



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 18-07

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CUSTOMS AND BORDER PROTECTION
LAREDO, TEXAS

RESPONDENT

AND

NATIONAL BORDER PATROL COUNCIL, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 2455, AFL-CIO

CHARGING PARTY

Case No. DA-CA-17-0067

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For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

The two top managers of the Laredo West Station wanted to hold a meeting with border patrol agents to talk about ways of improving the station's response to illegal border traffic in its area of responsibility. Five days before the meeting was held, they directed supervisors to recruit two volunteers from each shift to attend the meeting. Although supervisors approached agents directly about the meeting, management did not notify the Union. And while two union representatives learned of the meeting less than an hour before it began, no union representative attended.

The meeting began with two managers making some opening remarks. The managers and agents then engaged in a long and free-flowing discussion about border traffic, including changes in the directions of traffic, which led to further discussion of ways the station could best respond to the evolving situation. The participants raised and discussed suggestions such as increasing staffing levels, changing patrol assignments, creating or improving roads used by agents, and making better use of the equipment, technology, and vehicles used by agents. The meeting lasted about an hour and forty-five minutes.

Section 7114(a)(2)(A) of the Statute requires agencies to give unions the opportunity to be represented at "formal discussions" that meet certain criteria. The issues in this case focus on whether the meeting described above met the criteria of a formal discussion, and if so, whether the Agency gave the Union a sufficient opportunity to participate in the meeting. First, did the meeting concern a "general condition of employment" within the meaning of § 7114(a)(2)(A)? Because the meeting involved discussions about border traffic, technology, staffing issues, and other matters relating to the work situation of border patrol agents at the station, and because the meeting touched on possible changes to employees' work situation that would be of significant interest to the Union, and to employees in general, the answer to this question is yes.

Second, was the meeting "formal," as that term is understood by the Authority? While the meeting was informal in many ways (for example, there was no roll call, agenda, or meeting transcript), the signs of informality are outweighed by the signs of formality. For example, the meeting was planned and announced in advance; led by the two highest-ranking managers at the station; held in a formal setting; and dedicated to furthering the Agency's mission, a topic that again would be of significant interest to the Union. Therefore, the answer to the second question is yes.

Finally, did the Agency provide the Union a meaningful opportunity to be represented at the meeting? Because the Agency failed to give the Union the type of formal advance notice that it normally provides for formal discussions, and because the two union stewards who learned of the meeting did not hear about it until shortly before the meeting began, the Union did not have sufficient time to designate a representative of its own choosing. Thus the notice was inadequate, and the Agency committed an unfair labor practice.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On November 23, 2016, the National Border Patrol Council, American Federation of Government Employees, Local 2455 AFL-CIO (the Union) filed an unfair labor practice (ULP) charge against the Department of Homeland Security, United States Customs and Border Protection, Laredo, Texas (the Agency or Respondent). GC Ex. 1(a). After investigating the charge, the Acting Regional Director of the FLRA's Dallas Region issued a Complaint and Notice of Hearing on March 23, 2017, on behalf of the General Counsel (GC), alleging that the Agency violated §§ 7114(a)(2)(A) and 7116(a)(1) and (8) of the Statute by failing to give the Union an opportunity to be represented at a formal discussion held by management on October 19, 2016. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on April 7, 2017, denying that it violated the Statute. GC Ex. 1(d).

A hearing was held in this matter on June 27, 2017, in Laredo, Texas. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered. Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The National Border Patrol Council, American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a nationwide unit of U.S. Customs and Border Protection employees, which includes employees of the Respondent. The Union is an agent of AFGE for the purpose of representing bargaining unit employees in the Agency's Laredo Sector. GC Ex. 1(c); Tr. 29-30.

This dispute arose at the Laredo West Station, one of seven border patrol stations in the Laredo Sector of the U.S. Border Patrol. Tr. 14, 80-81. The station is led by Clara Torres, the Patrol Agent in Charge (PAIC), and Marcus Saucedo, the Deputy Patrol Agent in Charge (DPAIC). Tr. 79-80, 96-97. The station is housed in a one-story building with about ten offices. Tr. 57. Approximately 160 border patrol agents and other staff are based there, though about 30 agents are detailed to other stations and components within the Laredo Sector. Tr. 91.

At the risk of stating the obvious, the Border Patrol's mission is to secure the nation's borders. Tr. 80. PAIC Torres testified that border patrol agents support this mission by "looking for [and stopping] illegal alien traffic or illegal contraband trying to enter the United States illegally." Tr. 81. The movement of aliens and contraband entering the country illegally is referred to as "traffic." Tr. 59-60. The Laredo West Station is responsible for patrolling four zones covering more than one thousand square miles along a fifty-five mile section of the Rio Grande. Tr. 66, 91.

Most border patrol agents work one of three ten-hour shifts: the midnight shift, which runs from 10:00 p.m. to 8:00 a.m.; the day shift, which runs from 6:00 a.m. to 4:00 p.m.; and the swing shift, which runs from 2:00 p.m. to midnight. Tr. 24-25, 28, 51. There is another shift for agents assigned to a specialty unit that usually begins in the late evening hours. Tr. 26, 51, 60. Agents are supposed to have at least eight hours off between shifts. Tr. 27.

At the beginning of each shift, a supervisor leads muster, a briefing session attended by supervisors, managers, and the border patrol agents working that shift. During muster, the supervisor conducts a roll call, gives out assignments, and makes announcements. A muster usually lasts between twenty and thirty minutes. Tr. 15-17, 82-83, 110. There is a dedicated muster room at the station. Tr. 56.

In the fall of 2016, Torres and Saucedo decided to hold a “brainstorming session” with border patrol agents. *See* Tr. 85-86. Torres testified that the meeting was intended to give her and Saucedo a chance to hear from a sampling of all agents – including those she did not regularly see because they worked the midnight shift – about “what’s going on out there” and “how to better work the traffic.” *Id.*

On Friday, October 14, 2016,¹ Saucedo sent an email to watch commanders and first-line supervisors leading musters, stating:

Please canvass your agents and get two volunteers who are willing to get together with us probably next Wednesday [October 19] to brainstorm and initiate a draft on our path forward. Hopefully[,] we can come out with good ideas in order to make this a successful exercise. The [meeting] will be scheduled for 8am.

Send me the names of the Agents by Tuesday. Thanks.

Jt. Ex. 3; Tr. 28-29, 85, 97. Torres indicated that the meeting was subsequently rescheduled to start around 7:00 a.m., so that it would be easier for agents on the midnight shift to attend.² Tr. 98. In addition, Torres told agents that they could join the meeting late if they had a scheduling conflict. Tr. 84.

The supervisor leading the 2:00 p.m. muster on October 14 informed the agents in attendance that Saucedo was seeking two volunteers from each of the four shifts, to attend the October 19 meeting. Eduardo Aguero, a border patrol agent present at the muster, testified that none of the agents at the muster volunteered to participate in the meeting. Tr. 51-53, 60. A similar request was made at the swing shift muster on October 15 or 16, but again no one volunteered. *See* Tr. 53-55. Aguero said that another supervisor, David Vidale, approached him in the station’s

¹ Unless otherwise noted, all dates are in 2016.

² I credit Torres’s testimony that the meeting began around 7:00 a.m., which is supported by the testimony of Border Patrol Agent Eduardo Aguero. Tr. 55.

parking lot on October 17 and told him, “based upon my field knowledge, that he felt comfortable with sending myself or asking me . . . to attend this meeting.” Tr. 54. Vidale added that he would be asking another agent on the swing shift about attending the meeting as well. Tr. 54-55. Subsequently, Vidale adjusted the start times for Aguero’s Tuesday and Wednesday shifts so that he would have eight hours off between shifts. Tr. 55.

When the Agency plans to hold a formal discussion with a bargaining unit employee, it normally notifies the Union of the meeting, by email or in person, one or two days in advance. Tr. 108. The Union did not receive any written notice of the October 19 meeting. Tr. 100-01. However, some union stewards learned about the meeting on October 19, shortly before it began.

Phillip Bollenbeck (a union steward and officer) was told of the meeting at some point in the middle of his shift’s 6:00 a.m. muster. Tr. 19. According to Bollenbeck, the supervisor leading the muster stated that two agents from the shift had been “designated as representatives for that particular shift” to attend the meeting. Tr. 18-19. The supervisor also stated that if the non-attending border patrol agents had any concerns, they should “go see those representatives and they would . . . pose their questions or concerns to the managers that were going to be holding the meeting.” Tr. 19-20.

Bollenbeck did not immediately raise any concern that the Union should be represented at the meeting, because he wanted to see if any of the other stewards had talked about it with management or was planning to attend. Tr. 20. In addition, Bollenbeck was hesitant to talk to management because he “knew very little about” the meeting, including its exact location and start time. Tr. 20-21.

After the muster ended, at around 6:20 or 6:30 a.m., Bollenbeck started his work for the day and also reached out to the other union stewards at the station, all of whom responded within an hour. Like Bollenbeck, the other union stewards had not previously heard about the meeting, including Caleb Pippin, the lead steward, and Chianti Edwards, a steward who was out on training. Tr. 21-22, 36. (Bollenbeck testified that there was a fourth steward at the station, Luis Rivera, but that Rivera might have been on a detail at the time.) Tr. 35-36. Upon hearing back from the other stewards, Bollenbeck decided to continue performing his regular work duties. Tr. 22.

Pippin learned of the meeting minutes before it began. He was walking down a hall at the station, prior to an EMT certification test he would be taking at 8:00 a.m., when Torres spotted him and invited him to attend the meeting.³ Tr. 38-41, 43-44, 84. Asked to explain

³ Pippin testified that the meeting began at 8:00 a.m., but I find testimony from Torres and Aguero indicating that the meeting began around 7:00 a.m. to be more likely. Accordingly, while I credit Pippin’s claims (confirmed by Torres) that he talked with Torres right before the meeting was about to begin, and that his EMT certification test was at 8:00 a.m. (Tr. 40, 43, 98), I do not credit Pippin’s claim that he talked to Torres just minutes before his EMT certification test was about to begin. Aside from this discrepancy, I find Pippin’s testimony to be credible overall.

why she invited Pippin, Torres testified, "I saw him, I was like, you know what, I'm going to let Pippin know, because at that point it hadn't even dawned on me . . . to let the Union know, right; hey, you guys want to come or send somebody in there . . ." Tr. 100.

According to Pippin, Torres told him that there were agents who were "going to be in a meeting that morning with management . . ." Tr. 42. Pippin testified that Torres did not go into detail about the meeting, that she was "kind of vague as far as what she was describing," and that she said she was "going to be discussing some things that were going on at the station." *Id.* Pippin said Torres was aware of his training and said she was sorry he would not be able to attend the meeting. Tr. 42; *see also* Tr. 84, 100. Torres testified that she provided Pippin a little more detail, telling him that she would be "talking to a couple of the guys who had volunteered to come in and give us some operational ideas on . . . how to work traffic . . . in our area of responsibility." Tr. 84.

After Pippin left Torres, he did not contact the Union to see if another representative could attend the meeting, because the meeting was already about to begin, and he needed to get to his test quickly. Tr. 45-46. Pippin also testified that because he had not been told about the meeting previously, he felt "ambushed" when Torres stopped him in the hall. Tr. 47. As Pippin left Torres, he asked her to send him an email with a list of attendees. Tr. 42-43. (Although Pippin did not mention it in his testimony, it appears that Bollenbeck talked to him after he ran into Torres. *See* Tr. 21.) At the hearing, Torres acknowledged that the notice Pippin received was far shorter than the notice that is usually given to the Union prior to a formal discussion. Tr. 108.

The meeting began around 7:00 a.m. in a conference room that is used almost exclusively by upper management. Tr. 55-56, 98. Aguero and the other border patrol agents sat around the conference table, with Torres and Saucedo seated at the middle of one side of the table. Tr. 65. There were eight agents total, two from each shift. Tr. 60. No one from the Union attended. Tr. 44.

Torres did not prepare for the meeting in advance, and she did not have a formal meeting agenda.⁴ There was no roll call, and no attendance was taken. Tr. 86-87. Saucedo took handwritten notes throughout the meeting, and Torres recorded suggestions made by agents on her tablet, but the meeting was not recorded and no transcript was made. Tr. 66, 87, 105. No one person dominated the conversation, and agents were not required to raise their hands before speaking. Tr. 88. The meeting lasted about an hour and a half to two hours, perhaps more.⁵ Tr. 64, 87.

⁴ My description of the meeting combines the testimony of Torres and Aguero. While their testimony does not match in all details, I do not believe there were any significant, direct conflicts between the two witnesses, both of whom were sincerely offering their recollections of a long meeting. Even on a subject such as the length of the meeting, where the two witnesses' estimates varied widely, I have not found it necessary to pit one person's credibility against the other's, and my findings simply reflect my view of the most plausible facts.

⁵ Aguero testified that the meeting lasted four hours, based on the fact that he went out for lunch after it ended (Tr. 64), but I believe Torres's estimate is more accurate. Torres did indicate that she offered to adjourn the meeting after about thirty minutes, but the agents said, "no, we're good. They wanted to

The meeting began with Torres noting that border patrol agents had just finished an operation in Zone 1, the northernmost section of the station's area of responsibility. She said "the chief was very happy with our production in the area and apprehensions or turn-backs [and] the way we controlled the area . . ." Tr. 59. Torres indicated that the Agency was starting to notice that "traffic was moving to a different area," and she "requested different ways or how we could control the traffic in that area where it was shifting to while still maintaining control of our Zone 1." *Id.*; see also Tr. 89, 109. Torres then "opened up the floor requesting questions or asking for agent input" on this issue (Tr. 59), and the attendees began a free-flowing discussion about how agents and supervisors could control the movement of illegal aliens and drugs coming into the country. Tr. 60-61, 69. For example, agents made suggestions as to how to reduce the number of "got-aways" – "illegal aliens . . . [who] make it through [to the U.S.] without being apprehended." Tr. 61. Aguero noted in this regard that when traffic moves from one zone to another, agents can be redeployed to follow those movements. Tr. 69. He further explained that new assignments are given out each day; that assignments can be for various checkpoints, towers, or other areas within the patrol zones; and that daily assignments are recorded on a computerized log. Tr. 70-72. Torres testified that changes in traffic could lead managers to assign agents to new locations or to change the concentrations of agents assigned to different zones. Tr. 109-11.

Several agents proposed that the station hire additional agents, because it is currently understaffed. Tr. 61. Torres and Saucedo responded that they were not able to hire new agents, and other agents suggested that agents on details be brought in from elsewhere. *Id.* Many other topics were discussed, including aerial assets, establishing a river road, and using more ATVs to get to areas with rough terrain. Tr. 62. One agent suggested bringing back a specialized ATV team; Torres replied that they currently did not have sufficient manpower to sustain such a unit, but she would revisit the idea if their staffing level increases. Tr. 90-91. Attendees also talked about vehicle maintenance, as there was an "increase in vehicles that were going down . . . that had shocks and flat tires . . . vehicles being damaged out in the field due to operational use." Tr. 72. Torres and Saucedo acknowledged that there had been an increase in vehicle maintenance issues. *Id.* Aguero suggested that the Agency create new or better drag roads, which are dirt roads that have been smoothed over by agents so that footprints and other signs of traffic can be detected. Tr. 61-62, 75, 105-06. Torres told the agents that it was not feasible to build a new river road, but that she would get in touch with Texas authorities with respect to the drag roads. Tr. 63.

In addition, Torres stated that agents at the October 19 meeting "brought up the technology that's out there, and at every muster the agents will ask when are we getting, you know, more cameras or when are we getting this." Tr. 90. I asked Torres whether agreeing to use more cameras would require the Agency to assign more equipment or to assign agents to different areas. She responded that the station received two large camera "towers," and

keep brainstorming." Tr. 87. Nevertheless, I find it implausible that Torres would allow the meeting to go on for almost half the day, and based on the testimony describing the topics raised at the meeting, I believe they all could have been addressed in two hours or less. Accordingly, I find it more likely than not that the meeting lasted between an hour and a half and two hours.

that when the camera towers arrived management “did a formal . . . notice[], to the Union, to let them know that it was going to be a change, there was going to be change in working conditions” “because this agent was going to sit there for . . . his or her shift . . .” Tr. 112-13. Torres added that such notice is given “[a]nytime that we relocate that particular tower.” Tr. 113. Torres also noted that agents have “recon cameras” that are “used on the border every single day by agents,” and that these cameras can be redistributed in response to changes in traffic. Tr. 110.

A few hours after the meeting, Torres emailed Pippin a list of the meeting attendees, as requested.⁶ Jt. Ex. 2 at 1. Torres noted that she hoped to have similar meetings so that she could receive “more ideas and feedback regarding the work out there.” *Id.* Two days later, after speaking with the other union stewards and Union President Hector Garza, Bollenbeck sent Torres and Saucedo an email, asking why the Union had not been provided advance notice of the meeting. Jt. Ex. 1; Tr. 22. About two hours later, Saucedo sent Bollenbeck a reply, offering to talk more about the matter. *Id.*

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent violated § 7114(a)(2)(A) of the Statute by failing to provide the Union an opportunity to be represented at the October 19 meeting, and that the Respondent thereby violated § 7116(a)(1) and (8). GC Br. at 7-8.

Citing the statutory language of § 7114(a)(2)(A), the GC concedes that the meeting did not concern a grievance or personnel policy or practice, but it argues that the meeting did concern general conditions of employment. *Id.* at 13 (citing *U.S. Dep’t of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 174 (2009) (*Kirtland AFB*); *Dep’t of Health & Human Servs., SSA, Dall. Region, Dall., Tex.*, 23 FLRA 807 (1986), *rev’d & remanded as to other matters sub nom. AFGE, SSA Council 220 v. FLRA*, 840 F.2d 925 (D.C. Cir. 1988)). In this regard, the topics discussed at the meeting – hiring new agents, creating new details, installing and improving drag roads, adjusting to new traffic patterns, increasing the use of aerial assets and ATVs, and improving the level of vehicle maintenance – pertained to the work situation of bargaining unit employees. More broadly, the topics discussed at the meeting could affect the location of an agent’s patrol assignment, the agent’s capacity to find aliens, and the agent’s ability to use an ATV and cover more ground more quickly. The GC argues that it was especially important for the Union to have a representative at the meeting who could ask questions and provide input for employees who weren’t present or who were afraid to speak about sensitive issues. GC Br. at 14.

⁶ Torres did not include Aguero on the list, but it is apparent that this was just an oversight on Torres’s part. Jt. Ex. 2; Tr. 103-04.

The GC further contends that the meeting was formal because: (1) the two highest ranking officials at the station, Torres and Saucedo, attended and led the meeting; (2) it took place in a conference room that is used mostly by upper management; (3) it was planned and announced in advance, supervisors were instructed to find two agents from each shift to attend, and at least some agents needed to have their shifts rescheduled in order to attend; (4) it lasted at least one and a half hours; (5) there was “an agenda” because Torres “clearly intended to discuss border traffic issues before opening up the discussion for the agents to provide general feedback”; (6) Torres and Saucedo took notes; and (7) attendance was not completely voluntary, as Aguero was pressured by a supervisor to attend. *Id.* at 11-13 (citing *Luke AFB, Ariz.*, 54 FLRA 716, 728 (1998) (*Luke AFB*), *rev'd as to other matters sub nom. Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999)). Moreover, the GC argues that the topics discussed pertained to the Agency’s mission and involved matters that could impact bargaining unit employees. GC Br. at 12.

The GC submits that while Agency representatives told Bollenbeck and Pippin about the meeting shortly before it began, this notice was inadequate because it did not give the Union enough time to select a representative of their own choosing. *Id.* at 15-16. Citing *Dep’t of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 29 FLRA 594, 606 (1987) (*McClellan AFB*), the GC acknowledges that a union’s actual notice of a formal discussion may satisfy the statutory mandate, in the absence of formal notice; but it argues that the notice received by Bollenbeck and Pippin here was insufficient, as it came minutes before the meeting was to start and left the stewards in doubt as to the time and purpose of the meeting. Further, the GC asserts that Torres herself admitted that she had “wrongly forgotten to include the Union while planning and preparing for the meeting.” GC Br. at 17.

Respondent

The Respondent denies that it violated the Statute. It first contends that the October 19 meeting did not meet the threshold statutory requirement that the meeting must concern “any grievance or any personnel policy or practices or other general condition of employment[.]” 5 U.S.C. § 7114(a)(2)(A). Resp. Br. at 3-6. In support, the Respondent asserts that a meeting discussing assignments and details cannot meet the statutory definition of a formal discussion, because “assigning work is a sole right of management,” pursuant to § 7106 of the Statute. *Id.* at 5-6. In addition, the Respondent argues that the meeting pertained to “purely operational concerns,” including traffic, technology and cameras, ATVs, and drag roads. *Id.* at 11-12 (citing *IRS (Dist., Region, Nat’l Office Unit)*, 14 FLRA 698 (1984) (*IRS*)). According to Respondent, the Authority held in *IRS* that such operational matters do not constitute a formal discussion under 7114(a)(2)(A).

Next, the Respondent cites a number of factors which show the informal nature of the October 19 meeting: (1) the meeting was held in the conference room, with attendees sitting around a circular table, as opposed to sitting in a classroom setup; (2) Saucedo called the meeting with a limited amount of advance notice on Friday, October 14, and even then the exact date of the meeting was uncertain; (3) the meeting lasted an hour and forty-five minutes

at most; (4) there was no formal agenda; (5) there was no roll call and no formal transcript; (6) the meeting mostly consisted of questions and answers and free-flowing discussions, and attendees spoke without having to raise their hands; (7) attendance was not mandatory; and (8) agents could arrive late. Resp. Br. at 7-11.

Even if the meeting constituted a formal discussion, Respondent argues that it notified two union stewards of the meeting, thereby complying with the Statute. *Id.* at 12-15. In this regard, Respondent asserts that a supervisor told Bollenbeck about the meeting at the 6:00 a.m. muster on October 19, and that Bollenbeck relayed this information to the other stewards. *Id.* at 13. Respondent further asserts that by not talking to management about the meeting, and not requesting official time to attend the meeting, Bollenbeck waived the Union's right to be represented there. It cites *Nat'l Labor Relations Board*, 46 FLRA 107 (1992) (*NLRB*), for the proposition that a union may waive its right to be represented at a formal discussion. Resp. Br. at 12, 14.

ANALYSIS AND CONCLUSIONS

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.

In order for a union to have a right to be represented under this provision, there must be (1) a discussion; (2) which is formal; (3) between a representative of the agency and a bargaining unit employee or the employee's representative; (4) concerning a grievance or a personnel policy or practice or other general condition of employment. *U.S. Dep't of Def., U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256, 259 (2011) (*Tyndall AFB*). In adjudicating such cases, the Authority is guided by the intent and purpose of the provision, which is to afford a union the opportunity to be present at discussions addressing matters of interest to unit employees, in order to take appropriate action to safeguard their interests, as viewed in the context of the union's full range of responsibilities. *Id.* The intent and purpose of § 7114(a)(2)(A) is not a separate element in the analytical framework, but is simply a guiding principle that informs the Authority's analysis in applying the statutory criteria. *Gen. Servs. Admin.*, 50 FLRA 401, 404 n.3 (1995) (*GSA*). When a meeting satisfies these criteria, management must give the union notice of, and an opportunity to be present at, the meeting, or else it violates § 7116(a)(1) and (8) of the Statute. *Tyndall AFB*, 66 FLRA at 260. In determining whether notice is adequate, the Authority considers whether the notice gave the union enough time to designate a representative of its own choosing. *See Gen.*

Servs. Admin., Region 9, L.A., Cal., 56 FLRA 683, 685 (2000). A union can waive its statutory right to be present at a formal discussion, but this waiver must be clear and unmistakable. See *NLRB*, 46 FLRA at 112; *U.S. Nuclear Regulatory Comm'n*, 21 FLRA 765, 768 (1986).

Here, the parties agree that the October 19 meeting was between representatives of the Agency and bargaining unit employees. GC Exs. 1(c) & 1(d). Further, it is not seriously disputed that this was a discussion within the meaning of § 7114(a)(2)(A). See, e.g., *Pension Benefit Guar. Corp., Wash., D.C.*, 62 FLRA 219, 221 (2007) (*PBGC*) (quoting *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1343 (1996) (*FCI Bastrop*)). This leaves us with three issues to resolve: whether the meeting concerned a general condition of employment, whether the meeting was formal, and whether the Agency adequately notified the Union of the meeting.

The Meeting Concerned a General Condition of Employment

A matter concerns conditions of employment if it pertains to unit employees and is directly connected to the work situation or employment relationship of those employees. *Kirtland AFB*, 64 FLRA at 175. Many things can constitute conditions of employment, ranging from working hours and days off, *Veterans Admin., Wash., D.C.*, 37 FLRA 747, 753 (1990), to the use of work telephones, *Cong. Research Emps. Ass'n*, 18 FLRA 36, 37 (1985), to the office atmosphere and workplace morale, *GSA*, 50 FLRA at 404. The broad range of what constitutes a condition of employment can be further inferred from negotiability disputes. See *AFGE, Local 1164*, 60 FLRA 785, 787 (2005) (procedures to fill vacancies found to be negotiable as a procedure); *AFGE, Nat'l Council of Field Labor Locals*, 58 FLRA 616, 616, 618 (2003) (number of government vehicles available to employees found to be negotiable as an appropriate arrangement); *AFGE, Local 2761*, 47 FLRA 931, 934 (1993) (maintaining at least three electric scooters for maintenance employees found to be negotiable). In addition, the Authority has stated that “the location in which employees perform their duties, as well as other aspects of employees’ office environments, are ‘matters at the very heart of the traditional meaning of conditions of employment.’” *Kirtland AFB*, 64 FLRA at 175-76.

In reviewing the legislative history of § 7114(a)(2)(A), the Authority has indicated that the word “general” is intended to limit a union’s right to representation to those formal discussions “which concern conditions of employment affecting employees in the unit generally.” *Nuclear Regulatory Comm'n*, 29 FLRA 660, 663 (1987) (citations and internal quotation marks omitted).

It is clear that the October 19 meeting pertained to all, or most, border patrol agents at the station and therefore concerned bargaining unit employees “generally.” Accordingly, I begin my analysis by considering whether the meeting concerned conditions of employment; that is, whether the meeting was directly connected to the work situation or employment relationship of border patrol agents at the station.

In answering this question, I first note Torres's own statements that the meeting pertained to the work that agents perform every day. She testified that the meeting was intended to help her get ideas "how to better work the traffic" (Tr. 85), and after the meeting she wrote Pippin that she hoped to hold similar meetings "regarding the work out there." Jt. Ex. 2 at 1. Furthermore, she asked her supervisors to obtain volunteers from each of the four shifts, so that she could hear from the full spectrum of agents at the station. Tr. 85-86.

As for the specific matters discussed, it is clear that Torres, Saucedo, and the agents engaged in detailed discussions about many aspects of the work situation of agents. The group talked about controlling traffic and about ways to reduce the number of "got-aways." They also talked about vehicle maintenance and the ATVs agents drive, and the technology that agents use while performing their duties. In addition, the group discussed the support agents receive in performing their work. For example, they talked about creating a river road and creating or improving drag roads that agents use to detect traffic. The group also discussed ways to bring up staffing levels, something which could enable agents to again work in a specialized ATV unit. Moreover, the group talked about changes in traffic patterns, an issue that could lead to changes in assignments and, perhaps, the location and distribution of cameras that agents use, a matter that Torres admitted can involve changes to agents' conditions of employment. Tr. 112-13. That the meeting touched on possible changes to these conditions of employment bolsters the conclusion that the meeting concerned a general condition of employment, because § 7114(a)(2)(A) was "designed to address situations . . . where there is a high potential for changes to employees' conditions of employment." *Kirtland AFB*, 64 FLRA at 174. Finally, I find it notable that while it did not dawn on Torres previously, she eventually realized when she saw Pippin that the Union would have an interest in having a representative present. Tr. 100. All of this strongly supports the conclusion that the meeting concerned a general condition of employment.

The Respondent's arguments to the contrary are not convincing. It claims that the meeting did not concern a general condition of employment (and thus was not a formal discussion) because the meeting pertained to "purely operational concerns," including "technology and cameras, ATVs, and drag roads." Resp. Br. at 11-12. Respondent never explains, however, what it means by operational concerns or how that term is meaningful in the context of § 7114(a)(2)(A). As I just noted, the topics listed by the Respondent all pertain to border patrol agents' conditions of employment. Moreover, the Respondent cites no authority to support the proposition that a discussion of "operational" matters cannot also pertain to a general condition of employment. The decision it does cite, *IRS*, does not help its cause, since in that case the Authority did not address the question of whether the interviews in dispute were formal discussions, nor was the term "operational concerns" discussed in any way. 14 FLRA at 700. Respondent's claim that the meeting involved matters that were merely "operational" is similar to an argument that the Authority rejected in *Kirtland AFB*. In that case, the agency claimed that a meeting did not concern a personnel policy or practice or general condition of employment because it was simply held to "provide information" about a staff reorganization. The Authority stated that even if the agency's assertion were true, the meeting could still involve matters that would implicate the union's duty to

safeguard the interests of employees under § 7114(a)(2)(A). 64 FLRA at 174. As discussed above, the meeting in our case involved conditions of employment and potential changes to those conditions, matters that were clearly of interest to the Union. For all of these reasons, I do not accept the Respondent's "operational" argument.

Respondent also argues that the meeting did not concern a general condition of employment because the meeting discussed details and assignments, two issues that are encompassed in management's right to assign work. However, the fact that some of the matters discussed might involve management rights is irrelevant for determining whether those matters pertained to the work situation of bargaining unit employees. *See Dep't of Veterans Affairs Med. Ctr., N.Y., N.Y.*, 47 FLRA 1072, 1078 (1993). The Agency has not been asked to bargain over the issues discussed at the October 19 meeting; rather it asked employees to comment on matters that affected all agents at Laredo West. In those circumstances, the Union should also have had an opportunity to participate in the discussion.⁷

As the evidence clearly shows that the meeting pertained to the work situation of all border patrol agents at the station, I find that it concerned a general condition of employment.

The Meeting Was Formal

In order to determine whether a meeting is "formal," the totality of the circumstances presented in each case must be examined. The Authority has identified a variety of factors that are relevant for this purpose, but it has also stated that these factors are merely illustrative, not inclusive. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 157 (1996) (*Warren AFB*). The relevant factors include: (1) the status of the individual who held the discussion; (2) whether any other management representatives attended; (3) the site of the discussions (i.e., in the supervisor's office, at the employee's desk, or elsewhere) (4) how the meeting for the discussion was called (i.e. with formal advance notice or more spontaneously and informally); (5) the length of the discussion; (6) whether a formal agenda was established; and (7) the manner in which the discussions were conducted (i.e., whether the employee's identity and comments were noted or transcribed). *PBGC*, 62 FLRA at 222; *U.S. Dep't of Labor, Office of the Assistant Sec'y for Admin. & Mgmt., Chi., Ill.*, 32 FLRA

⁷ Although it may seem like a backhanded compliment in the context of this case, I sincerely believe that PAIC Torres is to be commended for seeking out the input and ideas of the agents at Laredo West. Managers are often reluctant to seek out the opinions of employees who are closest to the problems and challenges faced by the agency, and Ms. Torres is not likely to view my unfair labor practice finding as a reward for her efforts. The "moral" of this case, however, is not that managers should avoid consulting with bargaining unit employees, but rather that they must engage with employees in these situations with the participation of the employees' union. I believe that Torres recognized this, albeit belatedly, when she saw Pippin and invited him to attend the meeting at the last minute. And I believe that she understood that the Union's participation at the October 19 meeting would not have undermined her reasons for calling it.

465, 470 (1988). Also relevant is whether attendance at the meeting was mandatory. *AFGE, Local 2054*, 63 FLRA 169, 172 (2009). In addition, the Authority considers the purpose of the discussion, and in some cases the purpose of the discussion may be sufficient, by itself, to establish its formality. *Warren AFB*, 52 FLRA at 156.

There is no question that many aspects of the meeting were informal. Specifically, there was no roll call or recording of attendance, and no formal agenda. Agents could arrive at the meeting late if they had to, and the meeting did not follow a formal or scripted structure. While Torres made a few opening remarks and was responsible for determining when the meeting would end, the meeting was mostly an open-ended, free-flowing brainstorming session in which attendees freely asked questions and gave answers. Attendees did not need to raise their hands before speaking, and no one person dominated the conversation. At least in a general sense, attendance at the meeting was voluntary.

Significant as these indicia of informality may be, they are nevertheless outweighed by indicia of formality. In this regard, the meeting was run by Torres, the highest ranking manager at the Laredo West Station, and was attended by Saucedo, the second highest ranking manager there. The meeting took place in the conference room, a location used mostly by upper management that is obviously away from the patrol zones where border patrol agents do most of their work, and separate from the room where musters are regularly held. While it is true that the room was not in a classroom setup, agents were seated in a conference room at a large conference table, a setting one associates with formality. The meeting was planned in advance by Torres and Saucedo, and it is evident that they gave some consideration to the best way to elicit a wide range of ideas from a wide range of employees. Saucedo directed supervisors to recruit two agents from each shift to attend the meeting, and supervisors started recruiting volunteers at musters (which are themselves formal), on October 14, five days before the meeting was to begin. The meeting lasted at least an hour and a half, far longer than other meetings found to have been formal. *See, e.g., FCI Bastrop*, 51 FLRA at 1343, 1356 (25-30 minutes); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 594, 604 (1990) (15-25 minutes). And while there was no formal transcript, Saucedo took notes throughout the meeting and Torres took notes as well to help her remember the suggestions made by the agents.

The interaction between Vidale and Aguero shows us that the meeting was not truly voluntary for all attendees. It is more accurate to say that while management was hoping that eight agents would volunteer on their own, it was prepared to fill the gaps in volunteers by exerting some pressure on employees. Following Saucedo's directive that supervisors "get" two agents from each shift to attend the meeting, and needing to find volunteers after swing shift agents declined to volunteer on their own, Vidale tracked Aguero down in the station parking lot and persuaded him to attend the meeting. It is common knowledge that when a supervisor reaches out to an employee in this way, the "ask" is more a command than a question, and Aguero recognized this when he testified that Vidale was both "asking" and "sending" him to attend the meeting. Tr. 54. Thus, for Aguero at least, attendance at the meeting was less than entirely voluntary. *Cf. Luke AFB*, 54 FLRA at 728 (meeting was effectively mandatory because employee's complaint could be adversely affected by not attending).

Another sign of formality is the fact that the meeting's purpose – to let senior managers and agents talk about ways to “better work the traffic” – was clearly tied to the Agency's mission of protecting the nation's borders and to the daily working conditions faced by all agents. Tr. 85. Management took steps to ensure that the meeting would serve these goals by having a broad range of agents from all shifts and by encouraging Aguero to attend so that he could share his field knowledge and experience with the group. Management's efforts to obtain a specific number of attendees from all shifts further reflect the advance planning that went into the meeting. In this regard, Saucedo asked supervisors to confirm the agents attending a day prior to the meeting.

The formality of the meeting is also seen in the roles that the agents at the meeting were expected to play. As Bollenbeck's muster supervisor indicated, the agents attending were “designated as representatives” who were expected to convey questions and concerns of other agents who were not in at the meeting (Tr. 20), a representative function normally reserved for the exclusive representative. Surely, a Union representative would have been able to safeguard the interests of the entire bargaining unit by conveying the concerns of agents not present at the meeting and by raising issues that agents at the meeting might be too afraid to raise. *See Tyndall AFB*, 66 FLRA at 259.

As the foregoing shows, the indicia of informality, while significant, are outweighed by the indicia of formality. And while I have weighed each of the indicia, I have given particular weight to the purpose of the meeting: enabling managers to obtain feedback and ideas as to how to accomplish the Agency's mission most effectively. This purpose was entirely laudable, and in no way do I wish to discourage management from soliciting the opinions of employees. But because this purpose affects how every employee performs his or her job, it was precisely the type of discussion that the Union would have had a strong statutory interest in joining. This is what the Authority meant by “the intent and purpose” of § 7114(a)(2)(A) in *GSA*, 50 FLRA at 404. Accordingly, I find that the meeting was a formal discussion within the meaning of the Statute.

The Agency Failed to Give the Union Adequate Notice of the Meeting

Because the meeting was a formal discussion between representatives of the Agency and bargaining unit employees concerning a general condition of employment, the Agency was obligated to give the Union an opportunity to be represented at the meeting. As noted above, the Agency failed to provide the one- or two-day advance, written notice that it normally provides to the Union prior to a formal discussion. Tr. 108. And the actual notice that Bollenbeck and Pippin received was clearly inadequate.

In evaluating the notice given to Bollenbeck, it is important to understand that he was not notified of the meeting in his capacity as a Union official, but simply as a member of the incoming day shift; thus he had no particular reason to view the meeting as something that should spark the Union's interest. Nonetheless, he did recognize that he ought to discuss the matter with his fellow stewards, even though he did not really know much about the subject or details of the meeting. He was not able to begin trying to contact the other union stewards until the muster ended at 6:20 or 6:30 a.m., and by the time he heard back from them, about

an hour later, it is likely that the meeting had already begun, meaning that it was already too late for any of them to represent the Union for the entire meeting. Moreover, it would be unreasonable to expect Bollenbeck to attend the meeting without first hearing back from the other stewards, because the Union as an entity needed to make a considered decision as to who its representative should be. In addition, while Bollenbeck did not fully explain why he decided to continue performing his regular duties, it is likely, given the extremely short notice he received, that he did not have time to get permission to drop his regular duties and attend the meeting.

Likewise, Pippin learned of the meeting just minutes before it began and had no time to reach out to the other union stewards and discuss who, if any of them, should attend. Even PAIC Torres recognized that Pippin could not attend the meeting himself, because his EMT certification test conflicted with the meeting. Further, it is highly likely that the Agency's extremely short notice meant that there was not enough time for any other stewards (like Edwards, who was in a training) to leave their regularly scheduled duties to attend the meeting. *See* Tr. 21-22, 35-36. I fully agree with Pippin's characterization of Torres's last-second notification as an "ambush" – while Torres may have had good intentions in extending the belated invitation, that very belatedness made it totally impractical for Pippin and other Union officials to discuss the invitation and determine who would be the best person to represent the Union at the meeting.

In addition, my conclusion that the Agency's notice was inadequate is consistent with decisions of the Administrative Law Judges of the Authority, finding similarly short notices to be inadequate. *See Dep't of Def., U.S. Dep't of the Air Force, Edwards AFB, Cal.*, Case No. SF-CA-09-0087 (June 10, 2010) (ALJD No. 10-13) (one-day advance notice inadequate where agency made assurances that meeting was not formal and refused to postpone meeting to accommodate union representative's schedule); *Veterans Admin. Med. Ctr., Grand Island, Neb.*, Case No. 7-CA-80524 (Dec. 6, 1989) (ALJD Rep. No. 86) (45-minute advance notice to unidentified person in the union's office inadequate where notice usually given to the union's president). While these decisions do not constitute binding precedent, their reasoning is persuasive in illustrating the intent and purpose of § 7114(a)(2)(A): that a union must be notified of a formal discussion with sufficient time to make a reasoned choice of who to select to attend the meeting. For a more general discussion of notice in the context of a change in conditions of employment, *see U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 856 (2002). The facts of this case demonstrate that the notice given to the Union regarding the October 19 meeting was insufficient for that purpose.

In support of its contention that the Union waived its right to representation, Respondent cites the Authority's decision in *NLRB*, above, but this argument does not withstand scrutiny. In *NLRB*, the agency's EEO director conducted a broad investigation of both managers and bargaining unit employees in connection with an anonymous complaint alleging widespread racial misconduct in one division of the agency. The EEO director decided to interview nearly every person employed in that division, regardless of whether they were directly implicated in misconduct. At some point in the process, the union became aware of the investigation and the interviews. The EEO director explained to a union official

about the anonymous letter and the nature of the allegations, and she identified those bargaining unit members (some of whom had been implicated in misconduct and some of whom had not) whom she intended to interview. The union official advised the director that the union wished to represent, and attend the interviews of, those employees who were targets of the investigation, but not the other employees. *See id.*, 46 FLRA at 109-10.

With respect to one of the non-targeted employees, the Authority determined that the agency violated the Statute because it interviewed that employee prior to giving the union notice and an opportunity to be present at the interview. *Id.* at 110-11. With respect to the other non-targeted employees, the Authority accepted the judge's finding that the agency had given the union adequate notice of the interviews, meaning that the union had time to decide whether to attend and also to select which union official it wanted to attend each interview. *Id.* at 111-12, 136, 141. The Authority further found that the union waived its right to represent the non-targeted employees. In doing so, the Authority noted that: (1) the union indicated that it did not need to know about (and was not concerned with) the interviews of the non-targeted employees; (2) the union took this stance with "full knowledge" as to the purpose of the interviews and their scope, after meeting with the EEO director and being apprised of the purpose of the interviews and the names of the targeted and non-targeted employees; and (3) union officials had communicated with each other about the interviews. *Id.* at 110-12.

The facts supporting waiver in *NLRB* are largely absent in our case. Unlike in *NLRB*, the Union in our case did not receive adequate advance notice of the meeting. I have already explained why the notices to both Bollenbeck and Pippin were inadequate to allow the Union to designate a representative of its own choosing, or even to understand whether it wished to attend the meeting. I will not repeat those reasons here, but under these circumstances the Union could not clearly and unmistakably waive its right to participate in the meeting. I will simply reiterate that the union stewards were given inadequate information as to the nature and purpose of the meeting and inadequate time to confer among themselves to choose the appropriate representative to participate. In *NLRB*, the union explicitly told the agency that it had no interest in attending the interviews of non-targeted employees, and it did so with "full knowledge" of the nature and purpose of the interviews and the identity of the employees to be interviewed. *Id.* at 111-12. That clearly was not true in our case.

Based on the foregoing, I find that the Agency failed to provide the Union with adequate notice of, and an opportunity to be represented at, the meeting, in violation of § 7114(a)(2)(A) of the Statute, and that it thereby committed an unfair labor practice in violation of § 7116(a)(1) and (8).

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of Homeland Security, United States Customs and Border Protection, Laredo, Texas, shall:

1. Cease and desist from:

(a) Failing or refusing to provide the National Border Patrol Council, American Federation of Government Employees, Local 2455, 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 condition of employment.

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

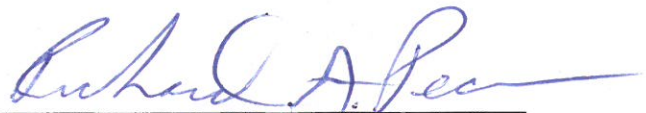
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Provide 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 condition of employment.

(b) Post at its facilities where bargaining unit employees represented by the Union 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 Laredo Sector Chief Patrol Agent and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, the Notice shall be distributed electronically to all bargaining unit employees on the same day as the physical posting of the Notice, by such means as email, posting on an intranet or internet site, or other electronic means, if such is customarily used to communicate with bargaining unit employees.

Issued, December 5, 2017, Washington, D.C.



RICHARD A. PEARSON
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, United States Customs and Border Protection, Laredo, 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 fail or refuse to provide the employees' exclusive representative, the National Border Patrol Council, American Federation of Government Employees, Local 2455, AFL-CIO (the Union) with advance notice and an opportunity to be present at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practices or other general condition of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL provide the Union with advance notice and an opportunity to be represented at all formal discussions with bargaining unit employees.

U.S. Customs and Border Protection, Laredo Sector

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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 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, Dallas, TX 75202, and whose telephone number is: (214) 767-6266.