interviews of bargaining unit employees who had been designated as agency witnesses. The Authority considered, and explicitly rejected, the agency argument regarding the attorney work product privilege.

> We find no merit in Respondent's argument and we reject the Respondents' exception. The question before us is whether the Respondent was required under section 7114(a)(2)(A) of the Statute to afford the Union an opportunity to be represented at interviews of bargaining unit employees known to be Union witnesses in a scheduled arbitration hearing. In *McClellan AFB* [29 FLRA 594 (1987)], the Authority rejected the holding of earlier cases such as *U.S. Customs Service* [9 FLRA 951 (1982)] and found that unions must be afforded an opportunity to be represented at interviews of unit employees in preparation for third-party proceedings where the "formal discussion" criteria are met. . . .
>
> In short, contrary to the Respondent's contention, nothing in our decision would "effectively destroy management's right to prepare its defense and thus destroy its right to a fair hearing." . . . Rather, our decision effectuates the intent of section 7114(a)(2)(A) of the Statute to allow a union to safeguard its representational interest by making sure that its witness is not coerced or intimidated prior to appearing at a scheduled arbitration hearing.

The *McClellan II* rationale is still valid under the particular circumstances of this case. Although Local 1929 was given notice of the meeting, it was not allowed to designate its own representative to the meeting. The Authority has routinely held that unions have a right to designate their own representatives and an agency's interference with that right is violative of the Statute. Although the Respondent may clearly prefer for another representative other than the designated arbitration representative to be present during these types of meetings, the choice of representative is not for the Respondent to make.

Essentially the Respondent argues that the "attorney work product privilege" would attach if the Union's arbitration representative is present for the meeting, but would

not attach if another Union representative is present. The Respondent even asserts that "Any competent union official can perform this service." (Respondent's Post Hearing Brief at page 8) The Respondent fails to explain why "any" representative from the Union would not compel the Agency's counsel to choose between revealing its case and its ethical duty. This is clearly because there is no coherent explanation for the Respondent's position, particularly in light of consistent, long-term Authority policy.

In considering the evidence as a whole, I find that the Respondent's interview with bargaining unit employee Todd in connection with the Lara Arbitration was a meeting within the meaning of section 7114(a)(2)(A) of the Statute, in that it was a discussion, that was formal, between an agency representative and a unit employee or the employee's representative; and concerning any grievance or any personnel policy or practice or other general condition of employment.[2/] Further, although the Respondent gave Local 1929 advance notice of the meeting, it specifically excluded James Stack, the arbitration representative, as Local 1929's representative at the meeting. The Union has a right to choose its own representative, and the Authority has held that the "attorney work product privilege" does not work to exclude the Union, or its designated representative, from the formal meeting. Further the evidence fails to support the Respondent's defense that Stack's attendance at the Lara Arbitration pre-arbitration interview of Todd would have interfered with the Respondent's questioning the employee and preparing its defense since the Respondent's counsel was not required to disclose its thoughts, impressions, legal theories or litigation strategy before, during, or after the interview with a witness.

2/ The parties stipulated that the May 26, 2004, meeting was called by Dixon, an agent of Respondent outside of Todd's supervisory hierarchy; the meeting was scheduled for the El Paso Sector Headquarters Conference Room; the meeting lasted approximately one hour; Todd was notified of the meeting by telephone from Maurer prior to the date of the meeting; and notes were made of Todd's answers to Maurer's and Dixon's questions. Dixon was a representative of the Chief Counsel's office and Maurer was present as a representative of the Labor Relations Office. During the meeting, Todd was asked questions related to the Lara Arbitration. (Stip. ¶¶15 and 16)

McClellan II; VA Long Beach; Department of Veterans Affairs, Medical Center, Denver, Colorado, 44 FLRA 768 (1992).

Under these circumstances, I find that the Respondent failed to comply with section 7114(a)(2)(A) of the Statute by refusing to permit Local 1929 to designate its representatives and provide an opportunity to attend the formal discussion and thereby violated section 7116(a)(1) and (8) of the Statute.

The Ortiz Arbitration

Issues

Whether the Respondent violated section 7116(a)(1) and (8) of the Statute by holding a formal discussion with bargaining unit employee Arnold concerning a grievance without affording Local 1929 notice and an opportunity to be represented at the discussion, as required by section 7114(a)(2)(A) of the Statute?

Whether the Respondent's defense that, because the scope of the interview with Arnold was limited to actions Arnold took as an acting supervisor on July 9, 2000, did not therefore require the Respondent to provide notice and opportunity for Local 1929 to be present and therefore Arnold was not a bargaining unit employee on July 9, 2000 for purposes of section 7114(a)(2)(A) of the Statute, lacks merit?

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent violated section 7116(a)(1) and (8) of the Statute by conducting a meeting with bargaining unit employee Arnold on June 14, 2004, without giving Local 1929 notice and the opportunity to be present. The General Counsel asserts that the Respondent's argument that Arnold was an Acting Supervisor on July 9, 2000 is irrelevant to the issue in this matter. The General Counsel asserts that the four elements needed to establish a formal meeting are present in this case and the Respondent's conduct was violative of the Statute.

In this matter, the meeting between bargaining unit employee Arnold and the Respondent's representatives

concerned the grievance of another bargaining unit employee that was scheduled for arbitration, the Ortiz Arbitration. The discussion with Arnold centered on his actions as acting supervisor as they related to the Ortiz grievance. Therefore, the General Counsel asserts that the Authority's decision *Nuclear Regulatory Commission*, 29 FLRA 660 (1987) is inapposite, since that case rested on whether the subject matter of the EEO complaint concerned a grievance, personnel policy or practice, rather than the status of the employee who was interviewed.

Further, the Authority has held that the Union has the right to attend a formal discussion where the bargaining unit employee was being questioned concerning events that occurred when he was an acting supervisor. In *Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming*, 31 FLRA 541 (1988) (*F.E. Warren*), the employee was considered to be acting on behalf of the Agency at the time of the acts which were the subject of the interview. The Authority found that the interview met all the elements of a formal discussion and that the agency had fulfilled its statutory obligations to notify the Union and provide it the opportunity to attend. *Id.* at 552.

In *McClellan III*, 38 FLRA 732, the Authority found that alternate supervisors were considered bargaining unit employees since they continued to be covered by the parties' collective bargaining unit during the time they performed as alternate supervisors and they continued to be subject to dues withholding. Therefore, the Authority found that although designated an alternate supervisor, the employee who was interviewed was a bargaining unit employee. Similarly, in the interview prior to the Ortiz Arbitration, Arnold was a bargaining unit employee and Local 1929 was entitled to be given notice of the meeting and the opportunity to be represented. The Respondent's failure to do so was violative of the Statute.

Respondent

The record is undisputed that the June 14, 2004 interview with Arnold, in connection with the Ortiz Arbitration, was limited to his recollection of events related to July 9, 2000, when he was an Acting Supervisory Border Patrol Agent. The Respondent asserts that Arnold was clearly an Acting Supervisory Border Patrol Agent at the time in question who exercised the supervisory authority of that position, *i.e.*, the granting of sick leave requests.

The facts in this case can be distinguished from those cases in which an employee is given an acting or alternate supervisory title in name only.

The Respondent distinguished the Authority's decisions in *Department of the Treasury, Bureau of Engraving and Printing*, 4 FLRA 33 (1980) and *F.E. Warren, supra*, in which the Authority indicated that it believed that meetings with current bargaining unit employees about times during which the employee was acting as a management representative, constituted "formal discussions." Noting that in *F.E. Warren*, the Authority expressly reserved ruling on the related issue of the application of Brookhaven when the employee was acting as management's agent, the Respondent asserts that the Authority was leaving open the question of what protections apply to a bargaining unit employee when he is interviewed solely regarding a time during which he was acting as management's agent.

Further, in *McClellan III*, the Authority found a meeting was a formal discussion, because the "alternate supervisor" appointment was basically in name only and did not include any transfer of real supervisory authority or responsibility to the employee. Both the ALJ and the Authority in that case focused exclusively on the employee's status at the time of the acts that were the subject of the questioning, not at the time of the questioning itself. The Respondent therefore argues that a similar analysis is necessary with the Arnold interview, noting that the only evidence in the record indicates that Arnold did, in fact, have and exercised traditional supervisory authority, specifically the granting of sick leave. (See Jt. Ex. 6) Because Arnold was acting with supervisory authority as a management representative on July 9, 2000, and the subsequent interview on June 14, 2004, was limited to a discussion of the events of July 9, 2000, the June 14, 2004 meeting did not constitute a formal discussion between the employer and a bargaining unit employee. Under those circumstances, Local 1929 was not entitled to notice and an opportunity to be present at the interview and the Respondent's conduct with regard to the Ortiz Arbitration was not violative of the Statute.

Analysis and Conclusion

As previously noted, the Authority has found that preparing a witness for an arbitration, or other third-party proceeding, constitutes a discussion, within the meaning of

section 7114(a)(2)(A) of the Statute. *McClellan II; GSA New York.* It is not disputed in this matter that the Respondent did, in fact, conduct an interview with bargaining unit employee Arnold on June 14, 2004 in preparation of the Ortiz arbitration and did not give Local 1929 notice or the opportunity to be present at the meeting. The Respondent argues that Local 1929 was not entitled to be present, since the interview with Arnold only related to actions on July 9, 2000 when Arnold was an Acting Supervisory Border Patrol Agent.

One of the criteria of section 7114(a)(2)(A) is whether there is a discussion "between one or more agency representatives and one or more unit employees". In this matter, there is no dispute that Arnold was a bargaining unit employee on the date in question, June 14, 2004. The Respondent defends its actions by asserting that Arnold was not a bargaining unit employee on the date of the alleged acts that are related to the Ortiz Arbitration. However, the Union has a primary representational interest in safeguarding its bargaining unit employees and ensuring that witnesses are not coerced or intimidated prior to an appearance at the scheduled arbitration hearing. *McClellan II.* Therefore, in agreement with the General Counsel, I do not find that the status of Arnold on July 9, 2000, is relevant to the issue of whether a formal meeting was held on June 14, 2004, when Arnold was interviewed by two of the Respondent's representatives prior to the Ortiz Arbitration. The Authority has consistently been concerned with the status of the employee on the date of the actual discussion, rather than any other time frame. See *GSA, New York; Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California,* 35 FLRA 1230 (1990).

Furthermore, even if Arnold's status on June 9, 2000, is an issue in determining whether there has been a formal discussion in this matter, I find that Arnold does not meet the criteria for supervisor and thus was a bargaining unit employee on that date. Section 7103(a)(10) of the Statute sets forth the criteria for determining if someone is a "supervisor".[3/] The stipulated record does not provide any

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3/ Section 7103(a)(10) states: "'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote,

(continued...)

evidence that Arnold had any authority to transfer, furlough, layoff, recall, suspend, or remove employees, or to adjust grievances or to effectively recommend such action. The Respondent only offers evidence that Arnold had the ability to approve leave as supervisory indicia. In *GSA, New York*, the Authority agreed with the Administrative Law Judge that the Respondent violated the Statute when the union was not notified of a formal discussion that occurred between the Respondent's Assistant Regional Counsel and a Team Leader in preparation for a pending arbitration hearing. The Administrative Law Judge had found that the individual in question had the authority, among other things, to and did approve leave requests for forty hours or less for team members. Before he signed any leave slip he consulted with the first-line supervisor to make sure he was consistent with the vacation schedule. The Administrative Law Judge found that his authority to approve leave requests for forty hours or less for each team member was not sufficient to make him a supervisor within the meaning of section 7103(a)(10) of the Statute, which does not include the ability to approve leave as a criteria for being a supervisor. *U.S. Small Business Administration District Office, Casper, Wyoming and Solidarity, USA*, 49 FLRA 1051, 1060-61 (1994); *U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Allen Park, Michigan*, 34 FLRA 423, 426 (1990). Therefore, for the purposes of section 7114(a)(2)(A) the employee was found to be an employee in the unit represented by the union and the failure to notify the union of the pre-arbitration interview was a violation of section 7116(a)(1) and (8).

Under these circumstances, I find that the evidence that Arnold had the authority to approve leave on June 9, 2000, absent any of the criteria set forth in section 7103(a)(10), is insufficient to establish that he was a supervisor within the meaning of the Statute. Therefore, the Respondent's defense to its failure to give Local 1929 notice and an opportunity to be present at the June 14, 2004 meeting is rejected.

3/ (...continued)
reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, ..."

In considering the evidence as a whole, I find that the Respondent's interview with bargaining unit employee Arnold in connection with the Ortiz Arbitration was a meeting within the meaning of section 7114(a)(2)(A) of the Statute, in that it was a discussion, that was formal, between an Agency representative and a unit employee or the employee's representative; and concerning any grievance or any personnel policy or practice or other general condition of employment.[4/]

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 (the Statute), it is hereby ordered that the Department of Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, El Paso, Texas, shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1929, concerning any grievance or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings, without affording the American Federation of Government Employees, AFL-CIO, Local 1929, prior notice of and an opportunity to be represented at the formal discussions.

4/ The parties stipulated that the June 14, 2004, meeting was called by Ramirez, an agent of Respondent outside of Arnold's supervisory hierarchy; Ramirez was present as a representative of the Labor Relations Office and Smith was present as a representative of the Chief Counsel's office; the meeting took place at the Labor Relations Office; the meeting lasted approximately one hour; Arnold was notified of the meeting by telephone call from Ramirez prior to the date of the meeting; and notes were made of Arnold's answers to Ramirez' and Smith's questions. During the meeting Arnold was asked questions related to the Ortiz arbitration. (Stip. ¶¶18 and 19)

(b) In any like or related manner, interfering with, restraining, or coercing its 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) Give the American Federation of Government Employees, AFL-CIO, Local 1929, the exclusive representative of our employees, prior notice of and an opportunity to be represented at formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment, to include interviews with bargaining unit employees concerning third-party litigation.

(b) Post at all locations in the El Paso Sector, where bargaining-unit employees 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 Respondent's Chief Patrol Agent, 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, Dallas Regional Office, Federal Labor Relations Authority, 525 S. Griffin Street, Suite 926, LB 107, Dallas, Texas, 75202-1906, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 20, 2004.

Susan E. Jelen

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 Homeland Security, Border and Transportation Security Directorate, U.S. Customs and Border Protection, El Paso, Texas, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1929 (Union), concerning any grievance or any personnel policy or practices or other general conditions of employment, including interviews conducted in preparation for arbitration hearings, without affording the Union, prior notice of and an opportunity to be represented at the formal discussions.

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

WE WILL give the American Federation of Government Employees, AFL-CIO, Local 1929, the exclusive representative of its employees, prior notice of and an opportunity to be represented at formal discussions with bargaining unit employees concerning grievances, personnel policies and practices or other general conditions of employment, to include interviews with bargaining unit employees concerning third-party litigation.

_____

Department of Homeland Security
Border and Transportation
Security Directorate
U.S. Customs and Border
Protection
El Paso, Texas

Date: _____ By: _____

(Signature)
(Chief Border Patrol Agent)

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, Dallas Region, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, LB-107, Dallas, TX 75202-1906, and telephone number is: 214-767-4996.