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

MEMORANDUM DATE: June 13, 2008

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA

Respondent

AND Case No. DE-CA-07-0377

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2924

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

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

DEPARTMENT OF THE AIR FORCE DAVIS-MONTHAN AIR FORCE BASE TUCSON, ARIZONA Respondent	
AND	Case No. DE-CA-07-0377
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2924 Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by 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 **JULY 14, 2008**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

SUSAN E. JELEN
Administrative Law Judge

Dated: June 13, 2008
Washington, DC

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

DEPARTMENT OF THE AIR FORCE DAVIS-MONTHAN AIR FORCE BASE TUCSON, ARIZONA Respondent	
AND	Case No. DE-CA-07-0377
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2924 Charging Party	

Michael Farley, Esq.
For the General Counsel

Phillip G. Tidmore, Esq.
Thomas J. Burhenn, Esq.
For the Respondent

John Pennington
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Part 2423.

On May 1, 2007, the American Federation of Government Employees (AFGE), Local 2924 (Union or Local 2924) filed an

unfair labor practice charge with the Denver Region of the Authority, against the Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona (Respondent or Davis-Monthan AFB). (G.C. Ex. 1(a)) On December 20, 2007, the Regional Director of the Denver Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(A) of the Statute in holding a formal meeting regarding a formal EEO complaint filed by an individual bargaining unit employee. (G.C. Ex. 1(b)) On January 11, 2008, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(d))[1]

A hearing was held in Tucson, Arizona, on March 6, 2008, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent have filed timely post-hearing briefs, which have been fully considered.

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

Findings of Fact

Davis-Monthan AFB is an activity of the United States Air Force, which is an agency under 5 U.S.C. §7103(a)(3). (G.C. Exs. 1(b) & (c)) During all times material to this matter, Jeffery Peterson was Director of the 576th Aerospace Maintenance and Regeneration Group (AMARG) at Davis-Monthan AFB and was a supervisor and management official under 5 U.S.C. §7103(a)(10) and (11) and acted on behalf of the Respondent. (G.C. Exs. 1(b) & (c); Tr. 84-85) Barbara Dycus has worked in the Military Civilian Equal Opportunity Office at Davis-Monthan AFB and has been the EO Director and Alternative Dispute Resolution (ADR) Champion for Davis-Monthan AFB. (G.C. Exs. 1(b) & 1(c); Tr. 110)

AFGE Local 2924 is a labor organization under 5 U.S.C. §7103 (a)(4) and is the exclusive representative of a unit of employees

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[1]/ At the hearing, paragraph 9 of the Complaint was amended to insert the correct name. (Tr. 7-9)

appropriate for collective bargaining at the Respondent. (G.C. Ex. 1(b) and 1(c)). At all times material to this matter, John Pennington has been the President for Local 2924. (Tr. 19)

Davis-Monthan AFB and Local 2924 have a Labor Management Relations Agreement (LMRA), which has been in effect since 1998. (G.C. Ex. 2) Davis-Monthan AFB also has an Alternate Dispute Resolution Program Plan that has been in effect since 2005. (G.C. Ex. 3; Tr. 16, 120-121)

Ken Rineer has been a bargaining unit employee in AMARG and was originally hired as an aircraft electronic mechanic. He took disability retirement on August 17, 2007. (Tr. 14, 47) In October 2006, Rineer filed an informal EEO complaint regarding a failure to grant him reasonable accommodations as a result of his work-related disability. He filed a formal complaint on November 13, 2006. (G.C. Ex. 4; Tr. 48-49) Rineer was not represented by the Union in the processing of his EEO complaint. The parties agreed to hold a mediation to attempt to resolve the EEO complaint. (Tr. 49-50)

On January 16, 2007,[2] Dycus sent Rineer an email message, informing him that the mediation was scheduled for February 8, and that Pedro Ledezma would serve as the mediator. (G.C. Ex. 5; Tr. 50) On January 26, Ledezma, who is a certified mediator for the Investigations and Resolutions Division (IRD) of the Department of Defense, confirmed the mediation scheduled for February 8. (G.C. Ex. 6; Tr. 51) In an attachment to all the mediation participants, Ledezma set forth the arrangements for the mediation, as well as setting forth the purpose of the mediation and the need for confidentiality. (G.C. Ex. 7; Tr. 51-52)

Some time prior to January 24, Dycus and Rineer had a conversation in which Rineer indicated that he did not want the Union to be present for the mediation. (Tr. 114, 118, 136-137)[3] Following this conversation, Dycus sent a Formal Complaint ADR

[2]/ From this point, all dates are in 2007 unless otherwise specified.

[3]/ I credit Barbara Dycus' testimony that Rineer directly told her that he did not want the Union present for the scheduled mediation. I found her testimony sincere and forthright in this manner, and consistent with the processing of the EEO complaint and mediation. I did not find Rineer's denial credible.

Election form to Rineer. The form stated:

1. This notice is to inform you that as a bargaining union employee you are hereby notified that the AFGE 2924 will be advised of your 8 February 2007 mediation and provided the opportunity to attend the mediation.

2. Please provide your position on the union's presence in your mediation by selecting from the following:

_____ I have no objection to the union's presence at any session. (Joint discussions or private caucuses)

_____ I have no objection to the union's presence at the joint discussion but object to having them present at the private caucuses).

_____ I object to having the union's presence at the mediation and request they not be present.

Complainant Signature/Date_____

3. You must provide your response to the above no later than 5 Feb 07. If you have any questions or [if] I can provide additional information, please call me at 228-5509.

(G.C. Ex. 10; Tr. 54-55, 134)

Rineer returned the form on the same date and initialed the line that stated "I object to having the union's presence at the mediation and request they not be present." (G.C. Ex. 11; Tr. 55)

On February 8, the mediation was held. Present were the mediator, Pedro Ledezma, Kenneth Rineer and Jeff Peterson. (Tr. 61-62) Peterson was Rineer's third level supervisor at the time of the alleged incidents in the formal EEO complaint. (Tr. 52)

The mediation was held in the EO office, which is separate from both Rineer and Peterson's work areas. (Tr. 61-62) At the beginning of the mediation, Ledezma explained the process he intended to use for the mediation and had both parties read and sign an Agreement to Mediate. This document stated, in part, "The parties voluntarily agree to engage in mediation. The parties understand that the mediator's role is to facilitate the process and assist the parties in attempting to reach a satisfactory solution. The mediator has no authority to decide the case and is not acting as advocate for any party." The document also stated "Mediation is a confidential process. Any statements made during the mediation are for resolution purposes only and likewise, any documents submitted to the mediator are for resolution purposes and will not be retained by the mediator." (G.C. Ex. 13; Tr. 62-64)

Rineer made an opening statement and Peterson also made some opening remarks. The mediation lasted about three hours and was terminated just before 4:00 p.m. During the mediation, the mediator met with both Rineer and Peterson in separate caucuses. At the end, no resolution was reached, and the mediator closed the mediation. (Tr. 64-66)

Some time after the mediation, in February or March 2007, John Pennington, the Union President, drove through a security gate on Davis-Monthan, where Rineer was detailed as a security guard. At that time, Rineer informed Pennington that a mediation had been held on his EEO complaint. (Tr. 14-15) This was the first time that the Union had been informed that a mediation was scheduled or had been held. (Tr. 15, 24) The Respondent admitted in its answer that the meeting was held without the Union being informed and noted that the bargaining unit employee involved in the meeting had requested that the Union not be present. (G.C. Ex. 1(c); Tr. 66)

Issue

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(A) by holding a formal meeting regarding an EEO complaint filed by an individual bargaining unit employee on February 8, 2007.

Positions of the Parties

General Counsel

Counsel for the General Counsel (GC) maintains that the mediation session held on February 8, 2007, was a formal discussion pursuant to 5 U.S.C. §7114(a)(2)(A). As such, management was obliged to provide the Union with prior notice and an opportunity to attend the mediation session, which management admittedly failed to do. This case presents the circumstance of an employee raising an objection to the Union's presence at the mediation session and whether that action negated the Union's statutory entitlement to attend the meeting as a formal discussion. The GC asserts that there is no evidence that the employee's objection to the Union's presence at the mediation session demonstrated a conflict, either direct or indirect, with the Union's statutory right to be present at the mediation session. The employee's objection never implicated any potential rights he might have as an EEO complainant, and, therefore, could not be construed as demonstrating a conflict between his rights as an EEO complainant and the Union's statutory right to be present at the meeting.

Respondent

The Respondent initially asserts that an EEO complaint should not be considered a grievance under the Statute, and, therefore, section 7114(a)(2)(A) is not applicable to this situation. Since this case involves the mediation of an EEO complaint, the issues involved should be resolved under the Civil Rights Act and the mandates of and the decisions of the EEOC. The Respondent further argues that both the Privacy Act and the Administrative Dispute Resolution Act (ADRA) require the exclusion of the Union from the mediation of EEO complaints. Finally, with regard to the specific facts in this matter, the individual employee expressly requested that the Union not be present at the mediation, and the individual's rights superseded the rights of the Union. Therefore, the Respondent did not violate the Statute by failing to give the Union notice and the opportunity to be present at the mediation.

Discussion and Analysis

As both the GC and the Respondent have correctly stated, the

Authority has previously dealt with the issue of whether section 7114(a)(2)(A) applies in situations dealing with mediations in formal EEO complaint cases. First, in *Luke Air Force Base, Arizona,* 54 FLRA 716 (1998)*rev'd Luke Air Force Base v. FLRA,* 208 F.3d 221 (9th Cir. 1999), cert. denied, 121 S. Ct. 60 (2000) *(Luke I),* the Authority found the mediation/investigation of the EEO complaints was a discussion, which was formal, between a representative of the Respondent and a bargaining unit employee concerning a grievance, within the meaning of section 7114(a)(2)(A) of the Statute. In *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware,* 57 FLRA 304 (2001)*(Dover),* the Authority noted "In light of the 9th Circuit's recent reversal of *Luke*, we take this opportunity to thoroughly review this issue in this case. Our review of the language, legislative history, and purpose of the Statute supports the conclusion that complaints pursued through the EEOC procedures are grievances. Accordingly, we reject the Respondent's arguments regarding this issue and do not acquiesce in the 9th Circuit's view of the scope of the term grievance."

And in *United States Department of the Air Force, Luke Air Force Base, Arizona,* 58 FLRA 528 (2003)(Cabaniss dissenting) *(Luke II)*, the Authority specifically stated, "We reaffirm the Authority's previous view set forth in *Dover*, as affirmed by the D.C. Circuit in *Dover AFB v. FLRA*, that the broad definition of 'grievance' under the Statute encompasses complaints filed under a NGP as well as complaints filed under alternative statutory procedures of the EEOC. (Footnote omitted) For the reasons set forth in those decisions, and those that follow, we respectfully disagree with the Ninth Circuit's determinations to the contrary that the formal discussion right under §7114(a)(2)(A) does not apply to complaints filed under EEOC's statutory procedure because they are discrete and separate from the grievance process." 58 FLRA at 534; *see also*, *United States Department of the Air Force, Luke Air Force Base, Arizona,* 59 FLRA 16 (2003) (Cabaniss dissenting)*(Luke III).*

In *Luke II*, the Authority again considered and rejected the Respondent's position that there is a conflict between the Union's institutional rights under §7114(a)(2)(A) and the employee's individual rights under the ADRA and other statutes governing confidentiality that warrants exclusion of the Union

from these sessions. In this matter, the Respondent raises defenses that have been previously rejected by the Authority in the above cases. While I have carefully considered all of the Respondent's arguments in this matter, I find the Respondent has presented nothing persuasive that has not already been considered and rejected by the Authority.

Framework for analysis

In order for a union to have the right to representation under section 7114(a)(2)(A) of the Statute, there must be: (1) a discussion; (2) which was formal; (3) between a representative of the agency and a unit employee or the employee's representative;

(4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Dover,* 57 FLRA at 306*; Luke,* 54 FLRA at 723*; Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts,* 59 FLRA 875, 878 (2004).

1. The meeting regarding the EEO Complaint was a discussion.

The Respondent does not dispute that the mediation held on February 8 was a discussion. The Respondent does dispute all the remaining elements.

2. The meeting was formal

The determination as to whether a discussion is formal is based on the totality of the facts and circumstances presented. *See F.E. Warren Air Force Base, Cheyenne, Wyoming,* 52 FLRA 149, 155-57 (1996)(*F.E. Warren*). In making that determination, the Authority has stated 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. *See General Services Administration, Region 9,* 48 FLRA 1348, 1355 (*GSA*). However, these factors are illustrative, and other factors may be identified and applied as appropriate. *Dover,* 57 FLRA at 307.

On January 16, Dycus sent Rineer an email message, informing him that the mediation was scheduled for February 8, and that Pedro Ledezma would serve as the mediator. (G.C. Ex. 5) In an

attachment to all the mediation participants, Ledezma set forth the arrangements for the mediation, as well as setting forth the purpose of the mediation and the need for confidentiality. (G.C. Ex. 7) On February 8, the mediation was held. Present were the mediator, Pedro Ledezma, Kenneth Rineer and Jeff Peterson. The mediation was held in the EO office, which is separate from both Rineer and Peterson's work areas. At the beginning of the mediation, Ledezma explained the process he intended to use for the mediation and had both parties read and sign an Agreement to Mediate. (G.C. Ex. 13) During the mediation, the mediator met with both Rineer and Peterson in separate caucuses. The mediation itself lasted about three hours. No resolution was reached regarding the underlying EEO complaint and the mediator closed the session.

Although the mediation session does not meet all of the criteria set forth in *Dover*, I find that a sufficient number of criteria are present to constitute a formal discussion within the meaning of the Statute. In that regard, Rineer and Peterson had advance notice of the mediation session, the site of the mediation was at a neutral location away from the work locations of both Rineer and Peterson, and the discussions lasted about three hours. Peterson, who had the authority to resolve the matter on behalf of the Respondent, was Rineer's third level supervisor. While there was not a formal agenda established for the meeting, Ledezma set forth guidelines for the conduct of the meeting at the beginning and generally followed a standard mediation format. The evidence further reflects that the meeting had a formal purpose, specifically the mediation of the dispute which was the basis of Rineer's EEO complaint. *See Dover; Luke I.*

Therefore, based on the totality of the evidence, I find that the February 8 mediation session met the criteria for formality as set forth by the Authority.

3. The meeting was between a representative of the Agency and a bargaining unit employee

In this case, the evidence reflects that Peterson was Rineer's third level supervisor at the time of the mediation. The Respondent admits that Peterson was a supervisor and/or management official within the meaning of the Statute and that he

was a representative of management. The evidence further reflects that Peterson was present at the mediation in his capacity as a supervisor and that he had the authority to reach a resolution of the EEO complaint, which was the purpose of the mediation. Under these circumstances, I find that Peterson was a representative of management under the provisions of section 7114(a)(2)(A) of the Statute.

The GC further asserts that Pedro Ledezma, the mediator, was also a representative of Respondent under the provisions of section 7114(a)(2)(A). The GC asserts that Ledezma was acting on behalf of Respondent during the mediation session, and that he served as an "agency representative". Ledezma is employed as a mediator by the Department of Defense Investigation and Resolution Division (IRD) in Sacramento, California. At the time Rineer filed his EEO complaint, the Respondent paid IRD a flat fee of $325.00 to cover services to be provided by the IRD. In addition, Ledezma received his regular DOD pay while he participated in the mediation. At the conclusion of the mediation, Ledezma wrote a report, outlining the parties, the issues, the time involved, and the outcome of the settlement efforts, which was forwarded to Dycus. Considering all these factors, the GC argues that Ledezma was a management official who was acting on behalf of the Respondent during the mediation.

The Respondent asserts that Ledezma, in his capacity as a mediator, was not a management representative, was not in Rineer's supervisory chain, had no authority to compel settlement by either party, and acted in a neutral capacity and was neither employed by nor paid by the Air Force.

Since I have found that Peterson was acting on behalf of the Respondent during the mediation session, it is unnecessary to determine the status of the mediator in this case. *See, Luke I, Luke II and Luke III*.

4. The meeting to discuss the EEO complaint concerned a grievance

The Respondent argues that the mediation session did not concern a grievance within the meaning of section 7114(a)(2)(A) of the Statute because Rineer had filed an EEO complaint, which

is outside the negotiated grievance procedure. Specifically, the Respondent argues that 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. *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 prior cases. Accordingly, I find that section 7114(a)(2)(A) is applicable to the mediation session between the Respondent and Rineer.

Therefore, I find that the mediation session was a meeting which concerned "any grievance or any personnel policy or practice or other general condition of employment", as required by section 7114(a)(2)(A) of the Statute. *See Dover.*

5. The employee's objection to the Union's presence at the mediation.

The final question to be determined in this matter concerns whether the Union's statutory right to prior notice and an opportunity to attend the formal meeting at issue is abrogated by the employee's request that the Union not attend. This potential conflict between the right of a Union to be present at the mediation of a formal EEO complaint and the rights of an EEO complainant has been given consideration by the Authority

In *NTEU v. FLRA,* 774 F.2d 1181 (D.C. Cir. 1985), a case involving the Union right to attend the interview of a bargaining unit employee in preparation for an MSPB hearing, the court stated:

> [I]n the case of grievances arising out of alleged discrimination on the basis of race, religion, sex or national origin, Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et *seq.*, provides that the right of an aggrieved employee to complete relief takes

> priority over the general interests of the bargaining unit. Similarly, a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter. *Id.* at 1189 n.12 (citations omitted; emphasis in original).

Later, in *Dover*, the Authority considered hypothetical problems posed by the Respondent, such as whether a Union might not agree to confidentiality, and whether the Union's presence might chill candid discussions, and concluded that there was no evidence to support such claims. The Authority also considered Respondent's claim that discussions during a mediation might implicate private information protected from disclosure, and concluded that there was no evidence to indicate that such disclosure would have occurred. *Dover*, 57 FLRA at 310.

On appeal, the D.C. Circuit, in *Dover AFB v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003) upheld the Authority's decision. While finding that there was no inherent or *per se* conflict between an EEO complainant's rights and the Union's rights to attend a formal discussion, the D.C. Circuit stated, as an aside, "We do not foreclose the possibility that an employee's objection to the union presence could create a 'direct' conflict that should be resolved in favor of the employee as described *supra* note 12, NTEU, 774 F.2d at 1189 n.12." *Dover*, 316 F.3d at 287.

In his concurring opinion in *Luke II*, Member Armendariz discussed the potential effect of an employee objecting to the Union's presence at the mediation of an EEO complaint, a fact not present in the case before him.

> "[W]here a direct conflict between a union's institutional rights and an employee's right to confidentiality in mediation and settlement discussions exists, I would be inclined to agree with the D.C. Circuit that the rights of the employee should presumably prevail. I note that such a direct conflict might arise in a variety of situations, including, for example, where an employee unequivocally requests that the exclusive representative *not* be present at a mediation session of a formal EEO complaint. Of course, a determination as to whether there is a direct conflict between the rights of an employee and the rights of a union requires an assessment of the facts

> presented in each case." (emphasis in original) (Member Armendariz issued a similar concurring opinion in *U.S. Dep't of Veterans Affairs, North Arizona Veterans Affairs Healthcare, Prescott, Arizona,* 61 FLRA 181, 187 (2005)).

The GC asserts that, in order to determine whether there is a direct conflict in the present case, it is necessary to assess the respective rights of the Union and Rineer in connection with the Union's presence at the mediation session. According to the Union President, the Union has an interest in attending the mediation of a formal EEO complaint, in order to represent the bargaining unit as a whole and to make sure that bargaining unit employee rights are not comprised. Further the Union's presence would permit it to track the effect of resulting settlement agreements on bargaining unit employees; and would permit it to observe the process and to ensure that proper EEO procedures were followed. In addition, the Union would be able to identify whether any governing laws, rules, regulations, or contract provisions were being violated through the mediation process or by any resulting settlement agreements.

On the other hand, the GC asserts that Rineer's objection to the Union's presence had nothing to do with any concerns over his right to "confidentiality in mediation and settlement discussions." Rineer testified that he objected to the Union's presence because he was upset that the Union had refused to take a grievance to arbitration and because he believed that the Union was entitled to be present at the mediation and he was curious to see how management might react to his objection. Rineer specifically testified that his objection was not based on any concerns over confidentiality, privacy interests, or that the Union's presence would disrupt the mediation process. Rineer's testimony rebuts any implication that through his objection he was exercising rights that might be drawn from his entitlements as an EEO complainant, such as the right to "confidentiality in mediation and settlement discussions."

The GC concludes that there is no evidence that Rineer's objection to the Union's presence demonstrates a conflict, either direct or indirect, with the Union's statutory right to be present at the mediation session.

The Respondent asserts that the complaint in this matter should be dismissed since an individual's EEO rights trump the

Union's right to be present at an EEO mediation when the complainant or individual objects to their presence, as Rineer did in this case. Therefore, the Respondent was not required to have the Union present at the mediation. Rineer was adamant that the Union not be allowed to attend the EEO mediation. Dycus noted his objection and his election to not have the Union attend the mediation was granted. The management official present at the mediation, Peterson, did not know why the Union was not present. In the employment discrimination context, an aggrieved employee's rights take priority over the general interests of the bargaining unit.

It is clear that the Air Force disagrees with the Authority case law that section 7114(a)(2)(A) of the Statute affords the Union an opportunity to be present at a formal discussion, specifically mediation, relating to a formal EEO discrimination complaint. *See, Luke I, Luke II, Luke III, Dover.* In this case, for the first time, we are faced with actual facts that had been previously presented only as hypothetical situations. Here, the bargaining unit employee who filed the EEO complaint specifically requested that the Union not be present at the mediation. In answering a form sent by the Respondent, Rineer checked the box stating "I object to having the union's presence at the mediation and request they not be present." (G.C. Ex. 10).

The GC argues that the testimony of Rineer explains that his concerns regarding the Union's presence were not grounded in his concerns for confidentiality or his rights in filing a discrimination complaint, and, therefore, this objection to the Union's presence should not be considered sufficient under the Statute and the current case law. The Respondent argues that the statement is sufficient to negate the Union's rights in this matter and that the individual bargaining unit employee's rights trump the Union's rights, and, therefore, it did not violate the Statute by failing to afford the Union the opportunity to be present at the mediation.

Looking objectively at the evidence before me, we have an individual who has filed a formal EEO complaint and has agreed to mediation in an attempt to resolve the matter. The individual employee is not represented by the Union in his EEO complaint and has raised concerns with various management personnel regarding the quality of the Union's representation. According to the credited testimony of Dycus, Rineer told her that the Union's presence would be a waste of time and in response she sent this AF form regarding the presence of the Union at the mediation.

The form itself explains the Union's right to be present and asks the recipient to respond regarding his/her opinion of the Union's presence.[4]

Rineer did respond, formally objecting to the Union's presence. There is no evidence that the Respondent coerced, manipulated or attempted to influence Rineer in his decision making regarding the presence of the Union. In fact, Rineer appears to have purposely objected to the Union's presence at the mediation. Further, Rineer was aware of the consequences for the Union by the action that he took. I find that Rineer's testimony regarding why he checked the form as he did does not negate the actual form itself, which is quite specific in its request that the Union not be present. There is no evidence that the Respondent was aware of Rineer's alleged motivation, and I find Rineer's subsequent testimony regarding his motivation to be of no consequence. Further, I do not find it necessary for the Respondent to seek clarification in the face of such an explicit direction that the Union not be present at the mediation. I do not find that it was necessary for the Respondent to go beyond the form itself and get some sort of explanation from Rineer for the actions that he took.[5]

Therefore, after careful consideration, I find that there was, in fact, a direct conflict between the individual employee's rights and the Union's right to have notice and an opportunity to be present at the mediation on the formal EEO complaint. In

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[4]/ Apparently, this was a form created at Davis-Monthan AFB, although there was no testimony regarding its creation. Further, although Dycus testified that the Union would have been invited to the mediation if the employee had checked that he had no objection to the Union's presence, I find this highly unlikely in the face of the Air Force position in these matters. I found Dycus' testimony vague and less than convincing in this area. However, that is not the matter before me at this time.

[5]/ Rineer testified that the Union's right to be present at the mediation session and to serve the greater good of the bargaining unit would outweigh his own personal interests, if there were any, in not having the Union present, (Tr. 60) I give no weight to this opinion, which was specifically solicited by the GC. This opinion is not in keeping with Rineer's testimony and behavior regarding his personal rights. There is no evidence that he understands the Statute and the meaning of individual rights over the Union's statutory rights and I find his comments in this area to not be persuasive.

light of the D.C. Circuit's opinion in *Dover*, I resolve this conflict in favor of the employee. Although the February 8 mediation meets the criteria of section 7114(a)(2)(A) of the Statute, the Union's right to be present was superseded by the individual employee's clear and specific objection to the Union's presence. Therefore, the Respondent's failure to give notice and to afford the Union an opportunity to be present at the meeting was not a violation of the Statute.

Having found that the evidence does not support the allegation that the Respondent violated the Statute, it is therefore recommended that the Authority adopt the following Order:

ORDER

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

Issued, Washington, DC, June 13, 2008.

_____
Susan E. Jelen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-07-0377, were sent to the following parties:

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Catherine Turner

Dated: June 13, 2008

Washington, DC