

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: March 25, 2004

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF AGRICULTURE
FOREST SERVICE
LOS PADRES NATIONAL FOREST
GOLETA, CALIFORNIA

Respondent

AND

Case Nos. SF-CA-02-0133
SF-CA-02-0400
SF-CA-02-0525

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 2023, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the stipulation, exhibits and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF AGRICULTURE FOREST SERVICE LOS PADRES NATIONAL FOREST GOLETA, CALIFORNIA Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2023, AFL-CIO Charging Party	Case Nos. SF-CA-02-0133 SF-CA-02-0400 SF-CA-02-0525

NOTICE OF TRANSMITTAL OF DECISION

Pursuant to § 2423.26 of the Authority's Rules and Regulations, the above-entitled case was stipulated to the undersigned Administrative Law Judge. The undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

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

Any such exceptions must be filed on or before **APRIL 26, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, Suite 201
Washington, DC 20424

ELI NASH
Chief Administrative Law Judge

Dated: March 25, 2004
Washington, DC

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

DEPARTMENT OF AGRICULTURE FOREST SERVICE LOS PADRES NATIONAL FOREST GOLETA, CALIFORNIA Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2023, AFL-CIO Charging Party	Case Nos. SF-CA-02-0133 SF-CA-02-0400 SF-CA-02-0525

John R. Pannozzo, Jr., Esquire
For the General Counsel

Joseph L. Duran
For the Charging Party

Robert J. Wilson
For the Respondent

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

On July 23, 2002, the Regional Director for the San Francisco Region of the Federal Labor Relations Authority (herein called the Authority), issued a Consolidated Complaint and Notice of Hearing in the captioned matter. This proceeding was initiated by three unfair labor practice charges filed by the National Federation of Federal Employees, Local 2023, AFL-CIO (herein called the Union). The consolidated complaint alleges that the Department of Agriculture, Forest Service, Los Padres National Forest, Goleta, California (herein called Respondent) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (herein called the Statute). Specifically, the consolidated complaint alleges that on three occasions the Respondent conducted formal discussions with bargaining unit employees regarding Equal Employment Opportunity (EEO) complaints that they had filed without giving the Union notice and an opportunity to be represented as required by section 7114(a)(2)(A) of the Statute.

A hearing was scheduled on these issues, but the parties filed a Joint Motion Transferring Case to the Chief Administrative Law Judge waiving their right to a hearing and requesting a decision based on a stipulation of facts and exhibits that they agree constitute the entire record in the case. Subsequently, the Respondent and the General Counsel submitted briefs in support of their respective positions. Based on this record, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The stipulated facts are as follows:

The National Federation of Federal Employees is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining within the Department of Agriculture, Forest Service, Washington, D.C.

The Union is an agent of the National Federation of Federal Employees for purposes of representing employees of the Respondent within the bargaining unit described immediately above.

The Department of Agriculture, Forest Service, Los Padres National Service, Goleta, California, is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

The National Federation of Federal Employees and the Department of Agriculture, Forest Service, are parties to a nationwide collective bargaining agreement that covers employees in the bargaining unit described above, which includes employees for whom the Union is an agent.

During the time period covered by the consolidated complaint, the persons below occupied the position(s) identified next to their name:

James L. Boynton—Forest Supervisor, Sierra National Forest,
Clovis, California;

Gene L. Rose—Employee Relations Specialist, Region 5, Forest
Service, Vallejo, California;

Mel Teigen—Regional Engineer, Region 5, Forest Service, Vallejo,
California;

Maribeth Gustafson—Forest Supervisor, Lake Tahoe Basin
Management Unit, South Lake Tahoe, California;

Gary Gilbert—Private Contractor, Baltimore, Maryland, under contract to provide EEO advice and assistance. On occasion, Gilbert served as the agency’s technical representative.¹

During the time period covered by the consolidated complaint, the persons listed immediately above were acting on behalf of the Respondent.

During the time period covered by the consolidated complaint, Boynton, Teigen and Gustafson were supervisors or management officials under 5 U.S.C. §§ 7103(a)(10) and (11).

Respondent’s Equal Employment Opportunity (EEO) Program is governed by the regulations of the Equal Employment Opportunity Commission (EEOC), set forth at 29 C.F.R. Part 1614. The Alternative Dispute Resolution (ADR) program is described in Chapter 3 of EEOC’s Management Directive 110 (MD 110) and Appendix H of MD 110, which sets forth EEOC’s policy statement on ADR. Respondent’s EEO program is also governed by the Department of Agriculture Departmental Regulation 4300-007, which is entitled “Processing Equal Employment Opportunity (EEO) Complaints of Discrimination” (Exhibit 7); Departmental Regulation 4710-001, which is entitled “Alternative Dispute Resolution” (Exhibit 8); and the “EEO Complaint Processing Procedures Manual” DM 4300-001 (Exhibit 9).

ADR is available at all stages of the EEO process: pre-complaint, after filing formally, and prior to a hearing. Mediation is one of the techniques that is available for use in the ADR program.

In the past, certain employees of the Forest Service have filed EEO class actions in United States District Court. In one such instance, a class of women filed a complaint, *Donnelly v. Glickman*, C-95-4389, dated December 8, 1995, against the Secretary of Agriculture. (Exhibit 10) A settlement agreement was proposed. (Exhibit 11) Four class members and the National Federation of Federal Employees submitted objections to the proposed settlement agreement. (Exhibit 12) A District Court Settlement Order approving the proposed settlement was issued on February 6, 2001. (Exhibit 13)²

In another instance, a class of Hispanics filed a complaint in U.S. District Court in *Brionez et al. v. Secretary of Agriculture*, C-01-3969, dated October 22,

¹

The parties’ stipulation does not make clear whether the term “agency” used in this particular stipulation refers to the Los Padres National Forest, its parent organization--the Forest Service, or both.

²

As described in the court’s order, the settlement agreement provided, among others: (1) a variety of affirmative injunctive relief measures all designed to address the fundamental class problem of sexual harassment and retaliation for EEO activity; (2) a monitoring body with independent oversight authority for three years; (3) a special EEO complaint process for complaints which were time barred, dating back to February 1, 1994; and (4) a dispute resolution process for disagreements over implementing the settlement agreement. (Exhibit 13 at 7) The affirmative injunctive relief measures encompassed by (1) included, among others, an Early Intervention Program (EIP) to resolve conflicts over sexual harassment issues and an informal EEO resolution process. *Id.* at n.1.

2001. (Exhibit 14) A settlement agreement dated June 26, 2002, was proposed. (Exhibit 15) The National Federation of Federal Employees submitted objections to the proposed settlement agreement. (Exhibit 16) A District Court Settlement Order approving the proposed settlement agreement was issued on October 22, 2002. (Exhibit 17)

Case No. SF-CA-02-0133 (Patrick Crespin)

Patrick Crespin was a GS-560-07 accounting technician at the Respondent and was in the bargaining unit. On January 10, 2000, Crespin initiated the informal EEO complaint process by contacting an EEO counselor to allege that on January 6, 2000, he was not selected for a GS-09 Budget Analyst position (Vacancy Announcement No. R507-707-99) based on physical disability (partially blind), national origin (Hispanic) and sex (male). Crespin's complaint was designated Complaint No. CRO-00472. On February 7, 2000, the EEO counselor provided Crespin a letter advising him that he could elect to participate in the ADR process and that such election would extend the informal EEO complaint process by up to 60 days.

On February 22, 2000, Crespin elected to participate in the ADR process. On March 7, 2000, the EEO counselor provided Crespin a letter advising him that the informal stage of his EEO complaint was completed and he had 15 days in which to file a formal complaint. Crespin filed a formal complaint (Complaint No. CRO-00472) on March 14, 2000, and selected Wes Shook, a fellow employee, as his representative. On June 22, 2000, the Department of Agriculture issued an acceptance letter for Complaint No. CRO-00472, which set forth the issues being referred for investigation and advised Crespin of the procedures that were to follow. (Exhibit 18) Complaint No. CRO-00472 was investigated and a report was submitted to the Department of Agriculture on October 13, 2000. On April 11, 2001, the Department of Agriculture forwarded a copy of the report to Shook and advised Shook of Crespin's appeal rights. The report advised Crespin that he could, within 30 days, withdraw his complaint, ask for a Final Agency Decision, or request a hearing from EEOC. Crespin did not appeal.

On April 23, 2001, Crespin was not selected for the position of Budget Analyst, GS-0560-11 (Vacancy Announcement No. R507-770-01B).

On May 21, 2001, Crespin sought EEO counseling concerning the April 23 non-selection alleging discrimination based on age (54), physical disability (legally blind) and national origin (Hispanic). His complaint was designated Complaint No. CRO-10797. Crespin selected Ginelle O'Connor, a fellow employee, as his EEO representative.

On May 29, 2001, Crespin requested ADR. Subsequently, the Respondent agreed to mediation.

On August 19, 2001, Crespin received his Notice of Right to File a Formal Complaint of discrimination in Complaint No. CRO-10797.

On September 10, 2001, Early Intervention Program (EIP) Manager Maxie Hamilton forwarded a "Mediation Confirmation" to Crespin; his EEO

representative, O'Connor; James Boynton, the Sierra National Forest Supervisor and "Resolving Official";³ and Gene Rose, who was the Regional Office Technical Representative.⁴ (Exhibit 19) The Charging Party was not provided a copy of the Mediation Confirmation.

On September 13, 2001, Crespin mailed his formal complaint in Complaint No. CRO-10797 to the Department of Agriculture, which received Crespin's formal complaint on September 20, 2001. (Exhibit 20)

On September 26, 2001, a mediation/settlement meeting was conducted involving Crespin, O'Connor, Boynton, Rose and mediator Laura Mancuso. The mediation/settlement meeting was conducted pursuant to the Department of Agriculture's ADR Program. The mediators are appointed under the Department of Agriculture's ADR Program and can mediate disputes besides those involving EEO matters. The Union did not receive advance notification of, and was not invited to attend, the September 26 meeting.

The September 26 mediation/settlement session was held at a public library in Goleta, California. The meeting began at 9:00 a.m. and lasted a majority of the day. The Respondent coordinated the date and time of the meeting and made the location arrangements.

Boynton is the highest ranking official in the Sierra National Forest; however, he does not have any supervisory authority over Crespin. Attendance at the meeting was voluntary and although notes were taken during the meeting, those notes were destroyed at the conclusion of the session. The subject of the meeting was the resolution of Crespin's discrimination complaints.

During the September 26 meeting, the "parties" entered into a Settlement Agreement.⁵ Stipulation at 7, para-graph 30. The Settlement Agreement was a resolution of all of Crespin's discrimination complaints and resulted in, among

3

In the Department of Agriculture's "EEO Complaint Processing Procedures," DM 4300-001, the term "Resolving Official" is defined as: "The Agency Official designated to represent the agency at an ADR session, and who has been delegated full authority to settle the EEO complaint, including execution of a binding settlement agreement." (Exhibit 9 at 4)

4

The Mediation Confirmation provided the time, date and place of the mediation and discussed the mediation process. (Exhibit 19) Although the stipulation does not further identify Maxie Hamilton, the Mediation Confirmation that Hamilton signed was on the letterhead of the Forest Service, Pacific Southwest Region, Regional Office in Vallejo, California. *Id.*

5

The stipulation uses the term "parties" in characterizing the participants in the mediation/settlement meeting. From its context, it is clear that the stipulation uses that term in this particular instance to refer to parties involved in the EEO case as contrasted with the parties to the consolidated unfair labor practice complaint that is the subject of this decision.

other things, Crespin receiving a promotion to a GS-9 Budget Analyst position.⁶ Crespin's promotion did not affect staffing because Crespin's GS-7 position was eliminated. (Exhibit 21) The participants in the settlement agreement also executed a "USDA Forest Service Pacific Southwest Region EIP Outcome Form."⁷ (Exhibit 22)

On October 2, 2001, the Union's Vice President, Joseph Duran, was informed by Deputy Forest Supervisor Gene Blankenbaker and then Human Resources Officer Barbara Vose that Crespin had been promoted to the GS-9 level pursuant to an EEO settlement. Crespin was one of two GS-9's on the Budget Staff.

On October 3, 2001, the Union provided pre-ULP charge notification pursuant to Article 12 of the parties' Master Agreement, to Regional Forester Brad Powell and Forest Supervisor Jeanine Derby. (Exhibit 1(g)) On October 5, 2001, the Respondent, through Blankenbaker, responded to the pre-charge notification. (Exhibit 1(g)) On October 5, 2001, the Union, through Duran, responded to Blankenbaker's letter. (Exhibit 1(g)) On November 20, 2001, the Union filed an unfair labor practice charge in Case No. SF-CA-02-0133.

On February 13, 2002, the Union demanded negotiations over the Crespin Settlement Agreement and the parties met on February 27, 2002. A memorandum was prepared describing the meeting.⁸ (Exhibit 23)

Case Number SF-CA-02-0400 (Cyndie Genzmer)

On June 25, 2001, Customer Service Representative Cyndie Genzmer, an employee of the Respondent and a member of the bargaining unit, contacted an EEO counselor concerning the denial of reassignment(s). This case was designated Case No. CRO-20185. The same day, Genzmer attended a union grievance meeting over the same matter(s).⁹ See Exhibit 24.

6

According to its terms, the settlement agreement resolved Complaint No. CRO-00472 as well as Crespin's informal complaint filed on May 21, 2001. (Exhibit 21)

7

This form identified the outcome of the mediation and some procedural matters relating to the settlement. (Exhibit 22)

8

According to that memorandum, the Respondent was of the view that there was no impact from the implementation of the settlement agreement. (Exhibit 23) The Respondent did, however, agree that the Union could be actively involved in meetings of the staff affected by the EEO settlement agreement that were for the purpose of mapping out work and developing an overall framework for staff operations.

9

Notes from the meeting indicate that the issue of Genzmer's promotion potential was discussed at this meeting. (Exhibit 24) According to those notes, the participants also discussed a previous statement allegedly made by the Santa Barbara District Ranger to Genzmer to the effect that the former planned to fill a particular vacant position through reinstatement rather than through competition. *Id.* at 2.

On July 19, 2001, as part of the informal EEO process, Genzmer elected ADR. Genzmer also agreed to extend counseling up to 60 days. (Exhibit 25)

On August 3, 2001, the Union filed a step one union grievance.¹⁰
(Exhibit 26) On August 16, 2001, the Respondent replied to the grievance.¹¹
(Exhibit 27)

On September 19, 2001, Genzmer sought EEO counseling concerning another matter. This case was designated Case No. CRO-20301.

On September 24, 2001, Genzmer received a Notice of Right to File a Formal Complaint of discrimination with respect to Case No. CRO-20185. She mailed her formal complaint to the Department of Agriculture on October 4, 2001.

On January 6, 2002, Genzmer mailed her formal complaint in Case No. CRO-20301 to the Department of Agriculture.

On February 14, 2002, a Mediation Confirmation was forwarded by EIP Manager Hamilton to Genzmer, her attorney Sally Feser, her other representative Ginelle O'Connor, Resolving Official Mel Teigen, Technical Representative Gene Rose and Mediator Pat Beck. (Exhibit 28) The Respondent coordinated the date and time of the mediation/settlement session and made the location arrangements. The meeting was scheduled for March 8, 2002, at the Best Western South Coast Inn in Goleta, California. The Union was not provided a copy of the Mediation Confirmation.

The mediation/settlement session was held on March 8, 2002. It began at 9:00 a.m. and ended at approximately 3:00 p.m., with one hour for lunch. In attendance at the session were: Genzmer, Feser, O'Connor, Teigen, Rose and mediator Beck. Teigen, who is the Regional Engineer and a management official, does not have any supervisory authority over Genzmer. The Union was neither provided notification of nor attended the mediation/settlement session. Attendance was voluntary and although all parties took notes during the session, those notes were destroyed at the conclusion of the session. The subject of the mediation was resolution of Genzmer's discrimination complaints.

At the March 8, 2002, mediation session, there was a full discussion of both of Genzmer's EEO complaints. Potential resolution of those matters was discussed and offers of settlement were exchanged; however, the parties were unable to arrive at a resolution.

10

The issue cited in the grievance as a violation of the collective bargaining agreement was the hiring of an individual for the Customer Service position in the Santa Barbara Ranger District. (Exhibit 26) It appears from the grievance that the Union objected to the use of a process that it referred to as "CTAP" rather than advertising the position internally prior to filling from any appropriate source. *Id.*

11

The response asserted that because the individual selected for the position ultimately declined, the grievance was null and void. (Exhibit 27) The Respondent agreed (1) to issue a letter to all management officials and employees requiring adherence to the merit promotion article of the collective bargaining agreement and (2) that the position would be advertised. *Id.*

On March 19, 2002, the Union provided pre-ULP charge notification, pursuant to Article 12 of the parties' Master Agreement to Regional Forester Jack Blackwell and Forest Supervisor Jeanine Derby. (Exhibit 1(h)) On March 26, 2002, the Union filed the unfair labor practice charge in Case No. SF-CA-02-0400. (Exhibit 1(c))

On June 21, 2002, the Department of Agriculture issued an acceptance letter concerning Complaint Nos. CRO-20185 and CRO-20301, which set forth the issues accepted for investigation and advised Genzmer of the procedures that were to follow. (Exhibit 29)

Case Number SF-CA-02-0525 (Jannet Benton)

Customer Service Representative Jannet Benton, an employee of Respondent and a member of the bargaining unit, received a notification pursuant to the women's class action suit, *Donnelly v. Glickman*, C-95-4389, which authorized her to file any related complaint with Region 5 of the Forest Service relating to employment decisions or conditions between February 1, 1994, and February 6, 2001. On June 19, 2001, Benton filed her complaint, which was referred to the "agency" on July 6, 2001.¹² (Exhibit 30)

By letter dated October 22, 2001, the Department of Agriculture accepted for investigation the complaint filed by Benton on July 19, 2001, along with several other formal complaints filed by Benton. (Exhibit 31)

Benton requested mediation and on March 26, 2002, a Mediation Confirmation was forwarded by EIP Manager Hamilton to Benton, her attorney Sally Feser and her other representative Ginelle O'Connor. (Exhibit 32) The Mediation Confirmation was also sent to Lake Tahoe Basin Management Unit Supervisor and Resolving Official Maribeth Gustafson, Technical Representative Gary Gilbert and Mediator Larry Huerta. The Respondent coordinated the date and time of the mediation/settlement session and made the location arrangements. The Union was not provided a copy of the Mediation Confirmation.

The mediation/settlement session was held on April 8, 2002, in a conference room at the Residence Inn, Stevenson Ranch, California. In attendance at the session were Benton, Feser, O'Connor, Gustafson, Gilbert and Huerta. The Union was neither provided advance notification of nor attended the mediation/settlement session.

12

The stipulation does not identify who the "agency" is. In Exhibit 30, which contains the heading:

CLASS ACTION SUIT
REQUEST FOR COUNSELORS REPORT
NOTICE TO CIVIL RIGHTS DIRECTOR

Agency is identified as "FS." Thus, it appears that the "agency" to which this particular stipulation refers is the Forest Service.

At the beginning of the mediation/settlement session, the parties signed an Agreement to Mediate.¹³ (Exhibit 33)

During the session, there was a full discussion of Benton's complaints. Potential resolution of those matters was discussed and offers of settlement were made; however, the parties were unable to arrive at a resolution of the EEO matters.

The mediation/settlement session began at 10:30 a.m. and ended at approximately 6:45 p.m. with no break for lunch. Gustafson is the highest ranking official in the Lake Tahoe National Forest, but does not have any supervisory responsibility over Benton. Attendance was voluntary and although notes were taken by all parties, they were destroyed at the conclusion of the session. The subject of the mediation was resolution of Benton's EEO complaints.

On April 26, 2002, the Union provided pre-ULP charge notification pursuant to Article 12 of the parties' Master Agreement to Regional Forester Jack Blackwell and Forest Supervisor Jeanine Derby. (Exhibit 1(i))

On May 6, 2002, the Charging Party filed the charge in Case No. SF-CA-02-0525. (Exhibit 1(d))

Analysis and Conclusions

Positions of the Parties

General Counsel

The General Counsel alleges that the Respondent violated section 7116(a) (1) and (8) of the Statute by failing to provide NFFE advance notice and an opportunity to be represented at three mediation sessions involving EEO complaints filed by three different employees that constituted formal discussions within the meaning of section 7114(a)(2)(A).

In support of its assertion that the Respondent violated the Statute, the General Counsel cites several recent Authority decisions in which it was found that mediation sessions concerning EEO complaints constitute formal discussions under section 7114(a)(2)(A) of the Statute: *U.S. Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA 528 (2003) (*Luke II*); *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304 (2001) (*Dover*), *enf'd*, 316 F.3d 280 (D.C. Cir. 2003); and *Luke Air Force Base, Arizona*, 54 FLRA 716 (1998) (*Luke I*), *rev'd*, 208 F.3d 221 (9th Cir. 1999), *cert. den'd*, 121 S.Ct. 60 (2000).

13

The Agreement to Mediate was under the heading of "USDA Forest Service Pacific Southwest Region Early Intervention Program and Alternative Dispute Resolution Process." (Exhibit 33) Among other things, the Agreement to Mediate provided that participation in the process was voluntary and specified various measures to safeguard the confidentiality of the process.

The General Counsel maintains that it is not in dispute that the mediation sessions on which the consolidated complaint is focused constituted discussions between representatives of the agency and bargaining unit employees or their representatives. The General Counsel asserts that those mediation sessions met the broad definition of “grievance” that the Authority has adopted in its decisions applying section 7114(a)(2)(A). In this regard, the General Counsel contends that the instant discussions concerned employee EEO complaints, which constitute grievances within the meaning of that section. The General Counsel argues that any claim on the part of the Respondent that there was no formal EEO complaint at the time of the mediation session involving the Genzmer case because her complaint had not yet been accepted should be rejected. The General Counsel maintains that if such argument were accepted, it would penalize the employee by allowing the Respondent to indefinitely delay the formal processing of EEO complaints.

The General Counsel contends that the mediation sessions were formal in nature. The General Counsel asserts that the circumstances involved in the meetings addressed in the consolidated complaint were very similar to those of the meetings that the Authority found were formal discussions in *Luke II*, *Dover*, and *Luke I*. The General Counsel cites several factors that demonstrate the formality of the three mediation sessions addressed in the consolidated complaint. Specifically, the General Counsel asserts that the mediation sessions were scheduled in advance and the employees were formally notified of them by the Respondent through its EIP Manager. Each meeting was attended by two management representatives acting on behalf of the Respondent and conducted off-site away from the employees’ work sites. Each meeting was lengthy and had a planned agenda, i.e., the discussion of the employees’ EEO complaints. Although they were destroyed at the end of the session, notes were taken during the meetings. Another factor demonstrating formality that the General Counsel points to is the fact that, as in *Dover*, the participants in the meetings signed a confidentiality agreement.

The General Counsel argues that consistent with the Authority’s decisions in *Luke II*, *Dover*, and *Luke I*, presence of union representatives at the mediation sessions would not conflict with the regulations of the EEOC or the Alternative Dispute Resolution Act (ADRA). The General Counsel contends that there is no evidence that there would have been a direct conflict between the presence of union representatives at the mediation sessions and any of the laws governing the confidentiality of such sessions. In particular, the General Counsel points to the fact that the mediation process involved included confidentiality provisions that applied to all participants in the mediation process.

As remedy, the General Counsel requests a cease and desist order and a Notice To All Employees to be posted throughout the Los Padres National Forest and signed by the Forest Supervisor.

Respondent

The Respondent, on the other hand, contends that the mediation sessions were not formal discussions and did not involve grievances within the meaning of section 7114(a)(2)(A) of the Statute.

The Respondent asserts that the meetings involving Crespin and Genzmer occurred within the context of the informal, as contrasted with the formal, EEO process. The Respondent argues that subsequent to the issuance of the court's decision in *IRS, Fresno Service Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983) (*IRS, Fresno*), the Authority has never held that a meeting conducted under the informal EEO process is a formal discussion. The Respondent contends that, in fact, Authority decisions support a finding that meetings conducted pursuant to the informal EEO process are not formal discussions and do not concern a "grievance." In support of this contention, the Respondent cites *U.S. Government Printing Office*, 23 FLRA 35 (1986) and *Social Security Administration and Social Security Administration, Field Operations, New York Region*, 16 FLRA 1021 (1984). Additionally, the Respondent asserts that the circumstances involved here are distinguishable from those in *Luke II, Dover*, and *Luke I*, in that the mediation sessions that were the focus of those three cases involved formal EEO complaints. The Respondent argues that under its EEO process, a complaint has to be "accepted" before it becomes formal and that in the cases of Crespin and Genzmer the meetings that are the subject of the instant complaint occurred before the EEO complaints were accepted.

The Respondent argues that Benton's EEO complaint was filed under the auspices of the District Court Settlement Agreement as contrasted with the complaint process prescribed by EEOC and, consequently, the mediation session was not a formal discussion. In this regard, the Respondent asserts that the process provided by the settlement agreement afforded the opportunity for the union's interests to be addressed if a settlement resulted from the mediation session.

The Respondent contends that the mediation sessions met very few of the indicia of formality that the Authority applies in determining whether meetings constitute formal discussions. Specifically, the Respondent argues that the meetings were voluntary, triggered by an employee request, scheduled by a neutral EIP coordinator, and conducted by a non-employee professional mediator. Furthermore, the Respondent maintains that there were no notes or minutes taken, and no supervisors or managers in the particular employee's chain of command were present.

The Respondent asserts that the mediation sessions did not concern grievances. The Respondent bases this assertion on the fact that the employees had the option of filing their complaints under the negotiated grievance procedure provided in the collective bargaining agreement that applied to them. Further, the Respondent urges that the majority holding by the Authority that EEO complaints constitute grievances be reconsidered and that the Authority adopt the approach followed by the U.S. Court of Appeals for the Ninth Circuit as set forth in *IRS, Fresno* and its reversal of *Luke I* and that of Chairman Cabaniss in her dissents in *Luke II* and *Dover*.

The Respondent insists that EEOC's regulations and numerous other statutes and regulations prohibit attendance by a union representative at EEO mediations. With respect to EEOC's regulations, the Respondent describes them as focusing on individual rights related to allegations of discrimination and placing

an emphasis on confidentiality throughout the process for addressing those allegations. The Respondent alleges that EEOC's regulations do not authorize the presence of a union representative at mediations undertaken to resolve EEO complaints and, in fact, indicate that EEOC intends attendance at EEO complaint proceedings to be strictly limited to those who have direct knowledge relating to the complaint and the complainant's representative. The Respondent also maintains that the inclusion of a union representative, who brings the broader interests and concerns of an exclusive representative, at mediation sessions would have a negative impact on the EEO process which is essentially a system for reaching individualized settlement of complaints. Thus, Respondent argues that the FLRA should defer to EEOC's construction of the EEO complaint process and that section 7114 should not be allowed to compromise the confidentiality that EEOC has built into its process. In this vein, the Respondent contends that nothing in section 7114 requires persons attending formal discussions to keep information from such meetings confidential.

The other statutes and regulations cited by the Respondent include the Administrative Dispute Resolution Act (ADRA), which it argues, specifies that dispute resolution processes, such as mediation, be confidential. The Respondent also contends that permitting the union to attend the mediation sessions is inconsistent with the Privacy Act, which it describes as operating to preclude disclosure of, among other things, the substance of EEO complaints. While acknowledging that its arguments regarding the ADRA and Privacy Act are in disagreement with the Authority's decisions and that of the U.S. Court of Appeals for the District of Columbia reviewing *Dover*, 316 F.3d 280, Respondent argues that the court missed the point.

The Respondent contends that permitting union representatives to attend the EEO mediation sessions is also prohibited by the Public Health Service Act, specifically 42 U.S.C. §§ 290dd-3 and 290ee-3, which it contends require that records relating to drug and alcohol abuse maintained by the agency be kept strictly confidential. The Respondent states that it cannot predict when an individual might reveal confidential information regarding drug or alcohol abuse and that if such a revelation occurred during a mediation session at which a union representative was present, the confidentiality requirement would be breached. The Respondent makes similar arguments with respect to Executive Order 13145, which protects genetic information; OPM requirements governing the release of documents and records; 29 C.F.R. 1630.14(d)(1) and 5 C.F.R. 339.304, which protect medical information; and 38 U.S.C. § 7332, which protects the confidentiality of certain medical records of patients of the Veterans Health Administration.

Finally, the Respondent argues that the circumstances involved in this case illustrate the "inherent" conflicts of interest that arise in the processing of EEO complaints between unions and the individuals filing them. Respondent's Brief at 55. According to the Respondent, its organization prior to the advent of laws prohibiting discrimination was a predominantly white male organization and the transition to a more diverse workforce was not always harmonious. That transition included several class action law suits filed by female and Hispanic employees some of which produced settlement agreements that the National Federation of Federal Employees objected to. Lastly, the Respondent asserts

that EEO complaints can involve conflicts between a complainant and a fellow bargaining unit employee, whom the union might be called upon to represent and that the EEO process must be available to employees without union intervention.

Analysis

A. The meetings were formal discussions under section 7114(a)(2)(A)

1. Analytical framework applied in formal discussion cases

In recent years the Authority has addressed the question of whether mediation sessions conducted in the context of formal EEO complaints constitute formal discussions under section 7114(a)(2)(A). In addressing the question, the Authority relies on the same analytical framework that it applies generally in formal discussion cases.

That analytical framework is rooted in section 7114(a)(2)(A), which provides that the exclusive representative has the right to be represented at formal discussions. Under section 7114(a)(2)(A), in order for a union to have the right to representation under section 7114(a)(2)(A), there must be: (1) a discussion; (2) which is formal; (3) between a representative of the agency and a unit employee or the employee's representative; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Luke II*, 58 FLRA at 531; *Dover*, 57 FLRA at 306; and *Luke I*, 54 FLRA at 723. All elements must be satisfied in order for the right to representation to exist.

2. The three meetings at issue constituted discussions

With respect to the first element, it is undisputed, and, therefore, found, that the mediation sessions that are the focus of the consolidated complaint constituted discussions.

3. The three discussions were "formal"

The Respondent contends that any discussions held were not "formal." In order to determine whether meetings constitute "formal" discussions, the totality of the circumstances must be examined. The Authority has identified the following illustrative factors for consideration: (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) the length of the discussions; (6) whether a formal agenda was established; and (7) the manner in which the discussions were conducted. *E.g.*, *Luke II*, 58 FLRA at 532.

The fact patterns relating to the discussions involved in this case are similar to those involved in *Luke II*, *Dover*, and *Luke I*, which were sufficient to

support a finding that meetings held for the purpose of mediating EEO complaints were formal in nature.¹⁴

In *Luke II*, the Authority relied on the following facts to find that such a discussion was “formal.” The meeting had a planned agenda, that is, to mediate and resolve an EEO complaint; the meeting was held in a location away from the employee’s work site; the attendees included a commander with authority to sign a settlement agreement on behalf of the respondent; the meeting followed the traditional mediation format of joint meetings and individual caucuses; and the meeting was scheduled well in advance. 58 FLRA at 532.

In *Dover*, the Authority relied on the following factors to find that a meeting held to mediate an EEO complaint was formal. The meeting was scheduled more than a week in advance; the established purpose of the meeting was to mediate and resolve an EEO complaint; attendees were provided with information concerning the mediation in advance of the meeting; the meeting was held at a location away from the employee’s work site; attendees included an agency representative, who was not the employee’s supervisor, and a facilitator who attempted to resolve the EEO complaint; the meeting followed a traditional mediation format; and the attendees signed a confidentiality agreement in advance of the meeting. 57 FLRA at 307.

In *Luke I*, the Authority cited the following factors as supporting a conclusion that a mediation/investigation session relating to an EEO complaint was formal. Management was represented at the meeting by an attorney who came from a higher level of management; the meeting took place outside the employee’s work area; the meeting lasted 3 hours and had a pre-established agenda, specifically a memorandum sent in advance that defined the objectives and procedures planned for the meeting; and attendance was, in effect, mandatory. 54 FLRA at 724-28.

In this case, the meeting conducted to mediate Patrick Crespín’s EEO complaint bore the following relevant characteristics. Management was represented by an official who was the highest ranking in the Sierra National Forest, who by definition was delegated full authority to settle the EEO complaint, and who had no supervisory authority over Crespín. Also present was Gene Rose, an employee relations specialist, whom the parties stipulated was a Regional Office technical representative. Participants were notified of the meeting over two weeks in advance. The meeting took place in a location away from Crespín’s work area and lasted a majority of the day. The pre-established subject of the meeting was the resolution of Crespín’s EEO complaint and, hence, the meeting had an agenda. Although the parties do not stipulate as to the format of the meeting, it is clear that it was essentially a mediation session and no doubt consisted of joint and/or separate discussions between the parties assisted by a mediator. The parties stipulated that attendance was voluntary. Although no minutes of the meeting were kept, the parties did sign an “EIP Outcome Form” that summarized the result of the meeting.

14

Chairman Cabaniss dissented in both *Luke II* and *Dover* and did not join in the majority’s conclusion that the union had a right under section 7114(a)(2)(A) to be represented at the meetings involved.

Viewed in their totality, the facts relating to the Crespin mediation session are sufficiently parallel to those presented in *Luke II*, *Dover*, and *Luke I* to warrant the same finding reached in those cases as to the formality of the discussion. Based on the totality of the facts, I find that the meeting relating to Patrick Crespin's EEO complaint was formal. In reaching this finding, I reject the Respondent's argument that because the mediator was conducting the meeting it was not formal. The fact that the mediation sessions in previous cases were led by a mediator did not result in the Authority finding that the meeting was not formal. See *Luke II*; *Dover*. Additionally, I reject the Respondent's argument that because attendance at the meeting was voluntary, it was not formal. In this regard, the Authority previously has found that the voluntary nature of a meeting does not undermine its formality when other indicia support such a finding. See *Luke II*, 58 FLRA at 533; *Dover*, 57 FLRA at 307. Nor does the fact that the manager present was not in Crespin's chain of command render the meeting other than formal. See *Dover*, 57 FLRA at 307.

Respondent's argument that the meeting was not formal within the meaning of section 7114(a)(2)(A) because Crespin's formal EEO complaint had not been accepted by the Department of Agriculture prior to the date on which the meeting was held is also rejected. Respondent contends that the Authority follows the approach adopted by the Ninth Circuit in *IRS, Fresno*, that it characterizes as holding that meetings held at the informal stage of the EEO complaint process are not formal discussions under section 7114(a)(2)(A). In *IRS, Fresno*, the Ninth Circuit held that by the terms of the applicable EEOC regulation, an EEO "precomplaint conciliation conference" was "informal." 706 F.2d at 1023-24.

It appears, however, that the Authority does not agree with, among others, that particular aspect of the Ninth Circuit's decision in *IRS, Fresno*. Specifically, in *Luke I*, the Authority stated that it rejected a respondent's reliance on *IRS, Fresno*, to support its position that meetings may be found informal when the "regulatory framework" of the EEOC characterizes them that way. 54 FLRA at 729.

Even assuming that the Authority were to follow the Ninth Circuit's approach and determine formality based on the point within the EEO complaints process that a meeting occurs, I find that Crespin's EEO dispute had developed into a formal EEO complaint prior to the time of the meeting at issue in this case. EEOC is responsible for issuing regulations and directives that govern the processing of EEO complaints in the Federal sector. EEOC's regulations concerning EEO in the Federal sector are set forth at 29 C.F.R. Part 1614. EEOC has also issued a complaints processing manual for the Federal sector--Equal Employment Opportunity Management Directive, EEO MD-110 (EEO MD-110).

Under the procedures prescribed by EEOC for addressing EEO complaints in the Federal sector, an aggrieved person must engage in a pre-complaint process that consists of consulting with an EEO counselor as a prerequisite to filing a complaint of discrimination. See 29 C.F.R. § 1614.105. Within specified time frames and, presumably, at the completion of counseling, the counselor must provide the aggrieved, among other things, with written notice

of the aggrieved's right to file a discrimination complaint. See 29 C.F.R. § 1614.105(d). EEOC characterizes this in other terms as the counselor informing the aggrieved that he/she has the right to pursue the claim further "through the formal complaint procedure." See EEO MD-110, Chapter (Ch.) 2, § VI.D.1. Upon receipt of that notice, the aggrieved may file a complaint with the agency that allegedly discriminated against him or her within 15 days of receipt of the written notice of right to file. 29 C.F.R. § 1614.106. EEO MD-110 provides that if the complaint is mailed, the date of filing is the postmark date.¹⁵ EEO MD-110, Ch. 5, § I. Within a reasonable time after a complaint is filed, the agency must notify the complainant whether and to what extent it is accepting or dismissing the complaint.¹⁶ *Id.*

Under the process set forth by EEOC, Crespin's formal EEO complaint in CRO-10797 was filed as of September 13, 2001, the date it was mailed to the Department of Agriculture. I reject the Respondent's contention that the EEO complaint was not formal at the time the mediation session occurred because the Department of Agriculture had not yet accepted it. Under the process set forth by EEOC, which is described above, the acceptance of an EEO complaint follows the filing of a formal complaint and status as a formal EEO complaint is not dependent on the agency's acceptance.

Turning to the meeting that related to Cyndie Genzmer's EEO complaint, I find that it, too, was formal. The following characteristics support that finding. The meeting was attended by the Regional Engineer of Region 5 of the Forest Service who was designated as resolving official and, hence, by definition, had full authority to settle the EEO complaint on behalf of the agency. The Regional Engineer did not have any supervisory authority over Genzmer. Gene Rose, the Region's employee relations specialist and technical representative, was also present. Participants were notified of the meeting as well as the date, time and place approximately 3 weeks in advance. The meeting took place in a location away from Genzmer's work area and took a total of approximately 5 hours, not counting a lunch break. The meeting had an agenda in that the pre-established

¹⁵
In relevant part, EEO MD-110, Ch. 5, § I provides as follows:

I. AGENCY SHALL ACKNOWLEDGE FORMAL COMPLAINT

Immediately upon receipt of a formal complaint of discrimination, the agency shall acknowledge receipt of the complaint in writing. The acknowledgment letter shall inform the complainant of the date on which the complaint was filed. If the complaint is mailed, the date of filing is the postmark date, not the date the agency received the complaint.

¹⁶

EEO MD-110, Ch. 5, § I provides:

Within a reasonable time after receipt of the [EEO counselor's report], the agency should send the complainant a second letter (commonly referred to as an "acceptance" letter), stating the claim(s) asserted and to be investigated. If the second letter's statement of the claim(s) asserted and claim(s) to be investigated differs, the letter further shall explain the reasons for the difference, including whether the agency is dismissing a portion of the complaint.

subject of the meeting was the resolution of Genzmer's EEO complaints. The meeting involved full discussion of Genzmer's EEO complaints and offers of settlement.

As was the case with the Crespin matter discussed immediately above, the circumstances involved in the meeting relating to Genzmer's EEO complaints are sufficiently similar to those in *Luke II*, *Dover* and *Luke I* to warrant a finding that it, too, was formal.¹⁷

I reject Respondent's argument that the meeting was not formal because Genzmer's formal EEO complaints had not been accepted by the Department of Agriculture prior to the date on which the meeting that is the subject of the ULP in this case was held. The same considerations that I discussed in conjunction with the same argument made with respect to Crespin's situation apply to that of Genzmer. With respect to the specifics involved in Genzmer's EEO complaint, she mailed a formal complaint to the Department of Agriculture in Case No. CRO-20185 on October 4, 2001, and in Case No. CRO-20301 on January 6, 2002. Thus, both formal complaints were filed prior to the March 8, 2002, mediation session. Hence, the complaints had developed into formal EEO complaints prior to the mediation session.

I find that the mediation session conducted in conjunction with Jannet Benton's EEO complaint also was formal. The meeting was attended by the Lake Tahoe Basin Management Unit Supervisor, who was designated as resolving official and, hence, had full authority to settle the EEO complaint on behalf of the agency. The Lake Tahoe Basin Management Unit Supervisor was the highest ranking official in the Lake Tahoe National Forest and did not have any supervisory authority over Benton. Also present was Gary Gilbert, the agency technical representative. Participants were notified of the meeting almost 2 weeks in advance. The meeting took place in a location away from Benton's work area and lasted approximately 8 hours. The meeting had an agenda in that the pre-established subject of the meeting was the resolution of Benton's EEO complaints. The meeting involved full discussion of Benton's EEO complaints and offers of settlement. Attendance was voluntary. Notes that were taken during the meeting were destroyed at the end and no minutes of the meeting were kept.

17

The facts that attendance was voluntary; notes taken during the meeting were destroyed at the end; and no minutes of the meeting were kept do not outweigh the other factors indicating formality.

The circumstances involved in this third meeting are sufficiently similar to those involved in *Luke II*, *Dover*, and *Luke I*, to warrant a finding that it, too, was formal.¹⁸

4. *The discussions were between a representative of the agency and a unit employee*

It is undisputed, and I find, that the three discussions that are the focus of the consolidated complaints were between a representative of the agency and a unit employee.

5. *The discussions concerned grievances*

In determining whether a matter constitutes a grievance under section 7114(a)(2)(A), the Authority applies the definition of grievance that is set forth in section 7103(a)(9) of the Statute. See, e.g., *Dover*, 57 FLRA at 308. Under that section, grievance is defined, in relevant part, as:

18

I am unpersuaded by the Respondent's argument that the Benton meeting was not a "formal" discussion because, among others, it addressed an EEO complaint filed pursuant to the terms of the settlement agreement reached in the class action suit, *Donnelly v. Glickman*. Section 21 of that settlement agreement authorized class members to file EEO complaints that would otherwise be time barred. See Exhibit 11 at 27; Exhibit 13 at 7. Other than a bare assertion, the Respondent does not offer any support as to why the fact that one of the EEO complaints discussed at the meeting was filed under a "special" complaint process undermines the formality of the meeting. I see no basis for finding that the origin of one of the complaints discussed at the meeting offsets the indicia that indicate the meeting was formal in nature.

any complaint—

(A) by any employee concerning any matter relating to the employment of the employee[.]

The Authority has construed this definition of grievance broadly as encompassing any employment-related complaint, regardless of the forum in which the complaint may be pursued, and as including EEO complaints. See, e.g., *Dover*, 57 FLRA at 308. The Authority has also stated that the statutory definition of grievance is not dependent on the scope of a negotiated grievance procedure. See, e.g., *Luke II*, 58 FLRA at 534. This last principle applies whether EEO claims are excluded from coverage under a negotiated grievance procedure, see, e.g., *id.*, or included within the coverage of a negotiated grievance procedure, see *Marine Corps Logistics Base, Barstow, California*, 52 FLRA 1039, 1047 (1997).

Applying the definition contained in section 7103(a)(9) and consistent with the Authority's findings in other cases, the EEO complaints that were the subject of the three meetings at issue in this case, constituted grievances.¹⁹ As discussed earlier, I find with respect to Crespín and Genzmer that their EEO disputes had developed into formal complaints by the time the discussions occurred. Accordingly, it is not necessary to determine whether an EEO dispute that is at the pre-complaint or counseling stage constitutes a grievance within the meaning of section 7114(a)(2)(A).

B. There is no basis for finding that presence of a Union representative at the meetings would conflict with ADRA, Privacy Act, EEOC regulations and other laws and regulations identified by the Respondent

In *Luke II*, *Dover*, and *Luke I*, the Authority concluded that the presence of a union representative at mediation sessions similar to those involved in this case was not inconsistent with either the ADRA or EEOC regulations. Consistent with those decisions, I reach the same conclusion here. I find that the facts presented fail to show a direct conflict between the Union's institutional rights under section 7114(a)(2)(A) and the employee's rights to confidentiality in EEO proceedings. The Respondent's arguments to the effect that such conflict exists are, like those rejected by the Authority in *Luke II* and *Dover*, hypothetical in nature.

In *Luke II*, *Dover*, and *Luke I*, the Authority also rejected arguments similar to those the Respondent presents here with respect to conflict between allowing a union representative at the meetings and the Privacy Act. In *Luke II*, the Authority adhered to previous Authority precedent and the view of the U.S. Court of Appeals for the District of Columbia Circuit that the Privacy Act entails an "actual retrieval" standard. 58 FLRA at 535-36. Consistent with that standard, the Authority found that there was no demonstration that the union's acquisition of knowledge of the issues raised in an EEO complaint as a result of attendance at

19

With respect to the Respondent's exhortation that the FLRA should adopt the approach of the Ninth Circuit as embodied in *IRS, Fresno*, I note that the FLRA has specifically declined to do so and respectfully disagrees with the Ninth Circuit's determination that the formal discussion right does not apply to EEO complaints. See *Luke II*, 58 FLRA at 533.

a mediation session would be related to the actual retrieval of information from a “record” within the meaning of the Privacy Act. *Id.* As with *Luke II*, I find that there is no evidence demonstrating that any knowledge of sensitive information obtained as a result of the Union’s presence at the three mediation sessions would have been related to the actual retrieval of such information from a “record” within the meaning of the Privacy Act. Therefore, I reject the Respondent’s argument in this case that allowing a Union representative to be present at the three mediation sessions involved, herein, would violate the Privacy Act. See 58 FLRA at 535-36.

The Respondent’s claims that allowing the Union to be represented at the three mediation sessions would have conflicted with several other laws and regulations that it contends protect individual’s confidentiality are also highly similar to those rejected by the Authority in *Luke II* as hypothetical. In addressing similar claims in *Luke II*, the Authority stated:

“[T]he Union’s statutory right to be represented at such [mediation and settlement discussions] cannot be nullified on the speculative grounds of potential privacy problems under the Privacy Act.” [Citation omitted.] Rather, such hypothetical issues are more appropriately addressed in an actual case when squarely presented. [Citation omitted.]

58 FLRA at 536.

Similar to the situation in *Luke II*, the Respondent presents no evidence in this case that any of the meetings involved any information or records that the laws and regulations that are cited by Respondent protect from disclosure. Accordingly, the Respondent’s claims that the various laws and regulations that it cites present a basis for finding that the Union did not have a right to be present at the three mediation sessions, is rejected.

C. The Respondent’s claims regarding “inherent” conflict do not present a basis for finding that the requirements of section 7114(a)(2)(A) do not apply to the mediation sessions at issue in this case.

If the Respondent’s argument that there is an inherent conflict in union attendance at meetings held in the context of the EEO complaint process, otherwise formal discussions that occur in the context of the EEO complaint process would, as a matter of course, be excluded from the requirements of section 7114(a)(2)(A). This, however, is not the path that the Authority has chosen to follow as demonstrated by *Luke II* and *Dover*. Rather than adopting an approach that an intrinsic conflict exists that warrants excluding meetings conducted in the context of the EEO complaints process from the requirements of section 7114(a)(2)(A), the Authority has adopted a more restrained approach to resolving conflicts between the EEO process and section 7114(a)(2)(A). The Authority expressly recognizes that in applying section 7114(a)(2)(A) “an appropriate resolution is required in the event of a direct conflict between individual and institutional rights.” *Luke II*, 58 FLRA at 535, quoting *Dover*. Consistent with that recognition, the Authority determines whether a “direct” conflict has been shown between the union’s presence at meetings conducted in

the context of EEO complaint processing and the rights of the complainant. See, e.g., *Luke II*, 58 FLRA at 734-35. Accordingly, I reject the Respondent's assertion that based on "inherent" conflict, the Union had no right to be present at the three mediation sessions.

Conclusion

I find that the three mediation sessions constituted formal discussions within the meaning of section 7114(a)(2)(A) and that the Union had the right to be represented at them. It is, therefore, concluded that by holding formal discussions without affording the Union an opportunity to be represented as required by section 7114(a)(2)(A), the Respondent violated section 7116(a)(1) and (8) of the Statute.

Based on all of the above, it is recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Agriculture, Forest Service, Los Padres National Forest, Goleta, California, shall:

1. Cease and desist from:

(a) Failing or refusing to provide the National Federation of Federal Employees, Local 2023, AFL-CIO, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practice or other general condition of employment, including meetings to mediate settlement of formal Equal Employment Opportunity complaints filed by bargaining unit employees.

(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) Provide the National Federation of Federal Employees, Local 2023, AFL-CIO, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal Equal Employment Opportunity complaints.

(b) Post at all facilities of the Department of Agriculture, Forest Service, Los Padres National Forest, 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 Los Padres National Forest Supervisor, 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, San Francisco Regional Office, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California, 94103-1791, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, March 25, 2004.

ELI NASH

Chief 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 Agriculture, Forest Service, Los Padres National Forest, Goleta, California, 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 National Federation of Federal Employees, Local 2023, AFL-CIO, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning any grievance or any personnel policy or practice or other general condition of employment, including meetings to mediate settlement of formal Equal Employment Opportunity complaints filed by bargaining unit employees.

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

WE WILL provide the National Federation of Federal Employees, Local 2023, AFL-CIO, advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning mediation of formal Equal Employment Opportunity complaints.

(Respondent/Activity)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: 415-356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, Chief Administrative Law Judge, in Case Nos. SF-CA-02-0133, SF-CA-02-0400 and SF-CA-02-0525 , were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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Dated: March 25, 2004
Washington, DC