

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
CHICAGO REGION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, BALTIMORE DISTRICT
OFFICE, BALTIMORE, MARYLAND
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3614, AFL-CIO
Charging Party

CASE NOS. WA-CA-03-
0182 & WA-CA-02-0261

**General Counsel's Response to
Respondent's Motion for Summary Judgment and General Counsel's Cross-
Motion for Summary Judgment**

Pursuant to sections 2423.27, 2429.21 and 2429.22 of the Regulations, General Counsel responds to Respondent's Motion For Summary Judgment which was filed on October 15, 2003 and submits the following Cross-Motion for Summary Judgment.

The issue in this case is whether the December 4, 2002 interviews conducted by Respondent's Attorney James Sober with bargaining unit employees Dianne Shaw and James Norris in preparation for a December 16, 2003 arbitration hearing on a Union grievance were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute.

Respondent admits that the December 4 interviews were conducted without affording the Union the opportunity to be represented. The Respondent further admits the interviews involved a discussion between a bargaining unit employee and a representative of the Commission concerning a grievance. See *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 155 (1996) (*F.E. Warren*). Thus, the sole remaining issue to be decided is whether the December 4 interviews were formal within the meaning of section 7114(a)(2)(A) of the Statute.

Concerning the issue of formality, it appears that this can be decided based on the submissions of the parties, thereby obviating the need for the October 28, 2003 hearing. Accordingly, the General Counsel submits the following Statement of Undisputed Facts and Argument.

Statement of Undisputed Facts

1. At all times material herein, Mr. Sober has been employed as an Attorney in the Commission's Office of Legal Counsel. (Resp. Answer paras. 9 and 10).
2. On or about January 11, 2002, the Union filed a grievance under the parties' collective bargaining agreement on behalf of unit employee Judy Navarro and all the Investigators in the Commission's Baltimore office supervised by M. Patricia Tanner. (Complaint para. 13; Answer para. 13; Resp. Motion for SJ, Ex. 1; and GC's Prehearing Disclosure, Ex. 1-copy attached).
3. The grievance was not resolved and was scheduled to be arbitrated on December 16, 2003. (Complaint para. 15; Answer para. 15; Resp. Statement of Facts, paras. 1 and 2; and GC's Prehearing Disclosure, Ex. 2, 3, 4, 5, 6 and 7-copies attached).
4. Mr. Sober was assigned to represent the Commission at the December 16 arbitration hearing. (Sober declaration paras. 1, 2 and 3).
5. At all times material herein, Ms. Shaw and Mr. Norris were bargaining unit employees employed at the Commission's Baltimore office. (Complaint paras. 11 and 12; Answer paras. 11 and 12).
6. By written submission dated November 18, 2002, the Union's attorney notified the Commission that Ms. Shaw and Mr. Norris, among others, were prospective witnesses for the Union at the December 16 arbitration hearing. (Complaint paras. 16 and 17; Answer paras. 16 and 17; Resp. Motion for SJ, Ex. 1).
7. On or about December 4, 2002, Mr. Sober met with Ms. Shaw and conducted an interview of her in preparation for the December 16 arbitration hearing. (Complaint para. 28; Answer para. 18; Sober declaration para. 7).
8. On or about December 4, 2002, Mr. Sober met with Mr. Norris and conducted an interview of him in preparation for the December 16 arbitration hearing. (Complaint para. 19; Answer para. 19; Sober declaration para. 7).
9. Each interview took place inside the employee's office at the Commission's Baltimore office. (Sober declaration paras. 3, 13 and 14). Mr. Sober knew that Ms.

Shaw and Mr. Norris were listed as potential witnesses for the Union at the upcoming December 16 hearing. (Resp. Statement of Facts para. 3).

10. The Commission did not notify and afford the Union the opportunity to be represented at Mr. Sober's interviews of Ms. Shaw and Mr. Norris. (Complaint para. 21; Resp. Statement of Facts para. 20).

11. Mr. Sober conducted his interviews of Ms. Shaw and Mr. Norris to gather facts regarding their knowledge as to the matters at issue in the December 16 arbitration hearing. (Resp. Statement of Facts paras. 9 and 11). In this regard, Respondent states that Mr. Sober was obligated as the Commission's attorney for the December 16 arbitration hearing to learn what the potential witnesses might actually know about the facts and circumstances underlying the grievance in order to properly defend the Commission at the hearing. (Resp. Motion for SJ page 9, n. 3).

12. Mr. Sober began each of his interviews by identifying himself as management's representative for the December 16 arbitration hearing and telling the employee that they had been identified as a potential witness and he wanted to interview them. (Sober declaration para. 11; See Shaw affidavit attached hereto as Exh. A at page 2; See Norris affidavit attached hereto as Exh. B at page 2). Mr. Sober advised each employee that they could decline to speak to him. (Sober declaration para. 11; Shaw affidavit page 2; Norris affidavit page 2).

13. The interviews followed a question and answer format. (Resp. Statement of Facts para. 18; Sober declaration para. 17; Shaw affidavit page 2; Norris affidavit page 2). The subject matter of each interview was the knowledge the employee might have regarding the matters at issue in the upcoming December 16 arbitration hearing. (Sober declaration para. 15). Attorney Sober questioned Ms. Shaw about a statement alleged to have been made by supervisor Tanner, while he questioned Mr. Norris about production standards and what he might know about the case. (Shaw affidavit page 2; Norris affidavit page 2). During each interview, Attorney Sober took notes. (Shaw affidavit at page 2; Norris affidavit page 2). ^{1/}

13. Mr. Sober's interviews with Ms. Shaw lasted no more than 15 minutes. (Sober declaration para. 15; Shaw affidavit page 2). Mr. Sober's interview with Mr. Shaw

^{1/} Mr. Sober concedes he took notes but is unclear if he did so during or after the interviews. (Sober declaration para. 16). Ms. Shaw and Mr. Norris specifically recollect Attorney Sober taking notes during his interviews. (Shaw affidavit page 2; Norris affidavit page 2). Noting the specific testimony of Ms. Shaw and Mr. Norris and that such is entirely reasonable and consistent with an attorney pre-hearing interview of potentially adverse witnesses, it is appropriate to conclude that Attorney Sober took notes during his interviews.

lasted between 5 and 15 minutes. (Sober declaration para. 15-interview lasted "about five(5) minutes"; Norris affidavit page 2- interview lasted "less than 15 minutes").

Argument

The interviews conducted by Respondent's Attorney Sober of bargaining unit employees Shaw and Norris in preparation for the parties' December 16 arbitration hearing were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute.

For the Authority to conclude that a formal discussion occurred, the evidence must show that there was (1) a discussion, (2) that was "formal," (3) between one or more representatives of the agency and one or more unit employees or their representatives, (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *F.E. Warren*, 52 FLRA at 155. In making determinations under section 7114(a)(2)(A), the Authority is "guided by that section's intent and purpose—to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit—viewed in the context of a union's full range of responsibilities under the Statute." *Id.* As indicated above the only issue in the subject case is whether Mr. Sober's interviews were "formal".

"Formality" under section 7114(a)(2)(A) of the Statute.

The adjective formal was placed in section 7114(a)(2)(A) to make it clear that the formal discussion right does not apply to highly personal, informal meetings such as a supervisor's counseling of an employee about performance. *F.E. Warren*, 52 FLRA at 156. In deciding whether a discussion is formal in nature, the Authority examines the purpose and nature of the discussion and considers the totality of circumstances presented. *Id.* The Authority has identified a number of factors that are indicative of formality: (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. *U.S. Department of Energy, Rocky Flats Field Office, Golden, Colorado*, 57 FLRA 754, 755 (2002). These factors are illustrative, and other factors may be identified and applied as appropriate. *F.E. Warren*, 52 FLRA at 157.

Attorney Sober's interviews of unit employees Shaw and Norris in preparation for the December 16 arbitration hearing were formal in nature.

The totality of circumstances presented in this case clearly demonstrates that Attorney Sober's interviews were formal in nature. Mr. Sober was not some low-level

functionary who engaged the employees in a brief, unplanned, informal and unstructured chitchat about inconsequential matters. Mr. Sober was a Senior Attorney representing the Commission at the December 16 arbitration hearing. He knew that Ms. Shaw and Mr. Norris were listed as potential witnesses for the Union and he specifically sought to interview them as part of his pre-hearing preparation to learn what each employee knew about the grievance issues. The interviews were a formal undertaking with a specific agenda. At the outset of the interviews, Mr. Sober identified himself and the matters he wanted to discuss. The interviews followed a structured question and answer format, typical of an attorney's interview of potential witnesses in preparation for a third-party hearing. Attorney Sober took notes during his interviews and the interviews lasted not more than 15 minutes each.

The purpose of the formal discussion right is to provide the Union with an opportunity to safeguard its interests and the interests of bargaining unit employees. Clearly, the exclusive representative has a compelling and significant interest in being represented when, as here, an attorney representing high-level management interviews unit employees listed as potential witnesses for the union at an upcoming arbitration hearing on the union's grievance.

Despite the foregoing, Respondent asserts that Attorney Sober's fact-finding interviews were not "formal" because only one of the formality factors was present, i.e., Mr. Sober was representing the Agency at the December 16 arbitration hearing. (Resp. Motion for SJ at page 8). Respondent reads the Authority's decisional analysis for formal discussions selectively and ignores key language. As discussed above, in deciding whether a discussion is formal in nature, the Authority examines the purpose and nature of the discussion and considers the totality of circumstances presented. *F.E. Warren*, 52 FLRA 156-158. The often-stated formality indicators go to the nature of the meeting and they are "illustrative" not conclusive. *Id.*^{2/}

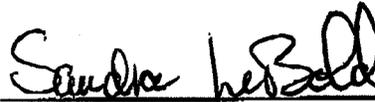
With respect to the illustrative formality factors, several are present in this case. The interviews were planned answer-and-question sessions designed to ascertain what the named witnesses for the Union could testify about at the upcoming arbitration hearing. Mr. Sober began each of his pre-hearing witness interviews by identifying himself and advising the employees what he wanted to discuss with them. Finally, Attorney Sober took notes during his fact-finding interviews and they lasted not more than 15 minutes.

^{2/} Respondent's reliance upon its claimed compliance with the *Brookhaven* assurances (9 FLRA 930) to establish that Mr. Sober's interviews were not formal discussions is misplaced. The *Brookhaven* safeguards only pertain to the agency's obligation to ensure that interviews with unit employees are not coercive and have no bearing on the Union's rights under section 7114(a)(2)(A) of the Statute. *Department of the Air Force, F.E. Warren Air Force Base*, 31 FLRA 541,545-546 (1988).

Accordingly, based on the totality of circumstances presented herein and noting the purpose and nature of Mr. Sober's interviews, the interviews of unit employees Shaw and Norris were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute. *F.E. Warren; Department of Veterans Affairs, Medical Center, Denver, Colorado*, 44 FLRA 768 (1992) (attorney conducted 15 minute interviews of unit employees to determine if employees had relevant testimony to support management's position at an upcoming arbitration hearing); *Veterans Administration Medical Center, Long Beach, California*, 41 FLRA 1370 (1991) (attorney conducted telephone interviews with unit employees in preparation for an upcoming MSPB hearing. interviews last between 5 minutes and one hour), *enforced*, 16 F. 3d 1526, 1532 (9th Cir.1994) (attorney preparation for an MSPB hearing is not an informal goal, and assessing the testimony of potentially adverse witnesses is not an informal undertaking) ; *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Base, California*, 38 FLRA 732 (1990) (attorney interview of unit employee in preparation for an arbitration hearing); *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Base, California*, 35 FLRA 594 (1990) (same); *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Base, California*, 29 FLRA 594 (1987) (same).

As Respondent concedes that all the other elements have been met, General Counsel submits that Respondent violated section 7114(a)(2)(A) of the Statute by not affording the Union the opportunity to be represented at Attorney Sober's interviews and that by such conduct violated section 7116(a)(1) and (8) of the Statute. To remedy these unfair labor practices, it is respectfully requested the Administrative Law Judge adopt the proposed remedial order attached hereto. The proposed remedial order is fully consistent with the relief ordered by the Authority in a formal discussion case. See *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304, 310-311 (2001), *enforced*, 316 F.3d 280 (D.C. Cir. 2003).

Respectfully submitted,



Sandra LeBold
Counsel for the General Counsel
Federal Labor Relations Authority
Chicago Region
55 W. Monroe, Suite 1150
Chicago, Illinois 60603-9729

Dated: October 21, 2003

GENERAL COUNSEL'S PROPOSED ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and section 7118 of the Statute, the Equal Employment Opportunity Commission shall:

I. Cease and desist from:

(a) Failing or refusing to provide the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, Local 3614 (the Union), advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for arbitration hearings.

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

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

(a) Provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews in preparation for arbitration hearings.

(b) Post at its facilities where bargaining unit employees represented by the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, Local 3614 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 Chair of the EEOC and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices 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, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

**NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Equal Employment Opportunity Commission violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, Local 3614 (the Union), advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for arbitration hearings.

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

WE WILL provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews in preparation for arbitration hearings.

(Agency)

DATED: _____ By: _____
Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, of the Federal Labor Relations Authority, Chicago Regional Office, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

CERTIFICATE OF SERVICE

I certify that a copy of the GC's Response to Respondent's Motion for Summary Judgment and the GC's Cross-Motion for Summary Judgment in Case Nos. WA-CA-03-0182 & 03-0261 has this day been served on the following parties:

Eli Nash, Chief, Administrative Law Judge
Office of Administrative Law Judges
Federal Labor Relations Authority
1400 K Street, N.W., 3rd Floor
Washington, D.C. 20424-0001 (By Fax and By Mail)

John F. Sherlock, III
Trial Attorney
Office of Legal Counsel
EEOC
1801 L Street, NW,
Washington, DC 20507 (By Fax and By Mail)

Regina M. Andrew, President
AFGE, Local 3614
c/o EEOC
Baltimore District Office
Room 3000
10 South Howard Street
Baltimore, Maryland 21201 (By Fax and By Mail)

Inez C. Thomas SL
INEZ C. THOMAS

Dated: October 21, 2003

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE**

State of: Baltimore, Maryland

Case Name: Equal Employment Opportunity
Commission

Baltimore District Office
Baltimore, Maryland

City/County of: Washington, D.C.

Case No.: WA-CA-03-0182

AFFIDAVIT

1 I, Dianne Shaw, being first duly sworn upon my oath affirm and hereby say:

2
3 I have been given assurances by an Agent of the Federal Labor Relations Authority that
4 this affidavit will be considered confidential and will not be disclosed as long as the case
5 remains open unless it becomes necessary to produce the affidavit for cross-examination
6 purposes if I testify in a formal proceeding.

7
8 I am over 21 years of age. My home address is 2804 Klein Court, Crofton, Maryland
9 21114. My work telephone number and area code is 410-962-4240.

10
11 I am currently employed as an Investigator, GS-12, by the Equal Employment Opportunity
12 Commission (EEOC/Agency), Baltimore District Office, Baltimore, Maryland. I have been
13 in this position since August 1992.

14
15 The exclusive representative of the employees in the Baltimore District Office, American
16 Federation of Government Employees, Local 3614, AFL-CIO (AGE/Union) had filed a
17 grievance regarding a comment made by a supervisory investigator. The matter was
18 eventually scheduled for arbitration. At some point, I had been named as a potential
19 witness in this proceeding by the Union.

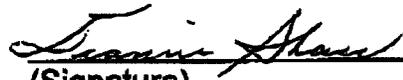
20
21 On December 4, 2002, a man appeared in the doorway of my office in the Baltimore

 Initials

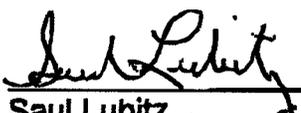
Exh. A

22 District Office. He identified himself as James Sober, a management representative, and
 23 he stated that I had been identified as a witness in the arbitration procedure and that he
 24 wanted to interview me. He told me that I had the right to decline the interview. I agreed
 25 to go ahead with the interview. He then proceeded to question me about the events
 26 surrounding the alleged statement made by the supervisory investigator. Nobody else was
 27 present. He took notes regarding my answers. The interview lasted less than 15 minutes.
 28 He didn't ask me to sign any documents.

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 30
 31 I have read and had an opportunity to correct this affidavit consisting of two typed pages
 32 and swear that these facts are true and correct to the best of my knowledge and belief.

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 35
 36 
 37 (Signature)
 38

39 Subscribed and sworn to before me
 40 this 5th day of March, 2003
 41 at the Baltimore District Office, EEOC..
 42

43
 44 
 45 Saul Lubitz
 46 FLRA Field Agent
 47 Washington Regional Office
 48 Tech World Plaza
 49 800 K Street, Suite 910
 50 Washington, DC 20001
 51

_____ Initials

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE**

State of: Baltimore, Maryland

Case Name: Equal Employment Opportunity
Commission

Baltimore District Office
Baltimore, Maryland

City/County of: Washington, D.C.

Case No.: WA-CA-03-0261

AFFIDAVIT

1 I, James Norris, being first duly sworn upon my oath affirm and hereby say:

2
3 I have been given assurances by an Agent of the Federal Labor Relations Authority that
4 this affidavit will be considered confidential and will not be disclosed as long as the case
5 remains open unless it becomes necessary to produce the affidavit for cross-examination
6 purposes if I testify in a formal proceeding.

7
8 I am over 21 years of age. My home address is 59 Pleasant Acres Drive, Thurmont,
9 Maryland 21788. My work telephone number and area code is 410-962-0602.

10
11 I am currently employed as an Investigator, GS-12, by the Equal Employment Opportunity
12 Commission (EEOC/Agency), Baltimore District Office, Baltimore, Maryland. I have been
13 in this position since May 1999.

14
15 The exclusive representative of the employees in the Baltimore District Office, American
16 Federation of Government Employees, Local 3614, AFL-CIO (AGE/Union) had filed a
17 grievance regarding a comment made by a supervisory investigator. The matter was
18 eventually scheduled for arbitration. At some point, I had been named as a potential
19 witness in this proceeding by the Union.

20
21 On December 4, 2002, a man appeared in the doorway of my office in the Baltimore

JPN Initials

Exh. B

22 District Office. He identified himself as James Sober, told me that he was counsel for the
 23 Agency, and that I had been identified as a witness in the arbitration procedure and that
 24 he wanted to interview me. He told me that I had the right to decline the interview.
 25 Because Sober was an Agency representative and I was not sure what choice I had in the
 26 matter, I agreed to go ahead with the interview. He then proceeded to question me about
 27 "production standards" and what I might know about the arbitration case. I asked him if I
 28 needed to have the Union present. He responded by saying "No, this is just an informal
 29 drop-in. It has nothing to do with you and the Union."

30
 31 Sober asked me to identify all of the supervisors that I had worked for during my tenure at
 32 the EEOC. He asked whether I had ever worked for a particular supervisor, Trish Tanner.
 33 He asked me if there had ever been any talk about production standards under Mr. Lee's
 34 supervision.

35
 36 After questioning me, Sober told me that he did not know why I was on the Union's witness
 37 list.

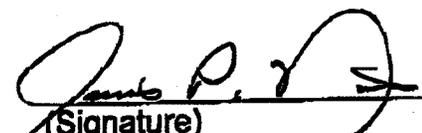
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 39 He took notes regarding my answers. The interview lasted less than 15 minutes. He didn't
 40 ask me to sign any documents. Nobody else was present during the interview.

41
 42
 43 I have read and had an opportunity to correct this affidavit consisting of three typed pages

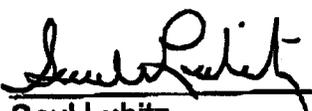
JS Initials

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and swear that these facts are true and correct to the best of my knowledge and belief.


(Signature)

Subscribed and sworn to before me
this 5th day of March, 2003
at the Baltimore District Office, EEOC..


Saul Lubitz
FLRA Field Agent
Washington Regional Office
Tech World Plaza
800 K Street, Suite 910
Washington, DC 20001

_____ **Initials**