

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

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA  Respondent	
and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547  Charging Party	Case No. DE-CA-01-0876

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 her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

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

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

Office of Case Control  
Federal Labor Relations Authority  
607 14th Street, NW, Suite 415  
Washington, DC 20424

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SUSAN E. JELEN  
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: SUSAN E. JELEN  
Administrative Law Judge

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

Respondent

and Case No. DE-  
CA-01-0876

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

Charging Party

Pursuant to section 2423.27(c) of the Rules and Regulations 5 C.F.R. § 2423.27(c), 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 Motions for Summary Judgment and other supporting documents filed by the parties.

Enclosures

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

DEPARTMENT OF THE AIR FORCE LUKE AIR FORCE BASE, ARIZONA  Respondent	
and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547  Charging Party	Case No. DE-CA-01-0876

Hazel E. Hanley, Esq.  
For the General Counsel

Gary Tidmore, Esq.  
For the Respondent

Brock V. Henderson, President  
For the Charging Party

Before: SUSAN E. JELEN  
Administrative Law Judge

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

Complaint and Notice of Hearing was issued in this case on behalf of the General Counsel by the Denver Region of the Federal Labor Relations Authority on July 25, 2002. The Respondent filed its Answer to the Complaint on August 7, 2002. On October 8, 2002 Counsel for the General Counsel filed its Motion for Summary Judgment. On October 16, 2002 the Respondent filed both a Response to Motion to Dismiss for Summary Judgment and its own Motion for Summary Judgment. Counsel for the General Counsel filed its Motion to Indefinitely Postpone the Hearing and Opposition to Respondent's Motion for Summary Judgment on October 25, 2002.

The scheduled hearing in this case was indefinitely postponed on October 28, 2002 while the Motions for Summary Judgment are considered.

The complaint alleges that the Respondent conducted two formal discussions with a bargaining unit employee concerning the settlement of his Equal Employment Opportunity (EEO) Complaint without giving the American Federation of Government Employees, Local 1547 notice and the opportunity to be represented, thereby failing to comply with 5 U.S.C. §7114(a)(2)(A) in violation of 5 U.S.C. §7116(a)(1) and (8).

Counsel for the General Counsel moves for summary judgment on the grounds that the facts, even if denied by Respondent, are incontestible and therefore there is no genuine issue of material fact in this matter. This theory requires the utilization of the stipulated facts in a previous case involving the same parties, Luke Air Force Base and American Federation of Government Employees, Local 1547, AFL-CIO, Case No. DE-CA-00309 decided by Administrative Law Judge (ALJ) Pearson on October 23, 2001, OALJ 02-08, (Luke AFB) and which is currently on appeal to the Federal Labor Relations Authority. Further the General Counsel urges the Chief Administrative Law Judge to examine the facts as set forth in two sworn affidavits attached to the motion for summary judgment. With all of this information, the General Counsel argues that, even though Respondent's Answer to the Complaint in this matter denies certain factual allegations, its motion for summary judgment should be granted.

The Respondent moves to dismiss the General Counsel's motion for summary judgement on the grounds that a genuine issue of fact exists to require a hearing in this matter. The Respondent argues that there are disputed facts regarding whether or not the elements required for a formal meeting were present in the two meetings at issue, citing *U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465 (1988). The Respondent also attached affidavits and exhibits to support its opposition to the General Counsel's motion for summary judgment.

Respondent also filed its own Motion For Summary Judgment, asserting that if the Chief Administrative Law Judge should determine that there is no genuine issue of triable fact, the Respondent is entitled to a Summary Judgment based on *Luke Air Force Base, Arizona, v. F.L.R.A.*, 208 F.3d 221, (9<sup>th</sup> Cir. 1999), cert denied, 531 U.S. 819 (2000) (The United States Court of Appeals for the Ninth

Circuit specifically held that "grievances" under 5 U.S.C. §7114(a) (2) (A) did not include the discrimination complaints that were brought pursuant to Equal Employment Opportunity Commission (EEOC) procedures and the Union had no right of representation at the settlement meeting and the Respondent Air Force Base did not violate 5 U.S.C. §7114(a) (2) (A).)

The General Counsel opposes the Respondent's motion for summary judgment, noting that the Authority had decided not to accept the reasoning of the Ninth Circuit. See *U.S. Department of the Air Force, 436<sup>th</sup> Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304 (2001), Chairman Cabaniss dissenting.

In its Opposition the General Counsel further argues that the affidavits and other exhibits attached to Respondent's Opposition support the General Counsel's Motion for Summary Judgment, that the material facts are not in dispute and that no hearing is necessary in this matter. Rather the parties have differing legal interpretations of the undisputed facts and the record as it exists now is sufficient for a decision.

Having carefully reviewed the documents filed in this matter, including the exhibits attached to each motion for summary judgment and the legal briefs filed by both the Respondent and the General Counsel in support of their respective positions, I find that a decision can be made pursuant to section 2423.27(c) and section 2423.34. I, therefore, make the following findings of fact, conclusions of law and recommendations:

#### **Findings of Fact**

1. Luke Air Force Base (Respondent) is an activity of the United States Department of the Air Force, an agency under 5 U.S.C. §7103(a) (3). (G.C. Ex. 1(b), 1(c))
2. The American Federation of Government Employees, Local 1547, AFL-CIO (the Union or Local 1547), is a labor organization under 5 U.S.C. 7103(a) (4). (G.C. Ex. 1 (b), 1(c))
3. The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Ex. 1(b), 1(c))
4. Respondent and the Union are parties to a collective bargaining agreement covering employees in the

bargaining unit described in paragraph 3. Article XXVI, Section B, Paragraph f excludes "Equal Employment Opportunity complaints involving an allegation of discrimination" from the parties' negotiated grievance procedure. (G.C. Ex. 2, p. 55; R Ex. 1, p. 45)

5. The unfair labor practice charge in this case was filed by the Union with the Denver Regional Director on July 12, 2001. (G.C. Ex. 1(a))
6. Harry C. McMillen is an employee under 5 U.S.C. 7103(a) (2) and a member of the bargaining unit described in paragraph 3. (G.C. Ex. 1(b), 1(c))
7. In or about July or August 2000, McMillen filed a formal Equal Employment Opportunity (EEO) complaint against Respondent. (G.C. Ex. 1(b), 1(c), 3)
8. McMillen was represented in the processing of his EEO complaint by attorney Mike Petite. (G.C. Ex. 3)
9. At all times relevant to this decision, the persons listed below occupied the positions opposite their names:

Capt. Matthew Hoyer	56 <sup>th</sup> Fighter Wing/
Assistant Judge Advocate	

Lt. Col. John Sylvia	Commander, 944 <sup>th</sup>
Maintenance Squadron	

Lt. Col. Joseph McCourt	Commander, 944 <sup>th</sup>
Logistics Group Deputy	

Deborah Clark	Employee Relations
Specialist	

(G.C. Ex. 1(b); 1(c))

10. At all relevant times, Sylvia and McCourt were supervisors and/or management officials under 5 U.S.C. 7103(a)(10) and (11) at the Respondent. Captain Hoyer was management's representative.

(G.C. Ex. 1(b))

11. At all relevant times, Sylvia, McCourt and Clark were acting on behalf of Respondent. (G.C. Ex. 1(b))

12. Helen M. Warren is a Personnel Management Specialist, GS-201-13 with the Office of the Secretary of Defense

(OSD), Civilian Personnel Management Services (CPMS), Office of Complaint Investigations (OCI), Sacramento Regional Office, Sacramento, California. She has worked for OCI as an investigator since September 1995. Her current supervisor is Sali L. Evans, Regional Director. (R. Declaration 1 and 2)

At all relevant times, Warren was not an employee of Respondent Luke Air Force Base or the Department of the Air Force. Respondent's EEO Office requested the services of OCI and Warren was assigned to conduct the investigation of McMillen's EEO complaint. (R. Declaration 1 and 2)

13. Department of Defense Directive Number 5124.4 was issued on August 30, 1993, and established the DoD Civilian Personnel Management Service (CPMS) under the authority, direction, and control of the Assistant Secretary of Defense (Personnel and Readiness) (ASD (P&R)). The mission of the CPMS is to "...provide civilian personnel policy support, functional information management, and civilian personnel administrative services to the DoD Components and their activities." (R. Ex. 3)

CPMS is responsible for the investigation of EEO complaints filed by civilian employees of DoD agencies and Military Departments, such as the Air Force. When a formal EEO complaint is filed, the local EEO manager requests an investigation by the OCI within CPMS, which charges a flat fee of \$250 for the investigation. During the process of planning and scheduling the investigation, the assigned investigator may ask the parties if they are interested in discussing settlement options immediately prior to the onset of the investigation. If they are agreeable, the investigator sets aside time for this process. This settlement process is completely voluntary. Without full agreement of those involved, the settlement conference does not take place. The investigator's role during this conference is to facilitate settlement discussions. The investigator does not serve as an agent for the activity and is not a party to the agreement. If resolution does not occur, the investigator begins the investigation. (R. Declaration 1 and 2)

14. By Memorandum dated April 2, 2001, Warren informed the EEO Director (with copies to McMillen and Capt. Hoyer)

that she would be at Luke Air Force Base on April 26 and 27, 2001 to investigate the discrimination complaint of Harry C. McMillen. "There will be a preliminary meeting to discuss settlement options. **Please have an agency representative who has the authority to resolve this complaint available for this preliminary meeting.** If the case is not resolved, interviews of the Complainant and witness determined to have direct knowledge of the issues forwarded for investigation will follow. (Emphasis in original)." (R. Declaration 2; R. Ex. 9)

Attached to the memorandum was a schedule for Thursday, April 26, 2001 and Friday, April 27, 2001. A settlement conference was scheduled for 8:30 am on Thursday, April 26, 2001, with Mr. Harry McMillen and "Agency Official with Authority to Resolve Case". (R. Ex. 9)

15. On or about April 25, 2001, a meeting was held in the Civilian Personnel facilities, Building 1150 at Respondent, to discuss McMillen's EEO complaint. Present at the meeting were McMillen and his attorney Mike Petite. Also present were Helen Warren, John Sylvia (McMillen's fourth line supervisor), Lt. Col. McCourt (representing the 944<sup>th</sup> Commander), and JAG Attorney Capt. Hoyer. McMillen's EEO complaint was discussed during the meeting and an offer to resolve the complaint was presented. McMillen wanted to discuss the offer with his wife and it was determined that there would be another meeting on the proposed settlement the following morning. (GC. Ex. 3)
16. McMillen was not required to attend the April 25 meeting but did attend the meeting in order to resolve his EEO complaint. (G.C. Ex. 3)
17. The meeting lasted from 8 or 8:30 am to approximately 12:30 pm. (G.C. Ex. 3)

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The record is clear that two separate meetings were held on consecutive days in April 2001. The General Counsel's complaint references "on or about April 25" and "on or about April 26". (G.C. Ex. 1(b), paragraphs 13 and 16). Respondent's Exhibit 9 refers to meetings scheduled for April 26 and April 27. Neither the General Counsel or the Respondent has referenced this date discrepancy in their motions or briefs. I therefore will continue to reference the dates as April 25 and April 26, in accordance with the complaint.

18. On April 26, 2001, a second meeting was held at the same location in the Civilian Personnel facilities, Building 1150, to continue the discussion regarding resolution of McMillen's EEO complaint. Present at this meeting were McMillen, his attorney, Warren, Sylvia and Hoyer. Lt. Col. McCourt was not present. Debbie Clark from Civilian Personnel came into the meeting to handle paperwork. A settlement agreement was signed by McMillen and the 944<sup>th</sup> Commander on April 26, 2001, resolving McMillen's EEO complaint. (G.C. Ex. 3; R. Declaration 2)
19. Warren did not conduct any investigation of the McMillen EEO complaint since there had been a resolution of the matter. (R. Declaration 2)
20. McMillen was not required to attend the April 26 meeting but did attend in order to resolve his EEO complaint.
21. The second meeting lasted about two hours.
22. Respondent did not notify the Union that the April 25 or April 26 meeting involved the EEO complaint of McMillen, a bargaining unit employee, nor did Respondent give the Union the opportunity to attend either meeting. (G.C. Ex. 4)
23. On April 25, 2001, Union Steward Harley D. Hembd, learned of the scheduled meeting and spoke by telephone with Diane Sanchez, Assistant to the EEO Director, H.K. Brown. Hembd requested that Local 1547 be represented at the McMillen settlement conference. Sanchez later informed Hembd by telephone that the Union could not be represented at the meeting. (G.C. Ex. 4)
24. The Union was not present at either the April 25 or April 26, 2001 meeting.

### **Jurisdiction**

Although the Authority is not bound by the Federal Rules of Civil Procedure, it has stated that motions for summary judgment that are filed with administrative law judges under section 2423.27 of the Regulations "serve the same purpose and have the same requirements as motions for summary judgment filed with United States District Courts pursuant to Rule 56 of the Federal Rules of Civil

Procedure." *U.S. Equal Employment Opportunity Commission*, 51 FLRA 248, 253; *Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky*, 33 FLRA 3, 4-6 (1988), *rev'd on other grounds sub nom. Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky v. FLRA*, No. 88-1861 (D.C. Cir. Aug 9, 1990) (unpublished). Rule 56 provides that summary judgment is appropriate when

all material facts have been admitted or cannot be

contested, and the admitted or incontestable facts entitle the moving party to judgment as a matter of law. *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 227 (1995). In the instant matter, I find that there are no material facts in issue and summary judgment is therefore appropriate.

### **Discussion and Conclusions**

The General Counsel contends that the Respondent violated section 7116(a)(1) and (8) of the Statute by conducting two formal discussions (on or about April 25, 2001 and April 26, 2001) with a bargaining unit employee concerning the settlement of a formal EEO complaint without providing the Union with notice and an opportunity to be represented as required by section 7114(a)(2)(A) of the Statute.

The Respondent admits that it held the two meetings without providing the Union with notice and an opportunity to be represented. It denies that it committed an unfair labor practice, however, for the following reasons. First, the Respondent argues that a union's right under the Statute to participate in formal discussions does not apply to EEO proceedings, because they are not "grievances" within the meaning of the Statute. (Citing to the Ninth Circuit Decision in *Luke AFB*) Second, the Respondent asserts that the meetings in this case were not "formal discussions" within the meaning of the Statute.

For the most part, the issues and the parties' arguments in this case are identical to those which were raised in two recent cases: *U.S. Department of the Air Force, 436<sup>th</sup> Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304 (2001) (*Dover*); and *Luke Air Force Base, Arizona*, 54 FLRA 716 (1998) (*Luke*), *rev'd sub nom. Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999) (*Table*), *cert. denied*, 121 S. Ct. 60 (2000).<sup>2</sup> The history of those

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The third case, *Luke AFB*, Case No. DE-CA-00309, OALJ 02-08, issued by ALJ Pearson on October 21, 2001, as noted above, is currently pending before the Authority on exceptions filed by the Respondent. That case involves the same parties and issues as this current matter.

two cases illustrates the opposing views of the Authority

and the Ninth Circuit Court of Appeals concerning the applicability of section 7114(a)(2)(A) to meetings related to an employee's EEO complaint. In *Luke*, the Authority held that such EEO meetings were "formal discussion[s] . . . concerning [a] grievance" and that neither EEOC regulations nor other statutes excluded such meetings from the requirements of section 7114(a)(2)(A). The Ninth Circuit, however, reversed the Authority in that case, rejecting the right of a union to be notified and given the opportunity to participate in the mediation of an employee's formal EEO complaint. In *Dover*, the Authority reviewed the rationale of its *Luke* decision, in light of its rejection by the Circuit Court. The Authority reiterated its *Luke* holding that a mediation session of an EEO complaint is a "grievance" within the meaning of section 7114(a)(2)(A), even when the collective bargaining agreement expressly excludes EEO complaints from the negotiated grievance procedure; moreover, the union has a right to attend such mediations, even when they are conducted by a "neutral" party such as an OCI mediator, and even when the employee did not designate the union as his representative. Notwithstanding the Ninth Circuit's decision in *Luke*, the Authority insisted in *Dover* that the presence of a union at such meetings does not conflict with EEOC regulations, the Privacy Act or other expressions of an EEO claimant's right to confidentiality.

In this matter, I am bound to follow applicable rulings of the Authority, even when the Authority has chosen not to accept the reasoning of a Circuit Court. As noted by ALJ Pearson in his decision in *Luke AFB*, the Authority is not bound by the case law of a single circuit. This results in the situation in this case, as the parties here are identical to those in the *Luke* case cited above, and my recommended order is similar to both the Authority's order in its 1998 *Luke* decision, which the Ninth Circuit refused to enforce in 1999, and ALJ Pearson's recommended order in *Luke II*. Nevertheless, I am constrained to follow the principles expressed by the Authority, and for the reasons set forth below, I conclude that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to provide the Union with notice and an opportunity to be represented at the meetings on April 25 and April 26, 2001.

#### **A. Relevant Statutory Provisions**

Section 7114(a)(2)(A) of the Statute 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[.]

Section 7116(a) (1) and (8) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

\* \* \* \*

(8) to otherwise fail or refuse to comply with any provision of this chapter.

**B. Section 7114(a) (2) (A) of the Statute Applies in the Context of EEO Statutory Appeals**

The Respondent argues that, as a general matter, the statutory right of a union to attend formal meetings does not apply to this fact situation since "grievances" under section 7114(a) (2) (A) does not include the discrimination complaints that were brought pursuant to EEOC procedures. Therefore the Union had no right of representation at the settlement meeting and the Respondent did not violate section 7114(a) (2) (A) as alleged. Although this argument was accepted by the Ninth Circuit in its decision, as well as by Chairman Cabaniss in her *Dover* dissent (57 FLRA at 312-14), the Authority expressly rejected it in both its *Luke* and *Dover* decisions. See, *Dover*, 57 FLRA at 310; *Luke*, 54 FLRA at 732-33. There are no new facts present in this case that would distinguish it from those two cases. Accordingly, I find that section 7114(a) (2) (A) is applicable to the EEO meetings between the Respondent and McMillen.

**C. The Meetings Satisfy the Elements of Section 7114(a) (2) (A) of the Statute**

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

discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Luke*, 54 FLRA at 723, citing *General Services Administration, Region 9 and American Federation of Government Employees, Council 236*, 48 FLRA 1348, 1354 (1994) (*GSA*).

### **The Two Meetings Regarding the EEO Complaint Were Discussions**

The Respondent does not dispute that each of the two meetings with the complainant were discussions, and I so find. The Respondent contests all of the remaining elements.

### **The Two Meetings Were Formal**

In *GSA*, the Authority stated:

In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), we have advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

48 FLRA at 1355. These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. *See, F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 157 (1996). Therefore, in determining formality, the Authority considers the totality of the facts and circumstances. *Id.*

#### **a. April 25, 2001 Meeting**

Based on the totality of the circumstances, I find that the April 25 meeting to discuss settlement of McMillen's EEO complaint was formal. While the specific details of what occurred in the meeting are not set forth in the record, the record is sufficiently clear to show the following undisputed facts. First, the meeting was held with several management representatives present, specifically noting the presence of John Sylvia, McMillen's fourth level supervisor,

Lt. Col. McCourt, representing the 944<sup>th</sup> Commander, and JAG attorney Capt. Hoyer, Respondent's legal representative. Second, the meeting was held in a conference room in the Civilian Personnel Building, which was outside McMillen's regular work site. *See, Luke*, 54 FLRA at 726 ("Meetings held outside an employee's immediate work area are associated with formality, while those held in the work area are not."). Third, the meeting was not impromptu but was scheduled in advance. Fourth, the meeting was not brief, lasting approximately three hours. Finally, the meeting had a planned agenda -- to discuss the possible settlement of McMillen's EEO complaint.

The Respondent argues that the meeting was not formal because attendance was voluntary. The voluntary nature of the meeting, however, does not undermine its formality. *See, Dover*, 57 FLRA at 307; *Luke*, 54 FLRA at 728.

#### **b. April 26, 2001 Meeting**

Based on the totality of the circumstances, I find that the April 25 meeting to discuss settlement of McMillen's EEO complaint was formal. As stated above, several management representatives were present, including Sylvia and Hoyer; the meeting was held in a conference room in the Civilian Personnel Building, which was outside McMillen's regular work site; the meeting was not impromptu but was scheduled in advance; the meeting was not brief, lasting approximately three hours, and finally, the meeting had a planned agenda -- to discuss the possible settlement of McMillen's EEO complaint.

The Respondent argues that the meeting was not formal because attendance was voluntary. The voluntary nature of the meeting, however, does not undermine its formality. *See, Dover*, 57 FLRA at 307; *Luke*, 54 FLRA at 728.

#### **The Meetings Were Between a Representative of the Agency and a Bargaining Unit Employee**

The April 25 meeting was attended by McMillen and his attorney Petite, and by several management representatives, specifically John Sylvia, McMillen's fourth level supervisor, Lt. Col. McCourt, representing the 944<sup>th</sup> Commander, and JAG attorney Capt. Hoyer, Respondent's legal representative. The April 26 meeting was attended by the same individuals, with the exception of McCourt and the inclusion, at times, of Debbie Clark, Employee Relations Specialist. Prior to arranging the meetings, Warren, the OCI investigator, had specifically requested that "an agency

representative who has the authority to resolve this complaint" be present at the meeting and the evidence reflects that this did in fact occur. As a result of the two meetings, an agreement resolving the EEO complaint was reached between McMillen and the Respondent. A settlement agreement was signed by both parties on April 26, 2001. See, *Luke*, 54 FLRA at 730 (the respondent's representative who had settlement authority was found to be a "representative of the agency" within the meaning of section 7114(a)(2)(A)). Thus, I find that the April 25 and April 26 meetings were between a "representative of the agency" and a unit employee within the meaning of section 7114(a)(2)(A) of the Statute.

Also present at both meetings was Linda Warren, who is a investigator for the Office of Complaint Investigations. Respondent argues that Ms. Warren is not a representative of the agency. Since other management officials were in attendance at the two meetings, and have been determined by me to be management officials and representatives of the agency within the meaning of section 7114(a)(2)(A), Ms. Warren's status is not relevant to finding a violation in this matter. I therefore find it unnecessary to address the Respondent's argument regarding her status as a mediator.

### **The EEO Complaint Concerned a Grievance**

With regard to the fourth requirement of section 7114(a)(2)(A), the Respondent argues that EEO complaints raised under the statutory EEO appeal procedure are not "grievances" under the Statute. The Respondent also contends that EEO complaints are not grievances under the Statute where the parties have excluded EEO complaints from the coverage of their negotiated grievance procedure.

The Respondent's contentions were resolved by the Authority in *Luke* and reaffirmed (over the Chairman's dissent) in *Dover*. The Authority held that a formal EEO complaint filed by an employee constituted a "grievance" within the meaning of section 7114(a)(2)(A) and rejected the assertion that section 7114(a)(2)(A) cannot recognize as a "grievance" any matter that the parties have excluded from their own grievance procedure. See *Dover*, 57 FLRA at 308-10; *Luke*, 54 FLRA at 730-32. In light of this precedent, I find that the two meetings regarding the EEO complaint concerned a "grievance" within the meaning of section 7114(a)(2)(A).

Therefore, I conclude that by holding formal discussions with a bargaining unit employee without affording the Union notice and an opportunity to be represented, as required by section 7114(a)(2)(A), the Respondent violated section 7116(a)(1) and (8) of the Statute, as alleged. I am therefore granting the General Counsel's Motion for Summary Judgment and denying Respondent's Motion for Summary Judgment.

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

#### **ORDER**

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

1. Cease and desist from:

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

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

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

(a) Provide the American Federation of Government Employees, Local 1547, AFL-CIO, with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning settlement of formal EEO complaints.

(b) Post at its Luke Air Force Base facilities, where bargaining unit employees represented by the American Federation of Government Employees, Local 1547, AFL-CIO, are located, copies of the attached Notice on forms to be

furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Luke Air Force Base, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, February 10, 2003.

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SUSAN E. JELEN  
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**POSTED BY ORDER OF THE**

**FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of the Air Force, Luke Air Force Base, Arizona, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the American Federation of Government Employees, Local 1547, AFL-CIO (the Union), with advance notice and an opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general conditions of employment, including meetings to mediate settlement negotiations pertaining to formal EEO complaints filed by bargaining unit employees.

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

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

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(Respondent/Activity)

Date:

By:

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204 and whose telephone number is: (303) 844-5224.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-01-0876 were sent to the following parties:

—

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Washington, D.C.