

IN ARBITRATION

In the Matter of the Arbitration Between:

**FEDERAL AVIATION ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION**

and

**PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS**

M. David Vaughn, Panel Arbitrator

Grievance of the Union:
Denial of Right to Meet
With New Employees in
Orientation at FAA Academy,
Article 3, Section 9 and
Article 63, Section 3,
5 U.S.C. § 7116 (a) (1)

OPINION AND AWARD

This proceeding takes place pursuant to Article 5 of the 2000 collective bargaining agreement (the "Agreement") in effect between the Federal Aviation Administration ("FAA" or the "Agency") and the Professional Air Systems Specialists ("PASS" or the "Union") (together, FAA and PASS are the "Parties" to the proceeding) to resolve a July 20, 2006 grievance filed by the Union's National Office alleging that the Agency violated Article 3, Section 9 and/or Article 63, Section 3 of the Agreement (the Parties stipulated that the language and intent of the two provisions is identical) as well as committing an Unfair Labor Practice, in violation of 5 U.S.C. § 7116 (a) (1), by excluding the Union, through its designated representatives, from participating in orientation meetings held at the FAA Academy for newly hired employees. The Parties were unable to resolve the dispute through the steps of the negotiated procedure; and the Union invoked arbitration. From a panel of arbitrators maintained by the Parties, I was designated to hear and decide the dispute.

A hearing was convened on March 7, 2007 at Washington, D.C. at which the Agency was represented by Ms. Allyn Dillman and the Agency by Howard Abrahams, Esq. The Parties stipulated at the outset of the proceeding that the dispute is properly in arbitration and before me; and I find it to be so. The Parties were then each afforded full opportunity to present witnesses and introduce documents in to the record. For the Union testified its National Vice-President Michael Perrone and General Counsel Michael Derby, Esq. Former Manager of Labor Relations for Airways Facilities (now Technical Operations) Ferrol Thomas, Technical

Liaison Mary Hahn, Program Manager for Technical Operations Hiring, Training and Certification Program Rita Nelson and Manager for Technical Operations Training and Development Group Francis Toner testified at the call of the Agency. Joint Exhibits 1-4 ("JX__"), Union Exhibits 1-4 ("UX__") and Agency Exhibits 1 and 2 ("AX__") were offered and received into the record. A court reporter was present at the hearing; the transcript, page references to which are designated as "T__.", constitutes by agreement of the Parties the official record. At the conclusion of the hearing, the evidentiary record closed.

The Parties elected to close by written briefs, the last of which was received on June 4, 2007, whereupon the record of proceeding closed. The Parties waived the provision of Article 5, Section 9 and granted additional time for the submission of the Opinion and Award, which is based on the record. The Opinion and Award interprets and applies the Agreement and applicable statutes, regulations and authorities.

APPLICABLE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 3, Section 9 and Article 63, Section 3 of the Agreement each provide, in identical language:

Union representatives shall be allowed up to two (2) hours at orientation meetings of new employees to explain the role and responsibilities of the Union. If the Union representative is not located at the site of the orientation, no travel time, expenses or overtime is authorized. The meeting shall be private.

APPLICABLE PROVISIONS OF THE STATUTE

Section 7116 (a) (1) of Title 5 U.S.C. provides:

- (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
- (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter[.]

STATEMENT OF THE ISSUES

The Parties framed the issues for determination somewhat differently, but to the same end. I find the issues to be:

Did the Agency violate Article 3, Section 9 and/or Article 63, Section 3 of the Agreement and/or did it commit an Unfair Labor Practice, in violation of 5 U.S.C. § 7116 (a) (1) when it refused to continue to allow the Union to explain its role and responsibilities privately at orientation sessions held at the FAA Academy with new employees? If so, what shall be the remedy?

FACTUAL BACKGROUND AND FINDINGS

The Parties

The Agency provides air traffic control services to the Nation's civilian air traffic system. Its responsibilities include installation, maintenance, certification and repair of air traffic control equipment.

The Union is the exclusive bargaining representative for approximately 11,000 employees of the Agency. The bargaining unit represents employees in several of the Agency's organizational components, including Technical Operations (also "TO") (TO was formerly Airways Facilities, or "AF"), the largest component of the Agency whose employees are represented by PASS. PASS-represented employees install, maintain, certify and repair Agency air traffic control equipment. The largest number of PASS employees are classified as Air Traffic Systems Specialists, GS-2101 ("ATSS"s or "2101"s).

The Contract Provision at Issue

The contract provision at issue in this proceeding, quoted above, was negotiated in 1992. T.72. The provision was not at issue in the next round of bargaining in 1996. T.73. The provision was opened for negotiation in the 2000 round of bargaining, but was

rolled over, without change. T.74. Other than an increase in the time allotted for the meeting from one hour to two during some unspecified negotiations (T.73.), there has been no change in the language and no specific evidence of discussion in bargaining with respect to the intent of the provision.

The Agency and the Union both submitted testimony to establish the intent of the Parties in negotiating the provision. Labor Relations Manager Ferrol Thomas testified that

The Union just wanted to make sure that they had an opportunity to talk to new employees, to talk about the Union, and when they say the orientation, that means an orientation for the Union about the Union. It didn't refer to the Agency's orientation. It was . . . strictly between the Union and the employee. And, you know, they didn't go to whether it was orientation - part of the Agency's orientation or whether it was the Union orientation. It only went to whether or not the Union would have an opportunity and how much time they would have doing it.

T.75.

The evidence establishes that Mr. Thomas was a member of the negotiating teams in 1996 and 2000, but not in 1992. T.71-72. Neither does the record establish that he was otherwise directly involved when the language was negotiated; and the basis for his testimony as to the intent of the negotiators is not apparent from the record. Mr. Thomas's testimony as to the manner in which the Parties implemented the language is useful. See citations below.

The Union submitted the testimony of Mr. Perrone to establish the meaning intended by the Parties in negotiating the language:

This basically gives us, the Union, the right to talk to new hires, gives us two hours per the contract for orientation, talking about the Union, explain who the Union is, that we are the sole representative for them, and it gives the FAA the authority to have a rep do that.
* * *

T.20.

Examination of Mr. Perrone's background establishes no connection to the 1992 negotiations during which the language was negotiated. Other than to read and interpret the language of the contract as an experienced advocate, Mr. Perrone's testimony adds little to the record as to the meaning of the language. Again, his testimony as to how the Parties applied the language is referenced, below.

Neither Party submitted from its records documentation of the proposals which led to the provision or any explanations or bargaining notes to explain what the Parties had in mind when they negotiated the language.

Orientation for New Hires prior to 2004

Until 2004, the orientation of employees hired as or for 2101/ATSSs was informal and done at local level: Local administrative officers would handle the paperwork, someone in management would swear the employees in and brief them on Agency benefits and procedures. Employees would be oriented one at a time if they came on board singly or together if more than one employee came on board at the same time. T.76.

At some point, and upon request from the Union, a local PASS representative would meet with the new employees to inform them about the role of the Union. Again, the procedure was informal and was not formally scheduled as part of or in conjunction with the remainder of the new employee's orientation. T.77. Mr. Thomas testified, without refutation, that:

. . . [T]he employees would come in and they would have their orientation through the Agency and then the Union would come to us and say, well, you've got new employees. We'd like to have their two hours, and we said, sure, you can have your two hours. Just let us know. So it could be a variable time. It could have been as far as a month or more, once an employee gets here that they finally get to, and it's probably been times when employees have come in two at a time and the Union says, well, you know, we think you're, you're going to get some more in, and we say we're going to get some more in maybe in the next month, and they'll say, well, we'll wait until, until you

get four people in here instead of having, you know, a meeting right away. So it was up the Union and we always gave them the two hours, and it didn't necessarily take place at the same time.

T.76.

Sometimes there would be no PASS representative present at the facility to conduct the orientation, or even if there was one, the briefing would not take place. Mr. Perrone acknowledged:

Typically you have a rep at the facility that would do that but sometimes there isn't. The folks may be at a location where there's not a rep. So then we'll have someone that the Union designated to come in and give them a briefing. * * * I've had over the years people will tell me that they never received a briefing, or they've gotten a briefing hodgepodge type of thing. And they start mentioning, oh, yeah, the Union's coming in to talk to you and the rep will say, yeah, I want to tell you about the Union, oh, but got to go."

T. 20.

The Agency allowed the Union's meeting with employees to be on paid time (T.77.) but did not regard the meeting as compulsory, so if an employee did not want to meet with the Union, the Agency would not compel the employee to do so, but would leave any enforcement of the meeting to the Union. *Id.*

The Agency's TOHTC Program

The Agency had previously scheduled and sent newly-hired 2101 employees to the FAA Academy for training following their orientation and after such additional time at their local facilities as would be necessary to get them to training at their scheduled training. In early 2004, in advance of the staffing mandate described in the next section, the Agency developed a new training program as part of their communications program. T.99. The program, called the Technical Operations Hiring, Training and Certification Program ("TOHTC" or the "Program") was of nine and one-half weeks duration. The Program was in some stage of

scheduling and implementation at the time the Agency resolved the staffing level dispute (see next section).

The Staffing Mandate and Its Impact on Agency Hiring

In 2004, the Agency was mandated in an Award issued by Arbitrator Sean Rogers to honor a commitment to achieve and maintain a minimum staffing level of 6100 technical employees, including 2101s. AX1a. The Federal Labor Relations Authority ("FLRA") denied the Agency's exceptions to the Award. T.65. The Union also filed an Unfair Labor Practice charge against the Agency, based on its failure. AX1b. The Agency and Union eventually entered into a settlement agreement in which the Agency accepted the mandate and started a hiring push to achieve the required staffing level. AX1c, T.94.

In order to bring this large number of employees on board and train them on an expedited basis, the Agency changed its procedures to send new 2101s directly to the Academy, where they were sworn in and oriented. During the hiring push, from March of 2004 through January of 2005, classes were scheduled back to back, with one class overlapping the other. T.119. Classes had approximately 24 students each.

The Orientation and Training Program

The Agency initially conducted orientation for the new employees on the first two days of the Program; that was cut back to one day for training conducted after January of 2005 in order to provide extra time for training. T.102. In the orientation, the employees were administered an oath of office, given benefit and other forms to complete and briefed on their responsibilities and familiarized with Academy services. T.99-100.

Employees then received nine and one-half weeks of technical training, at the conclusion of which they received a certificate, performed course evaluation and received some additional orientation in a one-day session. The training faculty continually

pushed for additional class time. Further changes in schedule took place in August of 2005 to increase and change the length of the orientation to approximately one and one-half days in order to respond to a specific, but undisclosed, problem which arose. T.104.

Union Meetings with New Hires at the Academy

Union witnesses testified that they learned of the Agency's new TOHTC program sometime in the late fall or early winter of 2004. T.21. By a letter dated October 22, 2004, the Union requested a briefing regarding the new Program. UX1. It learned that new hires would be sent directly to the FAA Academy and requested to meet with employees there and in conjunction with Agency orientation pursuant to Article 3, Section 9 of the Agreement. T.64. According to the testimony of Mr. Derby, the Union's discussion focused on the logistics of the meetings; there was no question as to the propriety of its request. *Id.* The Union believed that conducting the Union orientation meetings at the Academy, better, more consistent information could be convened and in a more efficient manner.

By an email dated November 12, 2004, the Agency, through Labor Relations, Litigation Cindy Wheeler responded to Union General Counsel Derby, granting the Union's Request:

In accordance with Article 3, Section 9 of the [Agreement], a Union representative shall be allowed up to two hours at orientation meetings of new employees to explain the role and responsibilities of the Union. As discussed with PASS, new employee orientation has begun, therefore, PASS will be provided up to two hours to meet with new employees on the following dates:

November 17, 2004
January 12, 2005
February 9, 2005
March 16, 2005
April 13, 2005

PASS is invited to participate next week on Wednesday, November 17, 2004 at the [TOHTC] Program for the second class. The PASS representative can identify the time

frame that would fit in their arrival time to the FAA Academy on Wednesday, November 17 (between 7 a.m.-3:30 p.m.). The first class can also be available on the same day, so the PASS representative will need to identify an additional time frame session to meet with the first class. * * *

UX2.

Ms. Nelson testified that she simply provided the Union in the email with the course dates then scheduled. She acknowledged that she understood the Union's participation at the Academy to be an ongoing, rather than temporary, arrangement. T.112.

The Union attended the classes listed in Ms. Nelson's email and made their presentations to new hires while the employees were on duty time. UX4. In March of 2005, Ms. Nelson responded to the Union's inquiry by furnishing it with the class schedule for the remainder of the Fiscal Year. In response to an inquiry from the Union in that message, She denied that her group had told any students that the PASS orientation was not mandatory. UX3.

**The Agency's Withdrawal of Permission
To Conduct New Hire Meetings at the Academy**

The Union continued to make presentations at TOHTC orientation until July of 2006, at which point Mr. Thomas sent to Union President Thomas Brantley a letter, the substance of which is:

This letter is your notice that we intend to return to our usual practice of allowing union representatives up to two hours only at local orientation sessions. This will, again, effectively apply the proper interpretation of Article 3, Section 9 of the [Agreement].

JX2.

The Agency gave various explanations for the determination not to allow the Union to conduct its meetings at the Academy during new employee orientation. Ms. Nelson testified that the PASS orientation was cut out of classes at the Academy because at least

some employees were reporting to their local facilities prior to reporting to the Academy and:

Because of the duplication of the effort as I called it. I understand that the two hours - up to two hours of representation was allowed also at the field, and the fact that we were bringing in employees who had already been brought on board and should have already been brought on board and should have already have received their two hours of representation.

T.106-107.

No evidence was introduced that any identified employees had been subjected to multiple meetings with Union representatives or that the Union, through its representatives, had provided multiple meetings. The belief is based, at most, on anecdotal evidence. Indeed, the Union disclaimed any right to or interest in conducting multiple meetings with employees. The evidence establishes that some employees who had reported to their local facilities had already become members of the Union at the time they arrived at the Academy; but it is not established that was the result of any Article 3, Section 9 meeting.

Ms. Nelson also testified that the orientation and training calendar was extremely crowded, the unidentified "incident" took place, requiring more administrative time, and that there was no room on the schedule for the Union meeting during either the orientation or the training. She stated:

Training wasn't going to allow us to put it in any of their times, and it had to be given to the employee up front. So there was no other place to put it but on the intake day. T.109.

The Grievance

The Union challenged the Agency position through the filing of a national grievance (JX3) and a ULP Charge (AX1b). The grievance protested Mr. Thomas' letter as "inconsistent with the bargaining

history, the Parties' past practice and the contract language itself." JX3.

In response to the challenge, the Agency took the position that PASS could only participate in orientation at the local level. Office of Labor-Management Relations Executive Director Melvin Harris denied the grievance in a letter dated September 1, 2006 (*sic* 2005?), stating in part:

Prior to October 2004, FAA employees were hired and sworn in at their duty locations nearly exclusively. The intake point for employees participating in the [TOHTC] program in October of 2004 was the FAA Academy, in a vast majority of cases. Currently more employees who are participants in the TOHTC program are hired in place at their duty locations before reporting to the Academy for training in conjunction with the TOHTC program. This is an assignment of work and is not negotiable pursuant to § 7106 (a) (2) (A) of the Statute. As a result of the decision to hire in place, future union meetings with new employees to explain the role and responsibilities of the union will not be held at the FAA Academy in OKC. Union representatives will be permitted up to two hours at orientation meetings with new employees at the duty locations where they are hired, as they had in the past. The Agency believes that there is no, or only de minimus, impact on BUEs or the union from this Agency decision.

JX4.

As indicated, the Agency in its grievance answer attributed the discontinuation of the Union meetings being held at the Academy on "the decision to hire in place", meaning that employees were entering on duty at local facilities, rather than reporting directly to the Academy, as had been the case during the hiring surge.

Changes in the Agency Orientation and Training

The Agency had all new hire technical employees report to, enter on duty and be oriented at the Academy for a period of

approximately six months in order to get to the required staffing level. T.78, 82-83. The hiring and training level during that period was approximately four times the normal rate. Even then, it appears that some new hires went to the local facilities to which they were assigned prior to going to the Academy. T.85, 101. However, after the initial push, testified Agency witnesses, it reverted to so-called "traditional hire", in which:

Instead of coming to Oklahoma City, they were going not just to Oklahoma City, but they were also going out to the field. So there was - it became a variety after a while. It was no longer just pushing them through this particular string.

T.125.

It thus appears that, beginning approximately six months after the hiring push, some new hire employees were instructed to report to the local facilities where they were assigned, were sworn in and oriented there and then later were sent to the Academy for training. T.108. Other new employees reported directly to the Academy and were sworn in and oriented there, starting training immediately thereafter.

The Union conceded that, if FAA ceased to conduct its initial orientation for employees at the Academy, the Union would not perform its Union orientation at the Academy. T.69. However, it believes, and the evidence supports the assertion that some employees, at least, still report directly to the FAA Academy and enter on duty there.

Invocation of Arbitration of Grievance

The Union requested expedited arbitration of the dispute. This proceeding followed.

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearing and in their post-hearing briefs. They are summarized as follows:

The Union argues that it met its burden to prove that the Agency's actions were in violation of the Agreement. It asserts that the evidence is that the Agency is still conducting orientation meetings at the FAA Academy, regardless of where employees might be "brought on board". It asserts that the clear and unambiguous language of the Agreement obligates the Agency to provide PASS with two hours for a private meeting with new employees at orientation meetings.

The Union maintains that conducting the Union meetings at the Academy makes sense for both the Union and Agency, in that a single Union representative can meet with multiple employees at the same time, minimizing the disruption to the employees in the performance of their duties and minimizing the official time which would otherwise be required.

PASS argues that the Agency's attempt to impart meaning to the language other than its words is contrived and self-serving. It points out that the Agency's initial response to the changed orientation was to allow the Union to participate in meetings with groups of employees at the Academy, that it had previously participated in centralized orientation and that the Union's orientation takes place in the same time frame as the remainder of the orientation.

The Union contends that the contractual language does not restrict the Union to do only local or individual briefings or to make the location of the orientation contingent on where the employees might be brought on board. It maintains that an interpretation of the contractual language to disassociate the PASS orientation from the Agency orientation would be nonsensical.

The Union argues that it is not attempting to gain any benefit beyond the right already contained in the Agreement and disclaims any right to time to meet in excess of two hours. It maintains that there is no proof that any employees received multiple two-hour briefings from the Union, despite Agency recording of official

time, even though some employees who were brought on board at local facilities and were later sent to the Academy were already PASS members when they arrived. That is not, maintains the Union, a reason to deny the Union the two hours to which it is entitled.

The Union posits that it was only after an Agency manager sat in on one of the orientation meetings did the Agency seek to exclude it from the orientation.

The Union argues that the Agency's unilateral decision to prohibit it from participating in the employee orientation conducted at the FAA Academy constitutes a violation of the cited provisions of the Agreement. It urges that I find that the Agency violated the Agreement when it prohibited the Union from conducting meetings with new employees at the FAA Academy and direct the Agency to immediately allow PASS up to two hours in the employee orientation meetings conducted as part of the TOHTC course at the FAA Academy.

The Agency argues that the Union failed to prove a violation of the Agreement. It asserts that the contractual language has been the same for an extended period of time and that the meetings provided for therein have historically occurred at the local facilities where the employees are assigned. FAA denies that it interfered with the Union, but contends that the Union did not effectively use the opportunity to explain the role of the Union to new employees. It maintains that the Union orientation was not intended or applied as a part of the Agency's orientation for new employees but merely a separate meeting.

The Agency argues that its decision to allow the Union to hold Union orientation meetings at the FAA Academy was a response to the special need to substantially increase staffing on an expedited basis. It asserts that the decision was not intended to be a permanent change in practice or working conditions.

The Agency argues that there was no, or only minimal, impact on employees or the Union from the Agency decision to restrict the Union to meet with new employees at their facilities to explain the role of the Union.

The Agency contends that it did not, by its action requiring the Union to meet employees only at local facilities, violate any protected past practice as a result of allowing a temporary change of location for Union orientation meetings and then returning them to the previous, local sites.

The Agency urges that the grievance be denied.

DISCUSSION AND ANALYSIS

Burden of Proof

It was the burden of the Union to prove, by a preponderance of the evidence, that the Agency's action prohibiting it from allowing PASS time to meet with new employees at the FAA Academy in conjunction with the Agency's orientation program. For the reasons which follow, I conclude that the Union met its burden and that the Agency's action violated the Agreement and constitute a ULP.

Ascertaining Intent

In determining the appropriate interpretation and application of contract language, it is the task of the decider of fact to ascertain the mutual intent of the Parties in negotiating the language and, if possible in situations not explicitly covered by the language, to determine what the Parties intended would apply in such situations. Where contract language is clear, the Parties are entitled to have it applied, as written.

To clarify otherwise ambiguous language, resort may be had to bargaining history, including the origin of, explanation for and language of prior proposals leading to the negotiated language, the

enlightenment for which might come from testimony or notes about the bargaining and the post-agreement course of dealing with respect to the language. Gaps in language may be filled through practices and courses of dealings established by the Parties over time. To an analysis of the record for purposes of ascertaining that mutual intent I now turn.

Contract Language

In the instant dispute, the language specifically allows the Union to meet privately with new employees for up to two hours "at orientation meetings of new employees" to explain the role and responsibilities of the Union. The Agency argues that the Union's meeting is separate from and connected to the Agency orientation meetings. I am not persuaded.

The language entitles the Union to meeting time with new employees *at orientation meetings of those employees*. If the right were to exist only with respect to a separate Union "orientation" - as the Agency argues - there would be no reason to reference "orientation", since the provision identifies with specificity the purpose of the Union's meeting: to explain the role and responsibilities of the Union, not "orientation". The language placing the Union meeting *at orientation meetings of new employees* clearly contemplates that the Union meetings take place *in conjunction with* the rest of employee orientation (the language entitles the Union to the meeting time *at orientation meetings of new employees*, not separately from those meetings) and with *groups* of employees ("meetings of employees") rather than being confined to meet one on one with them.

The language quoted also contemplates that the Union meetings take place where and when the employee orientation is conducted. That makes sense, as the purpose of the meeting ("to explain the role and responsibilities" of the Union) parallels other parts of the Agency orientation process, which is to explain to new employees how the Agency processes work. Thus, the language makes

the Union meeting appropriately held in conjunction with the remainder of the employee orientation to which it is related.

Bargaining History

Both Parties submitted testimony as to what had been the intent of the Parties in negotiating the language. Mr. Thomas and Mr. Perroni each testified as to what the language means, to largely inconsistent ends. Both are able advocates for the positions of their principles; however, the record fails to establish that either participated in the 1992 negotiations in which the language was adopted. Neither offered prior bargaining proposals, explanations or notes from the bargaining.

The evidence is that Mr. Thomas participated actively in negotiations including 1996 and 2000, but acknowledged that in 1996, his first negotiations, the language at issue here was already in the contract and was not in dispute and that in the 2000 negotiations, although the issue was open for negotiation, the language was, in the end, rolled over. Nothing in his testimony sheds light on the mutual intent of those who adopted the language. Mr. Perroni fares no better as having knowledge of the intent of the negotiators of the language; he did not participate in the 1992 negotiations either.

In the end, I conclude that Messrs Perroni and Thomas merely voiced the advocacy positions, what they wish and believe the language means, and conveyed some indication how the language has been applied, but added nothing with respect to the mutual intent of the representatives who negotiated the language.

Practice of the Parties; Course of Dealing

A way to ascertain the intent of the Parties in negotiating contract language is to examine how the Parties interpreted and applied the language after it went into effect. I note, in this regard, that the testimony of Mr. Perroni and a couple of the

Agency witnesses indicates that the Agency's intake and orientation of new employees prior to the 1992 adoption of Article 3, Section 6 was casual and basic. The evidence is that new employee orientation, such as it was, took place at the local facilities where the employees are assigned. There was no dichotomy between where employees were brought on board and where they received their orientation; it was all local.

Mr. Perroni testified that the Union met with him when he was a new employee in 1988, but his testimony and that of the Management witnesses who testified on the point establishes that the Union contacted new employees prior to 1992, but the contact was informal, inconsistent and varied in format. It does not appear that there was any coordination with the larger orientation program, because for all intents and purposes, there was no larger Agency orientation program.

The evidence is that nothing significant changed in the general procedures whereby new employees were oriented based on or immediately following adoption of the 1992 language. Testimony as to how the Union meetings with new hire employees were conducted following the adoption of Article 3, Section 9 reveals a continuation of the informal, catch as catch can Agency orientation process. Representatives of the Union sometimes met with new hires weeks after the employees came on board and started work and sometimes did not meet with them at all.

The principle which would be drawn from the negotiated language that the Union was entitled to meet with employees as part of an integrated new hire orientation process fails for lack of satisfaction of the premise: there was no new integration new hire orientation process during the time after 1992. The Agency handled orientation extremely loosely; so did the Union for its part. Neither Party appears to have been uncomfortable with the system; insofar as the record indicates, no one complained and no one grieved.

The Agency argues that the prior application of the language had always been to have the meetings between the Union and new hires conducted at the location where the employees were brought on board, that is, entered on duty. It urges that is the proper application of the contract language to the situation prevailing after it moved the location of new hire orientation to the Academy and that the past practice of the Parties supports such an interpretation of the contract language: all Agency orientation was local and all Union meetings with new hires were held locally. The Agency's assertion is true, but it is not dispositive of the outcome of this dispute, since the local facility where the employees were "brought on board" was, until early 2005, the same place employees received their Agency orientation.

The course of dealing tells nothing about how the Parties might handle situations under the contract where new hire orientation is moved off-site to the Academy, where the orientation process might be divided between the local facility and the Academy or where a new hire might be brought on board one place and oriented at another. That connection is established based on the language of the Agreement and on the practice of the Parties when such a split occurred.

Agency Changes to the Format and Location of New Hire Orientation

The evidence is that the Agency changed the format and location of new employee orientation as part of TOHTC, an integrated orientation and training curriculum. The development of the Program took place prior to the negotiated agreement on staffing levels, but the courses were held after execution of that agreement. The Union does not, in this proceeding, challenge the Agency's right to make the changes. Although the Agency might be obligated to bargain the impact and implementation of such a change, the grievance at issue does not challenge the Agency's action on the basis of failure to engage in such bargaining.

The evidence establishes that the planning for the changes was made in advance of the Agency's agreement to increase technical employment to required staffing levels. When the Agency implemented that Program, it created what had not, insofar as the record indicates, existed previously: a formal, standardized new hire orientation, integrated with training course and conducted away from the new hire's assigned facility. Only at that point did the Agency change the location of the orientation meetings. Thus, the prior (pre-TOHTC) application of the Agreement does not support the Agency's interpretation of the language, any more than it supports the Union's interpretation. Indeed, the Agency's new Program matches the negotiated language better than the arrangements the Parties had in place previously.

The Agency's Responses to the Union's Request to Participate

The evidence establishes that the Union requested to participate in the Agency's orientation conducted at the Academy and that the Agency responded, allowing the Union to do so. The Agency does not dispute that it initially allowed the Union to have its orientation meeting at the Academy in conjunction with and as part of the administrative schedule for that Agency orientation. It contends, however, that the arrangement was only temporary, limited to the specific dates listed, and does not constitute a change to the prior practice or having the meetings conducted locally. I am not persuaded.

I have reviewed the correspondence from the Agency in this regard. Nothing in either the Agency's initial email or its follow-up email notifying the Union of additional dates gives any indication that the Union's participation in new hire orientation at the Academy was temporary or conditional. The course dates listed were the course dates scheduled at the time. The second email listed course dates through the end of the fiscal year. There is no word of caution or limitation and no disclaimer limiting the Union's participation to the courses identified or otherwise making it temporary. Indeed, when asked, Ms. Nelson specifically denied

that the Union's participation was temporary. To the contrary, the Agency appears by its communications with the Union to have acknowledged that having the Union conduct its meetings in conjunction with and at the same location as the Agency's new hire orientation represented the way things were to be done under the contract.

I note, in this regard, that the Agency's actions appear, on their face, not to establish any new practice not provided for in the contract, but to be applying the existing contract language in the way the Agency understood the language. The Agency's after-the-fact attempts to characterize its commitment to allow the Union to conduct its meetings at the Academy as temporary and to merely be returning to the previous practice after a temporary deviation are after the fact, self-serving and unpersuasive.

I conclude that the contract language, confirmed in the Parties' courses of dealing, entitled the Union to follow the Agency orientation meetings, even when the Agency relocated those meetings to the Academy, and to conduct their meetings with new employees in conjunction with Agency orientation.

The Numbers of Employees with Whom the Union Met at Any Time

The Agency asserts that the Union had always conducted its new employee orientation meetings with individual employees, and maintains that its attempt to transition to group meetings, as it did when it met with classes of new employees at the Academy, is an unwarranted expansion of the Union's contractual rights. The record does not bear out the Agency's argument.

The evidence establishes that the Union frequently met with new hires one at a time when orientation was conducted at local facilities because employees at any particular local facility were usually hired one at a time. However, the Union presented testimony from Mr. Perroni that, where more than one employee was hired within a relatively short period of time, the Union would sometimes

wait and conduct a single meeting with those employees. The evidence thereby establishes, contrary to the Agency's assertions, that the Union conducted multi-employee meetings when it was practical to do so and would sometimes wait for the meetings in order to allow that result. Insofar as the record indicates, the Agency never protested those delays or attempted to interfere with the conduct of the multi-employee meetings on that basis.

The Agency argues that the Union's new hire orientation meeting is, and always has been, separate from the Agency's orientation meetings. It protests that, by attempting to force its way into the Agency orientation program, the Union is again attempting to expand its rights in an unwarranted manner. I am again unconvinced. The contract language supports the interpretation that the Union's meetings are part of the larger Agency orientation meetings. As indicated, if the meeting to allow the Union to explain the role and responsibilities of the Union were intended to be separate and divorced from employee orientation, there would be no need to refer to allowing the meetings "at orientation meetings of new employees".

The Agency's Subsequent Changes in Location of Orientation

The Agency also argues that its practice of orienting new employees at the Academy was temporary, for purposes of facilitating the hiring surge, and that it substantially returned to having employees oriented at the local facilities following achievement of the required staffing level, thereby negating any right on the part of the Union to conduct its meetings at the Academy and negating any right to a remedy. I am not persuaded.

There are at least two flaws in the Agency's argument. The first is that, contrary to the Agency's position, the Union is entitled to protest the Agency's exclusion from meeting with new hires at the Academy during the period beginning after the Agency's July 22nd letter; if the Agency's action is found to have been in error, the Union is entitled to pursue relief, even if no more

relief is warranted than a declaratory and injunctive statement. Second, the evidentiary record, while less than totally clear, appears to show that the Agency has adopted a multi-gate policy, whereby some employees report first to their duty station for orientation and are subsequently sent to the Academy for training, and some employees report directly to the Academy to be entered on duty, oriented and trained. As to those employees who enter on duty at the Academy, the Union remains entitled to meet with them, and the grievance remains "live".

It is certainly true that a binding past practice is a product of the conditions giving rise to the practice and that a practice may be modified or superseded as a result of changes in conditions. However, I am persuaded that the Union's right to conduct orientation meetings with new employees is derived, at bottom, not from a practice between the Parties but from the direct contractual commitment manifest in the negotiated language. That contractual obligation was not affected by the Agency's change in the location of its new employee orientation or by the apparent, partial change back. I hold that the Union has a right to conduct its meetings with new hires in conjunction with the Agency's orientation meetings, wherever they are conducted.

Changes in the HOHCP Program

The Agency also argues that its withdrawal of permission to meet with employees at the Academy was necessitated by time constraints in the orientation program, as a result of both travel restrictions and on the press of time to cover the content of the technical course which follows the orientation. It asserts that there is simply no room in the program for the Union meeting. I might accept for purposes of this analysis that there are both time and travel limitations on the program, but for the fact that the evidence establishes that the orientation program, *including the Union's meeting time*, appeared to work just fine on approximately six occasions. The Agency found time for the Union on those occasions. It points to no harm that resulted from allowing the

meetings. I do accept, for purpose of this analysis, that the program, as several times revised by the Agency, does not now contain a time slot for the Union. But that is nothing more than a response to Management's exclusion of the Union from the Program and not proof that no slot can be found. There is no proof whatsoever that the time constraints rise to the level which might, by whatever exercise of emergency powers, allow the Agency to ignore its contractual obligations.

If the Union's right to participate in the orientation of new employees, wherever that orientation is conducted, were based solely or primarily on a past practice, its position in the instant dispute would be much weakened, as past practices are a product of the circumstances giving rise to them; and when the predicates for the practice change, the binding nature of the practice is undermined to that extent. However, in the instant dispute, as indicated, the Union's entitlement to participate in the orientation derives not from practice, but from the language of the contract itself in addition to the interpretation the Parties have given that language. That right is not extinguished by competing demands on the time the Agency has determined is available. If it were, the Agency could extinguish any negotiated right by the simple device of creating a conflicting management-promulgated commitment.

Possible Duplicate New Hire Meetings with the Union

The Agency expresses concern that allowing the Union to conduct orientation meetings with new hires at the Academy will subject them to possible duplicate meetings when employees who have entered on duty and spent some time at the local facility to which they are assigned have their meetings with the Union locally and then meeting time is blocked out for such meetings at the Academy. I note that the Union disclaims any right or interest in conducting duplicate Article 3, Section 9 meetings with employees; and it is difficult to see how conducting such duplicate meetings would further the Union's interests. I note, further, that although the

Agency expressed concern at possible duplication, it identified no specific employees who had been subjected to duplicate meetings.

FAA has the right to control the time its employees spend on the clock and what they do with the time. It has the ability to keep records of Union meetings or to require certification by employees whether they have had such meetings. If there is a potential problem in this area - and there is little evidence that it is significant - it is within the power of the Agency to control.

Role of SupCom

The Union pointed to SupCom, an association of Agency first-line supervisors, some of whom attended at least one entire new hire orientation and training program (T.79) and apparently sat in on the Agency's orientation and Union meeting with new hires, with the Union's permission. The contract makes the Union's meeting with new hires "private", but the Union's grant of permission effectively waived the right for purposes of that observer and that particular meeting.

The Union would have me infer that the Agency's withdrawal of permission for the Union to conduct meetings with employees was somehow connected with the SupCom representative's observance of the Union meeting and that there was some type of anti-Union comment from SupCom which prejudiced the Union. It is possible that was the case, but Mr. Thomas denied that SupCom talked against the Union (T.80.); and there is insufficient evidence in the record to draw the inferences the Union seeks.

Alleged Lack of Harm to Employees or Union

The Agency alleges that any consequence of its conduct is *de minimis*. It maintains in essence, that neither employees nor the Union were harmed by its action. I am not persuaded. The Union is the exclusive representative of bargaining unit employees and a

participant in the employment relationship whose status is guaranteed by Statute. An inherent purpose of Article 3, Section 9 is to allow the opportunity for an early introduction to new hires so that the Union will have its fair chance to obtain the membership and support of new hires at early opportunities. Similarly, since employees are statutorily entitled to the benefits and protections of the Union, they also have a cognizable interest in receiving the information at their early opportunity. Finally, in enforcing a right established by contract, there is no necessity to show damages; and it would be no excuse that a violation is claimed to have caused no, or minimal, harm.

**The Work Status of Employees During the Union Meetings
And the Voluntary or Involuntary Status of the Meetings.**

The Agency presented testimony that it did not regard the meetings at which the Union is contractually allowed to explain the role and responsibilities of the PASS as mandatory. The contractual language certainly appears to create a right on the part of the Union to give its explanation to all new hires. That right creates a corresponding obligation on the part of the Agency to make all employees available, in the same duty status as they are when the Agency conducts orientation meetings. Whether the Union would enforce such an obligation is for PASS to determine and would, if refused by the Agency, be the subject of another proceeding.

FAA also raised the question whether it was obligated to maintain the employees in pay status during the meetings. It is not clear whether the Agency was intending to imply that, if forced to allow the Union to meet with new hires at the Academy, it would place employees on non-pay status for the period of the meeting. I am not persuaded that the Agency would have the right to compel employees to attend meetings while they are in non-pay/non-duty status, but the final resolution of that issue must also await another set of facts.

To the extent that the Agency would seek by either or both of those devices to avoid or dilute its contractual obligation to allow the Union to meet with new hires to explain its role and responsibilities, it would do so at its peril.

The Unfair Labor Practice

The arguments made by the Parties in their presentations go to the contract violation. However, when an Agency violates an obligation provided in a collective bargaining agreement, it thereby interferes with the exercise by employees, acting through their exclusive representative, of rights provided by the Statute and thereby commits a ULP. The Award so reflects.

Conclusion

It is, of course, the Agency's right to determine where to conduct new employee orientation, subject to an arguable obligation to bargain with the Union on request with respect to impact and implementation. The Award herein does not restrict that right. What the Opinion and Award does hold is that the Union is entitled to make its presentation to new hires in meetings held in conjunction with the Agency orientation, wherever the Agency might conduct such orientation. If the orientation is split between locations, the Award provides that the Union gets to make the presentation in connection with the first opportunity the Agency conducts the new employees' orientation.

A W A R D

The grievance is sustained. The Agency violated the terms of the National Agreement when it refused to continue to allow the Union to explain the role and responsibilities privately at orientation sessions held at the FAA Academy with new employees. By that conduct, the Agency also committed an Unfair Labor Practice.

The Agency shall cease and desist from refusing to allow the Union to make its private presentation during

such orientation sessions. The Agency shall post an appropriate notice, the language and posting provisions to be mutually determined between the Parties, acknowledging that it will not further interfere with employees and/or the Union in the exercise of protected rights.

If the Agency conducts its new employee orientation at the Academy, in connection with the TOHTC program or otherwise, then the Union is entitled to its contractual presentation in connection with each such orientation and class. The Agency shall make appropriate adjustments to ensure the provision of required time and the presence, in duty status, of all new hire employees participating in the class.

If the Agency ceases to conduct its new employee orientation at the Academy, then the Union shall be entitled to make its presentation in the same manner as described above, wherever the new employee orientation is conducted.

If the Agency divides its new employee orientation between two or more facilities, the Union shall be entitled to make its presentation, in the same manner as described above, in conjunction with and at the same location as the substantive portion of the orientation is presented. If that location cannot be determined, then the Union shall be entitled to make its presentation in conjunction with the earlier of the Agency presentations.

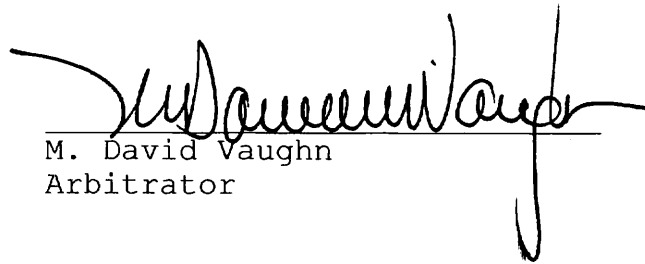
The Parties shall each review their records and determine whether the Union was given an opportunity to make its two hour presentation to each new hire given orientation since the Agency's unilateral change of policy in July of 2005. If, based on the more likely result of that review, the information establishes that the Union was not given opportunity to provide an orientation meeting of up to two hours to any new employee, or if it cannot be determined whether the Union was afforded that opportunity, PASS shall be afforded that opportunity within 30 days of the effective date of this Award. The Parties shall cooperate to identify such employees and to schedule and allow such presentations while the employee is in duty status.

In each case described above, the Union's presentation shall be deemed a part of the new employee

orientation and shall be made to employees when they are in the same duty status, and with the same degree of mandatory attendance, as when the employees are undergoing other, Agency-sponsored parts of the orientation.

I will retain jurisdiction over the dispute for a period of 90 days to address disputes which may arise from implementation of this Award.

Issued at Clarksville, Maryland this 26th day of July, 2007.



M. David Vaughn
Arbitrator