *SSA* case and by the court in the *Marine Corps* case, *supra*.

As described earlier in my decision, Article V of the CBA spells out in considerable detail the rights and obligations of Union officials and management concerning the use of official time. It is clear, albeit implicit, in paragraphs 4 and 5 of Article V, Section B, that employees

must first request it and supervisors must then approve it, before an employee may use official time. The section further articulates a balance between the employee's right to official time and his obligation to perform his job, and it authorizes the supervisor to deny official time if it would adversely affect the accomplishment of the organization's mission. The CBA does not expressly specify when and how the employee must make his request. Moreover, while the contract requires the employee to account for the precise amount of official time used on his return, it does not require the employee to estimate the length of his absence in advance. Thus, portions of the August 11 memo are not expressly contained in the CBA, as the first prong of the test requires. However, under the second prong, I conclude that the requirements imposed on Henderson's use of official time are inseparably bound up with the process of requesting and approving official time and reconciling conflicts between the need for official time and the accomplishment of the organization's operations. As noted by the Authority regarding the first prong of the test, "an exact congruence of language" is not required. *SSA*, 47 FLRA at 1018. No collective bargaining agreement can be expected to explicitly cover every possible situation; all that can be expected is that the CBA set forth the general principle that can then be applied to specific cases. Here, there is no doubt that the disputed portions of the August 11 memo were inseparably bound up with, and plainly an aspect of, the principles set forth in Article V, Section B. Therefore, the Respondent had no obligation to negotiate with the Union concerning the memo. The Union might reasonably have claimed that the memo incorrectly applied the principles of the CBA, and it then could have filed a grievance on the matter. But the agency was not required to bargain over something it had already negotiated and incorporated into the CBA.

For all of the foregoing reasons, I conclude that the Respondent did not violate § 7116(a)(1) and (5) of the Statute, as alleged.

3. The Discrimination Charge

Section 7116(a)(2) of the Statute makes it an unfair labor practice to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. The Authority explained the analytical framework for evaluating alleged violations of § 7116(a)(2) in *Letterkenny Army Depot*, 35 FLRA 113, 118-19 (1990)(*Letterkenny*). The General Counsel bears the burden in all such cases of establishing

by a preponderance of the evidence that an unfair labor practice has been committed. The General Counsel must demonstrate: (1) that the employee against whom allegedly discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion or other conditions of employment. If the General Counsel does so, it has established a *prima facie* case of unlawful discrimination. The Respondent can, in turn, rebut the *prima facie* case by establishing, by a preponderance of the evidence, that: (1) there was a legitimate justification for its actions; and (2) the same action would have been taken in the absence of protected activity. *Id.*

Mr. Henderson's protected activity is well documented in the record, and the Agency denies neither the fact that he engaged in such activity nor that management officials were well aware of his activity.[5] Applying the *Letterkenny* analysis, then, the first issue is whether Henderson's well-known protected activity was a motivating factor in the determination to issue the August 11 memorandum.

Initially, I find that the General Counsel has not demonstrated that Mr. Henderson's long history of protected activity, *e.g.,* filing grievances, ULPs and otherwise representing employees in adversarial proceedings, was a motivating factor in Smith's decision to issue the August 11 memorandum. There is no direct evidence of anti-union animus on Smith's part. Although Smith was concerned that

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[5] With regard to the arbitration case involving bargaining unit employee Pamela Goodwin, however, I find that Mr. Smith was unware of the particulars of Henderson's activity. The arbitration hearing was held in April 2000, and at the hearing Henderson cited Smith's alleged alteration of a document in 1998 as evidence of disparate treatment by Luke management. Smith testified that while he approved Henderson's requests for official time to work on the Goodwin arbitration, he knew nothing about the facts or issues of that case. I credit Smith's testimony. He did not testify or otherwise participate in the Goodwin case, and the grievant did not work for him. The General Counsel argues that Smith must have known that his actions were being challenged in the Goodwin case, because Agency management in general knew, and because Smith had approved Henderson's official time. I find this evidence and reasoning insufficient to rebut Smith's testimony. Smith was however, clearly familiar with other aspects of Henderson's protected activity, including grievances and ULP charges challenging Smith's actions as supervisor.

Henderson's abundant use of official time was interfering with the operations of his section, he rarely denied Henderson's requests for official time. In addition, Smith credibly testified that he did not care about the nature of Henderson's union business.

To be sure, the August 11 memorandum was clearly motivated by a desire to better control Henderson's use of official time. However, such a motive is not necessarily illegal. As the Authority has held, "conflicts . . . can be expected" between an employee's entitlement to official time and an agency's need to manage its work effectively, "and when such conflicts arise, the parties must recognize the need for and seek a reasonable accommodation." *Department of the Air Force, Scott Air Force Base, Illinois*, 20 FLRA 761, 764 (1985)(*Scott AFB*), *pet. for review denied, NAGE, Local R7-23 v. FLRA*, 806 F.2d 283 (D.C. Cir. 1986). In that context, the Authority has held that sincere attempts to reach such an accommodation do not constitute interference with protected rights. *Scott AFB*, 20 FLRA at 764; *Veterans Administration Medical Center, Leavenworth, Kansas*, 31 FLRA 1161, 1169-71 (1988). For such actions by an agency to be considered lawful, it must be evident from the context of the incident that the agency's intent is to reach an accommodation and not to unduly interfere or discourage employees in the exercise of their protected rights. *See Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 897-98 (1990) (*Hill AFB*). In making this determination, the Authority looks at past efforts to reach an accommodation with the employee, the responses of the employee to the agency's efforts, the time-sensitive nature of the work, and the presence or absence of union animus. *Id.* For example, in *Scott AFB*, the Authority found no ULP where a supervisor told an employee that he was spending too much time on union work and too little time on his job duties. In so holding the Authority noted that a conflict had arisen and that the union representative had been uncooperative in attempts to accommodate management's interests. *Scott AFB*, 20 FLRA at 765-66. On the other hand, where no actual conflict exists, a supervisor could not ask a union steward applying for another position how much time he spent on union activities and hypothetical questions as to how he would resolve conflicts between work and union responsibilities. *Veterans Administration Washington, D.C. and Veterans*

Administration Medical Center and Regional Office, Sioux Falls, South Dakota, 23 FLRA 122, 124 (1986).[6]

I find that our case most strongly resembles the situation in *Scott AFB.* The record shows that there was an ongoing conflict concerning Mr. Henderson's failure to balance his obligations as an employee and as a union representative. Contrary to the General Counsel's contentions, there were specific conflicts involving time-sensitive projects. Immediately prior to the August 3 exchange of e-mails, Mr. Smith had directed Henderson to work on matters that were to be the subject of an upcoming IG audit. (Tr. 296; G.C. Exh. 13). Further, as was the union representative in *Scott AFB*, Henderson was consistently uncooperative and combative in response to his supervisor's mission-related concerns. Henderson apparently believed that his primary obligation was to the bargaining unit and, therefore, union responsibilities always had priority over his work duties, as long as the Air Force could still fly airplanes. Such a belief is inconsistent with the plain language of the CBA, as I explained in the prior section of this decision, and with section 7131 of the Statute. *Cf.*, *Federal Railroad Administration*, 21 FLRA 508, 510 (1986) (union may not claim it is entitled to the allocation of official time to a particular employee without regard to management's needs regarding the performance of assigned work). Henderson made his disdain for Smith's mission concerns evident on many occasions to Smith verbally, often using profanity and disrespect, and he didn't hesitate to use similar sarcasm in his e-mails, which he sometimes copied to higher elements of the chain of command. Thus, I find that Smith's motivation was not to discourage Henderson's protected activity, but to seek a proper balance between the rights of the employee and the needs of management. It was Henderson's refusal to seek such a balance that resulted in the restrictions on his use of official time.

The General Counsel also argues that the August 11 memorandum was in retaliation for Henderson's copying his August 3 e-mail to the Fire Chief and the Squadron Commander. Communication with management officials is undeniably protected activity. In addition, evidence shows that, in some respects, the issuance of the August 11 memorandum was motivated by this activity. Smith conceded

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[6] Although many of the cited cases involve § 7116(a)(1) allegations, where motivation is not a material element of the offense, the principles concerning the accommodation of employee and management interests are also applicable in the context of a § 7116(a)(2) case such as ours.

in testimony that he told Henderson that if Henderson had not copied the commanders, "I would not be in a position to do what I was about to do[.]" (Tr. 301). Continuing, Smith noted that in the past he and Henderson had tried to work things out through verbal discussions, but this time he had to put things in writing.

I agree that Mr. Smith's decision to issue a formal memorandum was, at least in part, in response to Henderson's copying his August 3 memorandum. However, I find that Smith would have attempted to impose restrictions on Henderson's practice of using official time without prior approval, even if Henderson had not copied higher management. Smith's testimony, which I credit, indicates that there would have been further communications, both verbal and written, between Smith and Henderson regarding official time procedures in any event. It is clear that by August 3, 2000, Smith had determined his prior efforts to manage Henderson's work were unsuccessful and that a more formalized, written approach was required. Indeed it was Smith, in his August 3 "[s]tep up to the plate" memo, who felt it was necessary to put his concerns in writing and to send a copy of the memo to the fire chief. (G.C. Exh. 13). In this respect, it was not Henderson's copying of the commanders, but Smith's, which injected those officials into the dispute. Smith also testified that he put his instructions in writing not only because of higher management's involvement, but also to be sure that there were no misunderstandings. Henderson's own August 3 memo specifically invited Smith to make his requirements known in a more clear and formal manner, so that Henderson could respond with a grievance or ULP charge. (G.C. Exh. 14).

In sum, I find that Smith's August 11 memorandum was ultimately motivated neither by Henderson's general activity as Union president nor by his specific act of forwarding his August 3 memo to higher commanders. Instead, the memorandum was motivated by a legitimate attempt to find an accommodation between Henderson's entitlement to official time and the department's need to fulfill its fire inspection duties. To the extent that Smith was motivated by Henderson's copying the August 3 memo to higher management, I find that Smith would have attempted to impose restrictions on Henderson's use of official time in any event, and that he would have done so in writing, just as his August 3 "[s]tep up to the plate" memo to Henderson (as well as his earlier January 31 memo) was in writing. Accordingly, the Respondent's actions in restricting Henderson's use of official time did not violate § 7116(a)(2) of the Statute.

4. The Coercion Charge

According to the General Counsel, when on August 11, 2000, Smith refused to accept Henderson's bargaining request and told him that he needed to understand where his paycheck came from and set his priories, the Respondent violated § 7116(a)(1) of the Statute. The standard for determining whether management's statement or conduct violates § 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. *Compare, Scott AFB,* 20 FLRA at 764-66 (no violation found), and *Hill AFB*, 35 FLRA at 895 (violation found). There is no bright line distinguishing these cases; rather, the fact-finder must evaluate from the full facts and circumstances of each case how a reasonable employee would interpret the supervisor's words and actions.

Smith's allegedly coercive conduct occurred immediately after Henderson had been given the memo outlining the procedures he would be required to follow in requesting and using official time. As discussed above, the imposition of these restrictions was an attempt by Smith to accommodate the competing interests of the employee and management. I find that Smith was simply emphasizing that Henderson had an obligation to his employer as well as to the bargaining unit. That the words were spoken in an emotional context does not necessarily turn the statement into one in which the employee could draw a coercive inference. The record shows that Mr. Smith and Mr. Henderson often engaged in heated conversations.

Moreover, this particular conversation can only be understood in the context of the numerous conversations and e-mails exchanged since at least August 3. In this context, it is evident that Smith's emphasis was on convincing Henderson he needed to follow through on his fire inspection duties. He was not seeking to prevent Henderson from performing Union work, but rather to channel Henderson's Union work so that it did not swallow up his fire inspection duties entirely. In this context Smith's statement, that Henderson needed to understand where his paycheck came from, was not a threat but a statement that Henderson's work responsibilities must be attended to. These facts are comparable to those in *Scott AFB*, where the Authority found that a supervisor's comment that an employee should spend more time on the agency's business and less time on union matters was not coercive. 20 FLRA at 764-66. Looking at the incident in its entirety, I conclude that Smith's statements on August 11 were not coercive.

With respect to Smith's refusal to accept Henderson's bargaining demand, I also find that this conduct was not coercive. Shortly before this exchange occurred, Smith had called Henderson into his office to give him the memo outlining the procedures for requesting official time. They discussed those rules, and Henderson then handed Smith a written demand to bargain. When Smith refused to accept it, he informed Henderson that Henderson had been called into the office, not in his role as Union president, but as a subordinate employee. Smith therefore thought it was inappropriate to accept a Union-initiated document at that time. As Smith put it, "I was not going to let Mr. Henderson change hats in the middle of the meeting[.]" (Tr. 304). That is, Smith believed the proper focus of the meeting was that of a supervisor's expectations of his employee regarding work rules, and he did not want to allow the meeting to become a negotiation. There was nothing coercive or intimidating about this. Further, Smith did not interfere with Henderson's ability to file his demand to bargain. At the end of their meeting, Henderson told Smith that he would give the document to the labor relations specialist in CPO. He asked Smith if he could be released from duty to address the matter, and Smith immediately approved the request.

Under these circumstances, I find that neither Mr. Smith's statements nor his actions tended to coerce or intimidate Mr. Henderson, and that Mr. Henderson could not reasonably have drawn a coercive inference from Mr. Smith's conduct. Accordingly, the Respondent has not committed an independent violation of § 7116(a)(1).

Based on the above findings and conclusions, I conclude that the General Counsel has not proved that the Respondent violated § 7116(a)(1), (2) or (5) of the Statute. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, Dismissed.

Issued, Washington, DC, February 10, 2003.

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RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION**, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case Nos. DE-CA-00721 & DE-CA-00767, were sent to the following parties:

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