

Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended

Volume 4

January 1, 1974, through December 31, 1974

**This Volume includes Assistant Secretary Decisions Nos. 335 - 471
and Reports on Rulings Nos. 56 & 57**

**U.S. Department of Labor
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PREFACE

This Volume of Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended, covers the period from January 1, 1974, through December 31, 1974. It includes: (1) Summaries of Decisions and the full text of Decisions of the Assistant Secretary after formal hearing or stipulated record (A/SLMR Nos. 335 - 471); and (2) Reports on Rulings of the Assistant Secretary (originally referred to as Reports on Decisions), which are published summaries of significant or precedent-setting rulings by the Assistant Secretary on requests for review of actions taken at the field level (R A/S Nos. 56 & 57).

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341.	U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico	1-09-74	63-4128	ULP	70
342.	Department of Transportation, Federal Aviation Administration, Southwest Region, Airway Facilities Sector, Air Route Traffic Control Center, Albuquerque, New Mexico	1-25-74	63-4499	CU	79
343.	Department of the Air Force, Keesler Technical Training Center, Keesler Air Force Base	1-25-74	41-3181	ULP	81

<u>*/</u>	<u>TYPE OF CASE</u>
AC	= Amendment of Certification
CU	= Clarification of Unit
DR	= Decertification of Exclusive Representative
OBJ	= Objections to Election
RA	= Certification of Representative (Activity Petition)
RO	= Certification of Representative (Labor Organization Petition)
S	= Standards of Conduct
ULP	= Unfair Labor Practice

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351.	Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona	2-05-74	72-3823	CU	124
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356.	Department of the Air Force, McClellan Air Force Base, Sacramento, California	2-28-74	70-2480	RO	147
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377.	Department of the Army, Camp McCoy, Sparta, Wisconsin	4-10-74	51-2589	CU	245
378.	Department of the Treasury, Bureau of the Public Debt	4-10-74	22-4018	RO	247
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380.	Bureau of Reclamation, Boulder Canyon Project Office, Boulder City, Nevada	4-30-74	72-4202	ULP	257
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407.	Army and Air Force Exchange Service, Fort Polk, Louisiana	6-27-74	64-2111	OBJ	442
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458.	Department of Agriculture, Office of Automated Data Systems, St. Louis, Missouri, and Kansas City, Missouri	11-27-74	60-3536 62-3935	RO	811
459.	Federal Deposit Insurance Corporation	11-27-74	30-5475	RO	813
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461.	Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, and Defense Contract Administration Services District (DCASD), Salt Lake City, Utah	11-27-74	61-2341	RO	819
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471.	United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky	12-30-74	41-3126 41-3128 41-3129	ULP	860



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*/ TYPE OF CASE
G&A = Grievability and Arbitrability



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*/ To facilitate reference, listings in this Table contain only key words in the case title.
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<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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-- Tulsa Airway Facilities Sector	364	Great Lakes Program Center, HEW, SSA	419
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-- Polk, La., AAFES	407	-- Detroit Area Office, Detroit, Mich.	414
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-- Worth, Tex., GSA Region 7	416	Idaho Panhandle National Forests	394
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<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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-- Fort Apache Agency, Phoenix, Ariz.	363	Klamath Falls, Oreg., U.S. Air, Kingsley Field	443
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-- Yuma Projects Office, Yuma, Ariz.	401	-- National Association of Government Employees, Local R14-32, Newburg, Mo.	469
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Jacksonville, Fla., Naval Air Rework Facility	344,446	Los Angeles, Calif., Wadsworth Hospital Center, VA	388, 449
Jefferson National Expansion Memorial, St. Louis, Mo.	402	Louisville, Ky., Naval Ordnance Station	400,440,471
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<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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National Association of Government Employees, Local R14-32, Newburg, Mo.	469	-- Pensacola, Fla.	466
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-- Tennessee, Air National Guard	355	-- Puget Sound	415,425
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<u>TITLE</u>	<u>A/SLMR NO(S).</u>	<u>TITLE</u>	<u>A/SLMR NO(S).</u>
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-- Shipbuilding, Conversion, and Repair, Supervisor of, Pascagoula, Miss.	390	Public Debt, Bureau of (See: Treasury)	
National Weather Service, National Oceanic and Atmospheric Admin.	464	Reclamation, Bureau of (See: Interior)	
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Pacific Exchange System, Hawaii Regional Exchange, AAFES	451,454	-- Naval Air Station (North Island)	422,452
Pascagoula, Miss., (Naval) Shipbuilding, Conversion, and Repair, Supervisor of	390	San Francisco, Calif., DSA, DCASR	461
Pennsylvania National Guard	376	Santa Fe, N. Mex., New Mexico Air National Guard	362
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-- (Naval) Aviation Supply Office	434	-- Agriculture, Dept. of, Automated Data Systems, Office of	458
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-- Omaha District Office	417	Virginia National Guard	345
-- Southeast Service Center, Chamblee, Ga.	448	Wadsworth Hospital Center, VA, Los Angeles, Calif.	388,449
-- Public Debt, Bureau of	378	Warner Robins Air Materiel Area	
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**DECISIONS
OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS**

Nos. 335 - 471

January 1, 1974, through December 31, 1974

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION CENTER,
 BATH, NEW YORK
 A/SLMR No. 335

VETERANS ADMINISTRATION CENTER,
 BATH, NEW YORK

Respondent

and

Case No. 35-2624(CA)

LOCAL 491, NATIONAL FEDERATION OF
 FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On August 14, 1973, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's conclusions and recommendations to the extent consistent herewith.

The complaint herein alleges that the Respondent violated Section 19(a)(2) and (6) of the Order by changing unilaterally a condition of employment of nursing department employees which condition was granted to them under the terms of an existing negotiated agreement. Specifically, the Complainant alleges that the Respondent, without consulting with the Complainant, denied nursing assistants a ten-minute period of time, in pay status, for cleanup and personal hygiene prior to the end of the work shift as provided for in the negotiated

This case involved an unfair labor practice complaint filed by Local 491, National Federation of Federal Employees (Complainant), against the Veterans Administration Center, Bath, New York (Respondent), alleging that the Respondent had violated Section 19(a)(2) and (6) of the Order by changing unilaterally a condition of employment of nursing department employees which condition was granted to them under the terms of a current negotiated agreement between the parties. Specifically, the Complainant alleged that the Respondent, without consulting with the Complainant, denied nursing assistants a ten-minute period of time, in pay status, for cleanup and personal hygiene prior to the end of the work shift as provided for in the agreement. In this regard, Article 35 of the parties' negotiated agreement provided, in relevant part, that "The VA Center agrees to permit employees a 10-minute period of time in a pay status for clean up and personal hygiene prior to the end of the work shift whenever the work processes so require."

The Administrative Law Judge found that, irrespective of rights previously accorded the employees, the parties' negotiated agreement superseded any former practice, and the language contained in Article 35 necessarily was dispositive as to rights accorded employees to clean up before the end of the shift. Noting that the parties' dispute, in effect, involved a determination based on the application and interpretation of the parties' agreement which, pursuant to the terms of the agreement and Section 13(a) of the Order, must be resolved through the negotiated grievance procedure, the Administrative Law Judge concluded that the Assistant Secretary lacked jurisdiction to entertain the matter and recommended that the complaint be dismissed.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Complainant, by agreeing to the cleanup and personal hygiene provision contained in Article 35 of the negotiated agreement, clearly and unequivocally waived its right to insist upon an unqualified privilege to clean up ten minutes before completing a shift, irrespective of past practice. Further, the Assistant Secretary found that the Complainant had not met the burden of proving that the Respondent's implementation of the agreement constituted a unilateral change in the agreed-upon terms and conditions of employment or was motivated by anti-union considerations. Accordingly, the Assistant Secretary dismissed the complaint.

agreement. The Respondent contends that the issue involved herein is one of contract interpretation and application of the agreement which must be resolved under the contractual grievance procedure. Further, the Respondent argues that, consistent with past practice, it, in fact, has permitted all employees time for cleanup and personal hygiene whenever the work processes so required.

The essential facts of the case are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

On March 22, 1972, the Complainant and the Respondent executed a collective-bargaining agreement effective by its terms from April 13, 1972, until April 13, 1974. The agreement contained the following provision:

Article 35

MISCELLANEOUS

CLEAN UP TIME AND PERSONAL HYGIENE

The VA Center agrees to permit employees a 10-minute period of time in a pay status for clean up and personal hygiene prior to the end of the work shift whenever the work processes so require. (Emphasis added.)

WEARING OF UNIFORMS

Employees in the unit will be permitted to wear their uniforms home and to work if they so desire. Uniforms are government property and shall be treated as such at home as well as on duty. Adequate locker space if desired, will be provided all employees.

The evidence establishes that the parties intended through the above language covering cleanup time and personal hygiene to preserve a long standing policy of the Respondent permitting employees ten minutes in pay status for cleanup and personal hygiene when the head of a department determined that the work processes so required. Further, the above provision relating to the wearing of uniforms encompassed a

new policy established by the Respondent of permitting employees, who chose to do so, to wear their uniforms to and from work. 1/

Shortly after a June 7, 1972, meeting between the Respondent's head nurses and its Assistant Director, where there was a discussion concerning the interpretation of the above clauses in the agreement, Head Nurse Martha Maroney informed Joseph H. Folckemer, a union steward and a nursing assistant, that he could not be granted ten minutes to clean up before quitting work each day. Folckemer had indicated that he wanted this time because he wished to change out of his uniform. Maroney explained that cleanup time was not permitted at 3:50 p.m. because employees could wear their uniforms home, although nobody would be denied the right to clean up if needed. Nursing assistants were advised that they did not have personal hygiene time, as such, and that they were to leave at 4:00 p.m. or at the end of their particular shift. As a result of the discussion between Maroney and Folckemer, the Complainant requested a meeting with management to discuss the question of cleanup time. Subsequently, at a meeting held with the Complainant on July 7, 1972, management indicated that it was not denying employees personal hygiene time - that there was no policy change in this regard.

In June or July 1972, the Complainant complained to the Respondent's Personnel Officer, Marcellus M. Lang, that some employees were being denied cleanup time prior to a shift end. An affidavit prepared by Folckemer on October 13, 1972, and signed by nine nursing assistants and the union steward, stated that on or about June 7, 1972, they were told by the Nursing Supervisor that they no longer would be allowed ten minutes personal hygiene time because management had cancelled it; that in the past they had received such time; and that since June 7, 1972, they have not received any personal hygiene time. Folckemer testified that he had never been denied cleanup time when it was needed and did not believe that he would be denied such time prior to the end of his shift if it was needed. However, with regard to changing out of uniform and washing up at the end of the shift, he testified that "we have to do it

1/ Prior to the issuance of the new policy, employees who were required to wear uniforms on duty were not permitted to wear them to and from work; however, they were allowed ten minutes prior to the end of their shift to change out of uniform. The evidence establishes that it was routine for nursing assistants to utilize the time allowed for uniform change at the end of their shifts for cleanup and personal hygiene, as well as for changing uniforms. On February 10, 1972, the Respondent issued a memorandum on "Hours of Duty" which included the following statement: "Employees of this Center are permitted to wear uniforms to and from work. Therefore, no time will be set aside within their scheduled tour of duty nor will any additional time be added to hours of duty, for the purpose of changing into or out of uniform."

or. ~~but this time~~ ~~time~~, he testified that the basis of the employees' complaint in this matter was that "we want to change our uniforms and wash up 10 minutes prior to quitting time." Personnel Officer Lang testified, without contradiction, that upon receiving from the Complainant a list of names of employees allegedly denied personal hygiene time, he investigated the matter and learned that nobody was denied such time where the work process so required that it be given.

The Administrative Law Judge found that, irrespective of rights previously accorded employees to clean up ten minutes before shift end, the parties' negotiated agreement of April 13, 1972, superseded the former practice and the language contained in Article 35 necessarily was dispositive as to rights accorded employees to clean up before the end of a shift. Noting that the parties' dispute herein concerned the proper interpretation of the phrase contained in Article 35, "whenever the work processes so require," the Administrative Law Judge concluded that the dispute, in effect, involved a determination based on the application and interpretation of the parties' agreement which, pursuant to the terms of the agreement and Section 13(a) of the Order, must be resolved through the negotiated grievance procedure. Under these circumstances, the Administrative Law Judge concluded that the Assistant Secretary lacked jurisdiction to entertain the matter and recommended that the complaint be dismissed.

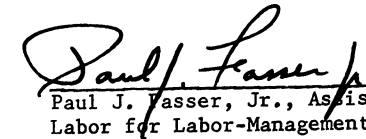
As noted above, Article 35 of the parties' negotiated agreement provides, in part, that employees will be permitted a ten-minute period of time in a pay status for cleanup and personal hygiene prior to the end of the work shift, "whenever the work processes so require." In agreement with the Administrative Law Judge, I find that the Complainant, by agreeing to the above-quoted provision, clearly and unequivocally waived its right to insist upon an unqualified privilege to clean up ten minutes before completing a shift, irrespective of past practice. ^{2/} Further, I find that the Complainant has not met the burden of proving that the Respondent's implementation of the agreement in this regard constituted a unilateral change in the agreed-upon terms and conditions of employment. Thus, there was no evidence presented by the Complainant that in any specific instance were unit employees denied cleanup and personal hygiene time "whenever the work processes so require[d]." Nor, is there any evidence that any of the Respondent's conduct herein was motivated by anti-union considerations.

Under all of these circumstances, I find that the evidence is insufficient to establish that the Respondent violated Section 19(a)(2) and (6) of the Order. Accordingly, in agreement with the Administrative Law Judge, I shall order that the complaint herein be dismissed in its entirety.

^{2/} Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223.

IT IS HEREBY ORDERED that the complaint in Case No. 35-2624(CA) be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.
January 8, 1974


Paul J. Vasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D. C.

.....
VETERANS ADMINISTRATION CENTER :
BATH, NEW YORK Respondent :

and : CASE NO. 35-2624(CA)

LOCAL 491, NATIONAL FEDERATION :
OF FEDERAL EMPLOYEES Complainant :
.....

Before: William Naimark, Administrative Law Judge

Appearances:

George Tilton, Esq.
National Federation of Federal Employees
1737 H Street, N. W.
Washington, D. C.
For the Complainant.

John S. Mears, Esq.
Veterans Administration
810 Vermont Avenue, N. W.
Washington, D. C.
For the Respondent.

REPORT AND RECOMMENDATIONS

Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order) arising pursuant to a Notice of Hearing on Complaint issued on December 14, 1972 by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, New York Region.

National Federation of Federal Employees, Local 491 (herein called the Complainant) initiated this matter by filing a complaint on November 7, 1972 against Veterans Administration Center, Bath, New York (herein called the Respondent). The complaint alleged that the Complainant and Respondent negotiated a contract in March, 1972 providing

for a ten minute period for clean-up and personal hygiene time, in a pay status, to be granted employees prior to the end of work shifts. It was further alleged that nursing assistants were denied such ten minute period on or about June 7 or 8, 1972 as a result of a restrictive interpretation by management of Article 35 of the contract between the parties. By depriving the said employees of such time and failing to confer in a meaningful manner with respect thereto, the complaint avers a violation of Sections 19(a)(2) and (6) of the Order.

A hearing was held before the undersigned on May 31 and June 1, 1973 at Bath, New York. Both parties were represented by counsel and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter Respondent and Complainant filed briefs on July 13 and July 16, 1973 respectively which have been duly considered by the undersigned.

The union herein contends management unilaterally changed a condition of employment in respect to nursing department employees which had been granted them under the contract between the parties. It maintains that wash up, or clean-up time prior to the end of a shift was accorded all unit employees prior to the agreement, and thereafter the nursing department did not receive such time based on an erroneous interpretation of said contract. The union insists the employer is justifying its action on the ground that employees are now permitted to wear uniforms home, and accordingly no time is needed to change clothing before going home. It is urged that clean up time is a separate right having no relation to changing uniforms, and its cancellation without consultation with the bargaining representative is violative of the Act. The union seeks restoration of clean up time for all employees ten minutes prior to shift end, compensation to all employees denied same, and three days' administrative leave to all union officers and stewards in order to "explain the meaning of the unfair labor practice and to reassure employees of their rights."

Respondent denies the commission of unfair labor practices. It insists the issue is one of contract interpretation and application of the clauses in the contract dealing with clean-up time and the wearing of uniforms. Management contends clean-up time, as it should be granted, is still accorded the employees in the same manner as previously. Further, there was no unilateral change of a working condition, but an application of the provisions of the agreement in respect to clean-up time as discussed and agreed upon by the parties during negotiations. Thus, even if the issue does concern the commission of an unfair labor practice, the conduct of Respondent did not violate the Order.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. Local 491, National Federation of Federal Employees is, and has been at all times material herein, the exclusive bargaining representative of all professional and non-professional employees, including canteen employees, at the Veterans Administration Center, Bath, New York.
2. Marcellus M. Lang, personnel officer, testified, and I find, that collective bargaining negotiations commenced in January, 1972 between Complainant and Respondent. During these negotiations management told the union that VA regulations had been changed so that if an employee is permitted to wear his uniform home, he could not be given time during his regular duty time to do so. Lang testified, and it is undenied, that the Complainant and Respondent discussed uniform change time, as well as clean up or personal hygiene time, during negotiations. Further, that the union wanted, basically, what is contained in Article 35 of the contract executed between the parties with respect to uniform change and clean up time.
3. On January 19, 1972 the VA regulations (MP-5 Part 1, Chapter 610) 1/ were changed so that field station heads might permit employees to wear uniforms to and from work, or require that uniforms be changed at the stations. A meeting of Respondent's nurses was held on January 19, 1972 at which time Chief Nurse Rieselmann told them that no on duty time will be allowed for the purpose of changing uniforms. 2/
4. The policy of Respondent regarding hours of duty for employees of the Center was established by a memorandum 3/ issued February 10, 1972. This memorandum provided that employees of the Center were permitted to wear uniforms to and from work; and further, that no time would be set aside within the "scheduled tour of duty...for the purpose of changing into and out of uniform."
5. On March 22, 1972 Complainant and Respondent executed a "Contract Agreement," 4/ effective by its terms from April 13, 1972 until April 13, 1974.

-
- 1/ Respondent's Exhibit 1.
2/ Respondent's Exhibit 3.
3/ Respondent's Exhibit 6.
4/ Complainant's Exhibit 1.

6. The said contract between the parties contained inter alia the following provision:

Article 35

MISCELLANEOUS

CLEAN UP TIME AND PERSONAL HYGIENE

The VA Center agrees to permit employees a 10-minute period of time in a pay status for clean up and personal hygiene prior to the end of the work shift whenever the work processes so requires. (underscoring supplied).

WEARING OF UNIFORMS

Employees in the unit will be permitted to wear their uniforms home and to work if they so desire. Uniforms are government property and shall be treated as such at home as well as on duty. Adequate locker space if desired, will be provided all employees.

7. Both of the aforementioned clauses contained in said Article 35 of the contract were set forth in a memorandum 5/ issued on March 28, 1972 by Respondent's Director, A. Tomasulo, M. D.

8. It is undenied, and I find, that prior to February 10, 1972 employees of the Center were not permitted to wear their uniforms home, and all said employees were granted 10 minutes before quitting time, or the end of a shift, to change from their uniforms to regular clothes. Uniforms were changed in the locker rooms at which time some employees would also wash up before leaving the hospital.

9. Assistant Chief Nurse Elizabeth M. Alamo testified, and I find that at a meeting of nurses on May 3, 1972 it was reported that some nursing assistants were leaving at 3:50 (ten minutes before shift end) although they were not permitted to do so. Accordingly, Nurse Alamo asked Donald L. Ziegenhorn, Assistant Director of the Center, to clarify the matter, which resulted in a meeting of head nurses on June 7, 1972.

10. On June 7, 1972 all head nurses attended a meeting at which Ziegenhorn spoke regarding the confusion regarding uniform change time and clean up time. Nurse Alamo testified, and I find that Ziegenhorn told them clean up time is permitted if the work situation required it - that if an

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- 3/ Respondent's Exhibit 5.

employee soiled himself while working, he should be allowed to clean up at any time. Ziegenhorn explained to the nurses that since the employees were entitled to wear uniforms home, they were not permitted to leave at 3:50 unless a head nurse determined there was a special reason justifying it.

11. Subsequent to the meeting on June 7, 1972, referred to in paragraph 10 above, Head Nurse Martha Maroney told Joseph H. Folckemer, union steward and nursing assistant, that he couldn't be granted 10 minutes to clean up before quitting work each day. She explained that clean up time was not permitted at 3:50 since the employees could wear their uniforms home, although nobody would be denied the right to clean up if needed. Nursing assistants were told they did not have personal hygiene time, as such, and they were to leave at 4:00 p.m. or at the end of a particular shift.

12. As a result of the discussion between Head Nurse Maroney and Nursing Assistant Folckemer, the union requested a meeting with management to discuss the question of clean up time. Bennett C. Joseph, Jr., 1st Vice-President of Complainant, testified and I find that a meeting was held on July 7, 1972 at which time management said it was not denying employees personal hygiene time - that there was no policy change. Joseph testified the terms "uniform change time" and "clean up time" were used interchangeably, and some individuals felt there was a distinction between the two terms, while others considered them both as one and the same thing.

13. In June or July, 1972 the union complained to Lang that some men were being denied, prior to a shift end, clean up time. Lang testified, and I find that he obtained the names of those allegedly denied such time, investigated the matter, and learned that nobody was denied clean up time where the work process so required it to be given.

14. Some disparity exists in the record as to the practice of allowing clean up, or personal hygiene time, prior to May or June, 1972. Folckemer testified that nursing assistants customarily left at 3:50 p.m. (10 minutes before the end of the shift) for uniform change and personal hygiene. Nurse Alamo testified that the 10 minutes previously granted the assistants before the shift end was to change uniforms, and not to attend to personal hygiene. Edward G. Daley, maintenance employee and union steward, testified that he received 10 minutes to clean up as a routine matter before his shift end, although he changed his uniform also. Both John Callear, chief of building management and Lang, testified that prior to February, 1972, the chief of each section or department decided whether to grant clean up time 10 minutes before quitting time. Lang also added that if the work situation

required the employees were given this 10 minute period for personal hygiene.

In view of the corroborative testimony by Callear and Lang in respect to this matter, and the fact that Folckemer utilized the time primarily to change his clothes, I find that, at least prior to the contract, employees of Respondent were granted 10 minutes clean up time before the end of a shift at the direction of the department or section head - all apart from the granting to employees 10 minutes before the shift end for the purpose of changing their uniforms. I further find that prior to the contract nursing assistants were, at least on some occasions, granted 10 minutes before shift end to clean up and attend to personal hygiene as well as change their uniforms before leaving the premises.

15. Employees Elsie Campbell, Edward R. Dalby, and John Callear testified and I find, that employees in Housekeeping and Building Management have always been, and still are, granted 10 minutes before the end of a shift to clean up before leaving the Center as a routine matter. 6/

16. It is not denied by Respondent, and I find, that subsequent to March 22, 1972 Respondent did not confer or consult with Complainant with respect to denying to nursing assistants 10 minutes before shift end to clean up as a routine matter, but that Respondent implemented unilaterally the policy of not permitting nursing assistants such clean up time unless the work process so required in accordance with the contract.

17. Article 36 of the contract between Complainant and Respondent provides, in part, as follows:

GRIEVANCE ADJUSTMENT FOR TITLE
38 EMPLOYEES AND WAGE BOARD
AND CLASSIFIED ACT EMPLOYEES

1. This procedure will be the sole procedure for processing grievances over the interpretation or application of the negotiated agreement. It may not be used for any other matters, including matters for which statutory appeals procedures exist...

6/ Although Lang's testimony reflects that no such policy exists for the hospital as a whole, such testimony does not negate the fact that as to these two departments the practice, as indicated, did exist at the Center.

Conclusion

It is urged by Respondent that, based on Section 13(a) of the Order, the Assistant Secretary lacks jurisdiction of this matter. This section provides, in part, as follows:

"An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. A negotiated grievance procedure may not cover any other matters...and shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances."
(underscoring supplied)

Respondent contends that since the agreement with Complainant contains a grievance procedure, 7/ the dispute herein must be handled thereunder since it is essentially a matter of contract interpretation or application. Further, it adverts to Assistant Secretary's Report No. 49 which recites that where there is a disagreement over the interpretation of a contract providing for a procedure to resolve the disagreement, the Assistant Secretary will not consider the problem as an unfair labor practice, but will leave the parties to their remedy under the contract.

Complainant asserts that the employer has unilaterally changed the conditions in the contract in violation of the Order. It maintains the nursing assistants are allowed 10 minutes to clean up prior to a shift end under the agreement. Hence, depriving these employees of this entitlement without consulting the union was a violation of the contract and a unilateral determination that constituted an unfair labor practice. The union cites Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, as authority for its position.

The crux of the dispute herein centers on whether the nursing assistants are entitled to 10 minutes' clean up time before their shift's end, apart from the requirements dictated by their work routines. The Complainant insists this was accorded the employees prior to the contract and, moreover, the negotiated agreement preserved this time as an unqualified right. Management urges that employees are only due this clean up time before shift end if the work processes so require, as set forth in Article 35 of the negotiated agreement.

7/ Article 36 of Complainant's Exhibit 1.

Irrespective of rights previously accorded employees to clean up 10 minutes before shift end, the agreement between the parties finalized the arrangement which would govern after April 13, 1972. Having discussed the question during negotiations, the parties resolved the matter (albeit giving rise to future problems) by agreeing to permit employees 10 minutes clean up time before shift end "whenever the work processes so require." Thus, upon executing the contract containing this provision, the Complainant has waived its right to insist upon an unqualified privilege to clean up 10 minutes before completing a work day. The clause entitles employees to clean up time based upon the dictates of the work process, and I cannot subscribe to Complainant's view that employees are entitled to this right unreservedly, or as freely granted in the past. In my opinion, the contract supersedes the former practice as to clean up time, and the language in Article 35 must necessarily be dispositive as to rights accorded workers to clean up before quitting time.

In urging that Respondent has unilaterally altered conditions of employment in violation of Section 19(a)(6) of the Order, Complainant relies upon Veterans Administration Hospital, Charleston, South Carolina, supra. It argues that the cited case is controlling. This argument is rejected. In the South Carolina case the hospital had unilaterally changed the tours of duty of certain nursing service employees - all contrary to, and in violation of, the agreement between the parties. The Assistant Secretary found a violation of the Order stemming from unilateral action contravening the negotiated agreement, and, as such, the Activity flouted the Order's bargaining requirements. In the case at bar, the Respondent denied 10 minutes clean up time to the nursing assistants before the shift end because it deemed the work process not to require such privilege. Thus, the action taken by management herein was based on an application, as well as interpretation, of the contract, specifically the phrase "whenever the work processes so require," as contained in the provision in Article 35 dealing with Clean Up Time and Personal Hygiene. Apart from the correctness of its application or interpretation of the language in question, Respondent predicated its conduct on, and relied upon, the agreement to sustain its action. Rather than initiating action in opposition to the contract, the employer in the instant case is seeking to support its position via the instrument itself.

It may well be that the union and management have varied ideas or thoughts as to the meaning of the phrase "whenever the work processes so require." Complainant might arguably conclude that nursing assistants' work routine requires they be allotted 10 minutes before leaving for personal hygiene. But this argument also calls for an interpretation of the contractual phrase, and in each instance where a disagreement

between the union and the employer arises, a resolution of the dispute involves an application of the contract itself. In such posture, Section 13(a) of the Order, as emphasized by the Assistant Secretary in Report No. 49, provides that such disputes be resolved under a grievance procedure as outlined in the agreement between an agency and a labor organization. If a union asserts an unfair labor practice to have been committed, which rests upon a dispute as to the interpretation of contractual language, the Assistant Secretary leaves the parties to the grievance procedure under this agreement.

I am persuaded that the employer's position is sound and tenable. The parties herein, concerned as they are with the rights of nursing assistants to clean up time as spelled out in the agreement, must necessarily resolve their dispute by means of an application and interpretation of the contract herein. Accordingly, they must invoke the grievance procedure as set forth in Article 36 of the agreement as the exclusive method of resolving this dispute. The avenue of redress from the Assistant Secretary, through unfair labor practice proceedings, is not afforded the Complainant in such an instance. In sum, I am constrained to conclude that Respondent did not institute unilateral action in violation of, or contrary to, the contract herein. Further, the dispute as to whether nursing assistants are entitled to 10 minutes clean up time before shift's end is one involving contract application and interpretation and therefore, as delineated above, the Assistant Secretary lacks jurisdiction to entertain the matter. I would therefore find that Respondent has not violated Section 19(a)(1) and (6) of the Order.

Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends the complaint herein against Respondent be dismissed.


 WILLIAM NAIMARK
 Administrative Law Judge

Dated at Washington, D. C.
 this 14th day of August, 1973.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE, NATIONAL GUARD BUREAU,
 TEXAS AIR NATIONAL GUARD
 A/SLMR No. 336

This case involves an unfair labor practice complaint filed by the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, (Complainant), against the above-named Respondent Activity, alleging, among other things, that the Respondent violated Section 19(a)(1), (2) and (6), of Executive Order 11491, by denying James Burgamy, a member of Local 3000, American Federation of Government Employees, AFL-CIO (AFGE), and an employee of the Texas National Guard, reenlistment in the Texas Air National Guard because of his filing of grievances and his union activities, and by denying Burgamy Union representation on several occasions. It is alleged that such actions were undertaken by the Respondent in order to discourage membership and activity in the Union.

The Administrative Law Judge concluded that Burgamy was, in fact, denied Union representation on at least two occasions. The first occasion occurred in April 1972, when Burgamy was being "counselled" by a superior officer with respect to alleged verbal abuse on the part of Burgamy. Despite the fact that Burgamy requested Union representation at this session, it was denied him by his superior officer, who stated that he did not need it. The second "counseling" session arose on or about May 19, 1972, and concerned Burgamy's arriving at work in civilian clothes contrary to a Base order. At this session Burgamy requested Union representation but was told that Union representation was not allowed at counselling sessions. As a result of this meeting Burgamy received a letter of "Adverse Personnel Action." The Administrative Law Judge found the statement at the April 1972, meeting that Burgamy did not need representation was violative of Section 19(a)(1) of the Order, as it would naturally discourage Burgamy from exercising his rights to be represented at the counselling sessions. He found further that the refusal by Burgamy's superior officer to allow Union representation at the counselling session in May 1972 was violative of Section 19(a)(1) and (6) of the Order. In this connection, the Administrative Law Judge concluded that this particular counselling session was a "formal discussion" within the meaning of Section 10(e) of the Order. The Administrative Law Judge also found that there was a general policy against permitting Union representatives at such counselling sessions, and that this policy violated Section 19(a)(1) and (6) of the Order.

Contrary to the holding of the Administrative Law Judge, the Assistant Secretary concluded that the "counseling sessions" were

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
NATIONAL GUARD BUREAU,
TEXAS AIR NATIONAL GUARD

Respondent

and

Case No. 63-4203(CA)

TEXAS AIR NATIONAL GUARD
COUNCIL OF LOCALS,
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On July 27, 1973, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Department of Defense, National Guard Bureau, Texas Air National Guard, herein called Respondent, had engaged in certain unfair labor practices and recommending that it takes certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Administrative Law Judge's Report and Recommendations. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge only to the extent consistent herewith.

The complaint herein alleged, in substance, that the Respondent violated Sections 19(a)(1), (2) and (6) of Executive Order 11491, by denying James Burgamy, a member of Local 3000, American Federation of Government Employees, AFL-CIO (AFGE) and an employee of the Texas Air National Guard, reenlistment in the Texas Air National Guard because of his filing of grievances and his union activities, and by denying Burgamy union representation on several occasions. It is alleged that

1/ Respondent's request for an extension of time in which to file exceptions was untimely filed, and, therefore, was denied.

not "formal discussions" within the meaning of Section 10(e) of the Order, and that, therefore, the failure to permit Union representation at such sessions was not violative of Section 19(a)(6) of the Order. In this connection, the Assistant Secretary noted that both incidents had no wider ramifications than being limited discussions at a particular time with an individual employee, concerning a particular incident. Accordingly, as the two incidents did not constitute "formal discussions" the denial of such representation at the particular counselling sessions did not constitute a violation of Section 19(a)(6) of the Order, and as the exclusive representative was not entitled to be present during these particular counselling sessions, the denial of such representation, in the circumstances of this case, was not found to constitute a violation of Section 19(a)(1).

The Administrative Law Judge also concluded that the Respondent violated Section 19(a)(1) and (2) of the Order by failing to permit Burgamy's military reenlistment and by subsequently discharging him from civilian employment. In this connection, he found the denial of Burgamy's military reenlistment was for discriminatory reasons; that the reasons given for such actions were merely pretextual, and that Respondent's actions were in fact motivated by, among other things, Burgamy's filing grievances and his seeking of Union representation. Under these circumstances, the Administrative Law Judge recommended that the Respondent be required to offer Burgamy reinstatement to his former position together with backpay and interest.

Contrary to the Administrative Law Judge, with respect to his 19(a)(1) and (2) findings, the Assistant Secretary concluded that under Section 19(d) of the Order, he did not have jurisdiction to decide the merits of whether Burgamy was denied military reenlistment for discriminatory reasons, and whether, accordingly, Burgamy's subsequent loss of civilian employment based on this military discharge, would constitute a violation of the Order. In this connection, the Assistant Secretary found that Burgamy was afforded the opportunity to, and did, in fact, utilize the Texas Air National Guard's appeals procedure and that there was no evidence that Burgamy was prevented from raising under the appeals procedure the issue of whether he was denied reenlistment for discriminatory or other improper reasons under the Order. It was noted that Burgamy, while availing himself fully of the appeals procedure, failed to raise the issue of discriminatory motivation in pressing his appeal.

Having found that Respondent did not violate Section 19(a)(1) and (6) of the Order, in denying Burgamy representation by his exclusive representative at certain "counselling sessions," and having found that he was precluded by Section 19(d) from considering whether Burgamy's failure to secure military enlistment was discriminatorily motivated in violation of Section 19(a)(2) of the Order, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

such actions were undertaken by the Respondent in order to discourage membership and activity in the Union.

The essential facts in the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

James Burgamy enlisted in the Texas Air National Guard on September 26, 1966. Subsequently, he became a civilian employee of the Texas Air National Guard as an air technician. A condition of such employment was membership in the Texas Air National Guard. In approximately 1969 Burgamy joined, in his civilian capacity, the 136th Supply Squadron, whose commander was Colonel Millson. As it is customary for technicians in the Texas Air National Guard to have their civilian and military positions as closely aligned as possible, in November 1971 Burgamy was transferred, in his military capacity, to the 136th Supply Squadron, where his duties, both civilian and military, were parallel.

Burgamy's military enlistment in the Texas Air National Guard expired on September 25, 1972, and he was denied reenlistment. Previously, Burgamy had been notified by letter dated August 24, 1972, that, as a result of the impending loss of military membership in the Guard, his civilian employment would be terminated on September 30, 1972, and that "there were no Administrative Appeal Rights to this termination action," (of his civilian employment), because the civilian job was contingent upon successful military reenlistment.

The record reveals, however, that the denial of his military enlistment was appealable under appeals procedures of the Texas Air National Guard and that Burgamy, in fact, appealed the decision not to reenlist him to the highest level of the Texas Air National Guard, the Adjutant General. On September 22, 1972, the Adjutant General advised Burgamy that the denial of his reenlistment was sustained. There was no further appeal possible from this denial. 2/

I. Denial of representation at "counselling" sessions.

Burgamy had filed approximately four grievances commencing in July 1971, until the date of his termination. Alleged unfair labor practices occurred with respect to two "counselling" 3/ incidents which culminated in certain of the above-noted grievances. The first incident occurred in April 1972, when an altercation arose between Major Honea, Burgamy's second line supervisor, and Burgamy, with respect to a discussion

2/ It was noted that 32 U.S. Code, Section 709(e)(5) provides: "A right of appeal which may exist shall not extend beyond the Adjutant General of the jurisdiction concerned."

3/ This term was never precisely defined but, apparently, it was used by the Respondent to denote meetings between an employee and his supervisor in which any range of subjects could be discussed, including proposed disciplinary actions.

of job changes. In this connection, Burgamy indicated that he desired that a Union representative be present during the discussion, but Honea objected, stating that this was not necessary. Burgamy took exception to Honea's position, allegedly verbally abused Honea, and walked out of the latter's office. Later that same day, Honea summoned Burgamy to his office to "counsel" him with respect to the alleged verbal abuse incident. Burgamy again requested Union representation and Honea again repeated that he did not need it. Nevertheless, Burgamy left the office and returned with a Union representative who remained while Honea read a letter of reprimand which eventually was placed in Burgamy's personnel file. This matter prompted the filing of a grievance on April 18, 1972.

A second incident occurred on or about May 19, 1972, when a dispute arose concerning Burgamy's arriving at work in civilian clothes despite the fact that there was an outstanding order that military clothes must be worn. He was summoned to the office of Colonel Millson, his third line supervisor, for a "counselling session" with respect to this incident. Burgamy advised Millson that he wanted Union representation, but Millson stated that he did not allow representation at "counselling sessions." As a result of this meeting, Burgamy received a letter of "Adverse Personnel Action." This letter also prompted the filing of a grievance. 4/

The Administrative Law Judge concluded that the statement by Major Honea, during the April 1972, incident, that Burgamy did not need a Union representative, would naturally discourage Burgamy from exercising his right to be represented at the "counselling session" and thereby violated Section 19(a)(1) of the Order. The Administrative Law Judge also concluded that the refusal by Colonel Millson to allow a Union representative to be present at the "counselling session" in May 1972, was violative of Section 19(a)(1) and (6) of the Order. In this regard, the Administrative Law Judge found that this particular "counselling session" constituted a "formal discussion" within the meaning of Section 10(e) of the Order. Additionally, the Administrative Law Judge determined that there was a general policy against permitting Union representatives at such "counselling sessions," and that such a policy violated Section 19(a)(1) and (6) of the Order.

Under the particular circumstances of this case, I reject the foregoing conclusion of the Administrative Law Judge. In my view, the evidence does not establish that the "counselling sessions" involved herein were "formal discussions" concerning grievances, personnel policies and practices, or working conditions within the meaning of

4/ The Administrative Law Judge found in connection with this grievance that Burgamy was not denied Union representation in his use of the informal grievance procedure or in the subsequent processing of his formal grievance.

Section 10(e) of the Order. 5/ Moreover, the sessions involved did not relate to the processing of a grievance. 6/ Moreover, the matters discussed at the sessions did not involve general working conditions and work performance. Rather, they were related, respectively, to an individual employee's alleged short-comings with respect to alleged abusive language used to his supervisor, and to the same employee's alleged failure to follow a uniform requirement on the Base. In my judgement, both incidents had no wider ramifications than being limited discussions at a particular time with an individual employee, ~~Burgamy~~, concerning particular incidents as to him. 7/ Accordingly, as the two incidents did not constitute "formal discussions" in which the exclusive representative was entitled to be represented by virtue of Section 10(e) of the Order, it follows that the denial of representation at the particular "counselling sessions" involved herein did not constitute a violation of Section 19(a)(6) of the Order. 8/ Moreover, as the exclusive representative was not entitled to be represented during these "counselling sessions," I find that the denial of such representation, of statements to the effect that such representation was being denied, did not, in the circumstances of this case, interfere with any rights accorded

5/ Section 10(e) provides that an exclusive bargaining representative "shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

6/ Indeed, the particular grievances Burgamy filed were filed after the sessions occurred.

7/ Compare U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278, in which it was found that discussion involved constituted a "formal discussion" within the meaning of Section 10(e) of the Order. In this regard, the Chief Administrative Law Judge noted that the resolution of the grievance would have a general impact on all employees in the unit.

8/ I reject the Administrative Law Judge's finding at footnote 23 of his Report and Recommendations that even if these counselling sessions were not considered to be "formal discussions" within the meaning of Section 10(e), it is necessary, in order to effectuate the purposes of the Order, that employees be entitled to be represented by their exclusive representative in meetings of this type. In my view, an individual employee is not entitled in every instance to have his exclusive representative present because of a concern that a meeting may ultimately lead to a grievance or "adverse action."

Burgamy under the Order and, therefore, did not constitute a violation of Section 19(a)(1). 9/ //

II. Failure to permit military reenlistment and Burgamy's subsequent discharge from civilian employment.

As noted above, when Burgamy's enlistment expired on September 25, 1972, he was denied reenlistment. When pressed by Burgamy, for further details as to the reason for such denial, Colonel Millson advised Burgamy that, among other things, he had failed to complete his career development course (CDC), was impertinent to officers, failed to wear his uniform properly, did not respond to counselling, and his argumentative manner with other enlisted men was disruptive. The evidence establishes, however, that as of August 1, 1972, Burgamy was rated by his immediate supervisor as doing satisfactory work despite the fact that on September 5, 1972, he was given a denial of enlistment letter by his supervisor. As noted above, Burgamy's civilian employment was terminated because of his loss of military membership in the Texas Air National Guard.

The Administrative Law Judge found that the alleged reasons for not permitting Burgamy's military reenlistment were pretextual, and that Burgamy's conduct in filing grievances, and seeking to have the Union represent him, as well as his frequent complaints to his supervisor about working conditions, and his insistence that the Union be present while he presented such complaints during "counselling sessions," were the factors which actually motivated Millson into determining not to permit Burgamy's military reenlistment. Under these circumstances, the Administrative Law Judge concluded that the Respondent's conduct was violative of Section 19(a)(1) and (2) of the Order, and, in this connection, he recommended, among other things, that the Respondent offer Burgamy reinstatement to his civilian position with back pay and interest. In reaching this disposition, the Administrative Law Judge rejected the Respondent's contention that Burgamy's discharge as a civilian employee, which was required by law because he was no longer a member of the Texas Air National Guard, was not reviewable by the Assistant Secretary. Thus, he noted that the Assistant Secretary has found in both representation and unfair labor practice situations that the Executive Order applies to civilian employees of the National Guard and protects the rights of such employees. The Administrative Law Judge also rejected the Respondent's contention that there was an appeals

9/ Had these meetings involved grievances, it is clear Burgamy would have been permitted to have representation by his exclusive representative. The record reveals that ordinarily the Respondent was very careful in permitting representation by the exclusive representative whenever a grievance had been filed. In this connection, the Administrative Law Judge found that the Order was not violated as a result of Honea's refusal to permit Burgamy to be represented at the meeting concerning job changes because this denial was remedied as soon as Honea discovered that a grievance had, in fact, been filed.

procedure available to Burgamy concerning his discharge which he utilized and that, therefore, Section 19(d) of the Executive Order was controlling. In this connection, the Administrative Law Judge concluded that Section 1104 of the Texas Code of Military Justice 10/, under which Burgamy processed his appeal from the denial of his military reenlistment, did not permit Burgamy to seek consideration of the issue whether he was denied reenlistment in the Texas Air National Guard because he engaged in activity protected by the Order. Accordingly, the Administrative Law Judge found that 19(d) did not bar consideration by the Assistant Secretary with respect to the issue whether there had been discrimination in the denial of Burgamy's reenlistment.

Under the circumstances of this case, I reject these findings of the Administrative Law Judge. Thus, the record reveals that Burgamy was afforded the opportunity to and did, in fact, utilize the Texas Air National Guard's appeals procedure, including utilizing the final step of such procedure—an appeal to the Adjutant General of the Texas Air National Guard. Moreover, contrary to the Administrative Law Judge, I find that there is no evidence that Burgamy was prevented from raising under the appeals procedure the issue whether he was denied reenlistment for discriminatory or other improper reasons under the Order. 11/ The evidence establishes that Burgamy had every opportunity to raise the issue of alleged discrimination to the Adjutant General, but chose not to do so. In this regard, in a letter dated September 9, 1972, acknowledging Burgamy's request for review of the denial of his reenlistment, the Adjutant General stated "should you desire to submit any written statement, evidence in writing or a written brief to support your contention, please mail them to me no later than 18 September 1972." 12/ To this, Burgamy merely replied that, "I respectfully request that myself and my representatives be present during your personal

10/ Section 1104 provides "Any member of the state military forces who believes himself wronged by his commanding officer, and who upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the Governor or Adjutant General."

11/ Contrary to the finding of the Administrative Law Judge, in United States Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272, it was not found that the appeals procedure, on its face, permitted the unfair labor practice issues to be raised. Rather, in Berwyn, it was found that under the adverse action appeals procedure of the agreement therein, other types of discrimination, such as that alleged in the complaint, i.e., discrimination based on union activities, were not clearly precluded from consideration.

12/ Section 5(a)(3) of the Texas Air National Guard Grievance Procedure provides: "5. Grievance Coverage...a. Grievances covered under this system include, but are not strictly limited to, the following: (3) Alleged violations----of Section 19(a)(1), (2) and (4) of Executive Order 11491-----."

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investigation." At no time did he avail himself of the opportunity to raise the issue of discrimination, despite the fact that clearly he was given an opportunity to do so, and the final rejection of his appeal by the Adjutant General stated that all pertinent information in Burgamy's file had been reviewed and that the decision not to reenlist him was sustained.

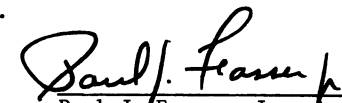
Under all of these circumstances, I find that there was an appeals procedure under which Burgamy could appeal the denial of his reenlistment; that the appeals procedure permitted him to raise the issue whether the denial was discriminatorily motivated and in violation of rights protected by the Order; and that Burgamy, while availing himself of the appeals procedure, failed to raise the issue of discriminatory motivation in processing his appeal. Accordingly, I conclude that the issue herein could properly be raised under an appeals procedure and that, under Section 19(d) of the Order, I am precluded from determining, in the context of an unfair labor practice proceeding, whether Burgamy was in fact, denied reenlistment for discriminatory reasons. 13/

Having found that the Respondent did not violate Section 19(a)(1) and (6) of the Order in denying Burgamy representation by his exclusive representative at certain "counselling sessions," and that Section 19(d) is dispositive with respect to the question whether Burgamy's failure to secure enlistment was discriminatorily motivated, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-4203(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 8, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

13/ Section 19(d) of the Order provides, in pertinent part, that, "Issues which can properly be raised under an appeals procedure may not be raised under this section..."

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D. C.

-2-

DEPARTMENT OF DEFENSE
NATIONAL GUARD BUREAU
TEXAS AIR NATIONAL GUARD

Respondent

Case No. 63-4203 (CA)

and

TEXAS AIR NATIONAL GUARD COUNCIL OF
LOCALS, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DAVID W. PACE, Esq., and
FRANK COOKSEY, Esq., Office of the
Attorney General of Texas, Box 12548
Capitol Station, Austin, Texas 78711,
on behalf of Respondent.

DOLPH DAVID SAND, Esq., American Federation
of Government Employees, 1325 Massachusetts
Avenue, N.W., Washington, D.C. 20025
for Complainant.

Before: Samuel A. Chaitovitz
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a First Amended Complaint filed on November 27, 1972, under Executive Order 11491, as amended, (hereinafter called the Order) by American Federation of Government Employees, Texas Air National Guard Council of Locals 1/ against Texas Air National Guard (hereinafter called variously the Respondent, the Texas Air National Guard and the Activity), a Notice of Hearing on

1/ Hereafter called the Union. American Federation of Government Employees will hereafter be abbreviated as A.F.G.E.

Complaint was issued by the Acting Regional Administrator for the Kansas City Region on January 15, 1973.

A hearing was held in this matter on March 20 and 21, 1973 in Dallas, Texas. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved. Upon the conclusion of the taking of testimony both parties made oral argument on the record and submitted briefs.2/

Upon the entire record 3/ herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendations:

Findings of Fact

1. Background

During December of 1969, AFGE Local 3,000 was recognized as the collective bargaining representative of the civilian employees of the Texas Air National Guard at Hensley Field. In June of 1971 the Texas Air National Guard Council of Locals, AFGE, became the collective bargaining representative of all civilian employees of the Texas Air National Guard.

Mr. James E. Burgamy enlisted in the Texas Air National Guard on September 26, 1966, and at sometime subsequent became a civilian employee of the Texas Air National Guard as an Air Technician. In approximately 1969 Mr. Burgamy joined, in his civilian capacity, the 136th Supply Squadron, whose commander was Colonel Richard A. Millson.

During 1971 Mr. Burgamy was, in his military position, undergoing "boomer training" 4/ as part of the 181st Air Refueling Squadron. Mr. Burgamy was unable to successfully complete his training and was transferred briefly to a civilian engineering unit.

2/ Both parties filed briefs on April 30, 1973.

3/ The following corrections are hereby made in the Transcript.
Page 6 line 23 "for that?" is corrected to "or that..."
Page 89 line 19 "formal" is corrected to "informal"
Page 90 line 4 "of the formal..." is deleted.

4/ Part of the air refueling operation.

In November 1971, he was transferred in his military capacity to the 136th Supply Squadron. Col. Millson was military as well as civilian, commander of the 136th Supply Squadron. Mr. Burgamy had attained the military rank of Staff Sargent, (E-5). While working in the 136th Squadron in his civilian capacity Mr. Burgamy held two positions, first filing telephone requests for parts from the other various units and then in the warehouse.

Mr. Burgamy's military enlistment in the Texas Air National Guard expired on September 25, 1972 and he was denied reenlistment. He was notified by letter of August 24, 1972, that as a result of his impending loss of military membership in the National Guard, his civilian employment would be terminated on September 30, 1972 and that "there were no administrative appeal rights to this termination action."

2. Mr. Burgamy's Civilain Employment 5/

Although there was some testimony that Mr. Burgamy's civilian work started to deteriorate between August and November 1971, when he joined the 136th Supply Squadron in a military capacity, he was rated by his supervisors on his Civil Service Commission annual rating form, as performing his civilian duties satisfactorily for the period of August 1971 thru August 1972. His poor work was never given as a reason for his subsequent discharge nor was there any creditable evidence submitted that he was ever advised by his supervisors that his work was of such a poor quality or quantity that he was risking discharge if he did not improve.

Commencing about July 1971 until the date of his termination Mr. Burgamy did file a number of grievances and had a number of various types of meetings with his supervisor concerning the grievances, complaints concerning his working conditions and complaints that his supervisors had about him. Although the record is quite confused and not clear as to precisely how many meetings there were and as to what occurred at each such meeting the record does establish the following:

A. Summer 1971 Grievance

During the summer of 1971 Mr. Burgamy requested leave from his civilian job so that he could attend his summer military training. During this attempt to secure the leave there is no evidence

5/ Col. Millson testified that it was not always easy to separate his and the employee's military activities and duties from their civilian activities and duties.

that any superior denied Mr. Burgamy Union representation. Mr. Burgamy then followed the grievance procedure 6/ concerning his failure to secure the requested leave. There is no evidence that during the processing of the grievance Mr. Burgamy was denied Union representation until it reached the level of his 3rd line supervisor, Col. Millson. With respect to this meeting, Mr. Burgamy's testimony is somewhat confused. He testified that he arrived at Col. Millson's office with the Union representative and that Col. Millson told the Union representative to leave. Mr. Burgamy didn't recall whether the Union representative left 7/ or remained. Col. Millson testified that although there was a discussion as to whether or not there was a grievance, the Union representative was not requested to and did not leave. 8/ This grievance was ultimately adjusted informally.

B. Grievance dated April 18, 1972

A dispute arose during April, 1972 concerning certain changes in Mr. Burgamy's job. Major Floyd Honea, Mr. Burgamy's second line supervisor, testified that he asked Mr. Burgamy if he wanted to come to his office to discuss the job changes. Mr. Burgamy allegedly came to his office but wanted a Union representative. Maj. Honea testified in agreement with Mr. Burgamy, that he told Mr. Burgamy that he didn't need the Union representative and the Union representative left. Mr. Burgamy states that he was denied Union representation by Honea at this stage of the grievance procedure. 9/ Maj. Honea states that Mr. Burgamy then, in a loud voice abused him concerning his refusal to allow Union representation.

Later the same day Maj. Honea sent for Mr. Burgamy in order to "counsel" him concerning the abusive language incident. Mr. Burgamy reported to Maj. Honea's office and stated that he wanted a Union representative present. Maj. Honea advised Mr. Burgamy that he did not need a Union representative. Mr. Burgamy left and returned with the Shop Steward. The Union representative remained while

6/ There was no negotiated grievance. The procedure followed was the Texas Air National Guard's own grievance procedure.

7/ The Union representative was not called as a witness.

8/ Because of the confusion in Mr. Burgamy's testimony with respect to this meeting, I credit Col. Millson's version of this meeting.

9/ Maj. Honea later discovered that Mr. Burgamy had apparently already started to process a grievance and that this was part of the procedure. Maj. Hone states that he did meet with Mr. Burgamy and the Union representative on the next day.

Major Honea read to them an adverse letter he proposed to place in Mr. Burgamy's personnel file. They then discussed this proposed action 10/.

Mr. Burgamy testified that he was denied a Union representative at a May 3, meeting with Col. Millson at the third step of the grievance procedure. Col. Millson's report of that meeting indicates that Union representatives were present and that among other items, Col. Millson's disapproval of Mr. Burgamy's instance upon Union representation at counselling sessions was discussed. The report also indicated that Col. Millson referred to the processing of these grievances by Mr. Burgamy and the Union as harassment of management.11/ The grievance was then appealed to the Adjutant General of the Texas ANG, who did not rule upon it because of Mr. Burgamy's impending separation.

C. June 5, 1972 Grievance

On or about May 19, 1972 a dispute arose concerning an incident when Mr. Burgamy came to work in civilian clothes instead of in uniform as required by the base commander. During the latter part of May, Mr. Burgamy was called into Col. Millson's office for a counselling session concerning Burgamy's appearing in civilian clothes. Mr. Burgamy, fearing a reprimand, requested Union representation at the counselling session. Mr. Burgamy states that he was told by Col. Millson that he did not allow Union representation at counselling sessions. Mr. Burgamy states he was unrepresented by the Union at this session. Col. Millson questioned Mr. Burgamy about being out of uniform. This meeting resulted in Mr. Burgamy receiving a letter of "Adverse Personnel Action" dated June 1, 1972. Col. Millson generally denied that he ever refused to allow Mr. Burgamy to have Union representation. However, in light of his position as set out in his memorandum of the May 3 grievance meeting, discussed above, I credit Mr. Burgamy's version of this meeting.

Mr. Burgamy then utilized the informal grievance procedure and was not denied Union representation during these informal procedures. The formal grievance procedures were then initiated on June 5, 1972.

10/ Maj. Honea states that although he normally does not allow Union representatives at counselling sessions, he has never denied Mr. Burgamy the request to have a Union representative present.

11/ Union official Nicklas states that at one grievance meeting involving Mr. Burgamy, he was not sure which one, he was told by Col. Millson that the Union was soliciting grievances and harassing him and the superiors.

Mr. Burgamy's testimony is somewhat confusing with respect to whether he was denied Union representation at the 1st level. All agree that he had Union representation at the 2nd level. Mr. Burgamy testified that at the 3rd level, before Col. Millson, he came with his Shop Steward but that Col. Millson asked the Shop Steward to leave. He did not recall whether the Shop Steward left and Col. Millson's testimony and his report of that meeting showed two Union representatives were present. 12/ Col. Millson testified that he never denied Mr. Burgamy Union representation at any grievance meeting. I find that the weight of the evidence establishes that Mr. Burgamy was not denied Union representation at this meeting. 13/ Col. Millson's report of the grievance meeting again referred to the filing of this grievance as harassment.

This grievance and the validity of the June 1, adverse action letter was not ruled upon by the Adjutant General's office because of Mr. Burgamy's pending termination.

D. July 31, 1972 Grievance

An informal grievance was instituted concerning alleged abuse of sick leave by Mr. Burgamy. This was handled informally and there is no allegation that during this matter Mr. Burgamy was denied Union representation.

E. Other Aspects of Mr. Burgamy's Civilian Employment

Mr. Burgamy, as indicated above, filed a number of grievances and requested Union representation in them all. Since April 1972 he filed more formal grievances than any other Union member at Hensley Field. 14/ Similarly the evidence established Mr. Burgamy had a habit of stopping by Col. Millson's office, often with a Union representative to discuss various work related matters. Col. Millson testified that he considered Mr. Burgamy to be dissatisfied with everything and a troublemaker; it was clear from Maj. Honea's testimony that he held the same opinion of Mr. Burgamy.

12/ One did not testify and the other Mr. Nicklas, did not testify with respect to whether or not he was present.

13/ Mr. Burgamy's recollection of this meeting seemed confused and, in light of the report of the meeting and Burgamy's own statements that he usually did have Union representation at grievance meetings, Col. Millson's testimony is credited.

14/ Of 8 grievances filed Mr. Burgamy was responsible for 3.

Mr. Burgamy was terminated as of September 30, 1972 because his military enlistment in the Texas Air National Guard had terminated.

3. Military Career

Mr. Burgamy joined the 136th Supply Squadron in his military capacity in November 1971 after he had failed to complete his "boomer training" and after he had been unable to permanently transfer into an engineering unit. He was advised by Col. Millson, who was the Commander of the 136th and therefore his military superior, both by letter and orally, concerning the appropriate uniform for his first UTA. 15/ Mr. Burgamy attended the first UTA in the improper uniform and was made to go home and change his uniform. 16/

A. CDC Training Course

Col. Millson advised Mr. Burgamy that he was required to enroll in and complete a supply CDC course 17/ when Mr. Burgamy first joined the 136th Supply Squadron. Col. Millson testified that soon thereafter he learned that Mr. Burgamy had not signed up for the course so in January 1972 he again instructed Mr. Burgamy of the CDC requirement. Again Col. Millson testified, he learned in February that Mr. Burgamy had not yet enrolled in the course. Col. Millson further testified that on a number of occasions he "counselled" and advised Mr. Burgamy that he was required to complete the CDC and finally that such completion was essential if he wished to remain in the Unit. Mr. Burgamy did not complete any volume of the course.

Mr. Burgamy admits that he was asked to take the CDC and that he did not complete it. He denied that he was ever "counselled" on his failure to complete the course. Mr. Burgamy contends he did not know how long he had to finish the CDC. Although he did apparently sign a document on December 6, 1971 acknowledging that he had to complete the course within 6 mos. of December 9, 1971,

15/ UTA stands for "Unit Training Assemblers". These are the weekend or evening training periods required of members of the National Guard.

16/ This was not marked on Mr. Burgamy's military record.

17/ "Career Development Course". These are training courses required of members of the Air National Guard. They are related to the individuals military specialties. They are composed of a series of "volumes" which are in the nature of workbooks which the individual works upon, completes and then turns in or mails back. They are similar to correspondence courses.

there was apparently some confusion because the CDC he received in the mail gave him a longer period of time to complete the course.

Col. Millson determined that Mr. Burgamy would not be reenlisted when his enlistment in the National Guard expired on September 25, 1972. As a result Mr. Burgamy first received a letter dated August 24th advising him of this. Mr. Burgamy requested more detail and he received a letter dated September 5, 1972 from Col. Millson which stated that Mr. Burgamy was not being reenlisted because he had not completed a single volume of his CDC despite the fact that he had in writing acknowledged it was to be completed not later than May 1972. The letter further states that Mr. Burgamy had been "counselled" "many times" by his trainer, Unit training Supervisor and Unit training officers regarding this requirement of completing the training course 18/ as well as by Col. Millson. The letter went on to state: "In weighing the obvious need for further training, your failure to respond to counselling and your impertinent manner in dealing with superior officers and airmen against your potential value to the unit, it was determined not to be in the best interest of the unit to approve your enlistment."

Mr. Clyde Clay who was an Air Technician for 18 years and a member of the Texas Air National Guard at Hensley Field for 19 years testified that he never completed a CDC in his particular job career field. Mr. Burgamy had completed a CDC, including one in the Supply field. Mr. Clay and Mr. James Nicklas, an Air Technician and member of the Texas Air National Guard for 17 years stated that they did not know of anyone being denied reenlistment for not completing a CDC.

B. Other Military "Incidents"

Sgt. Charles W. Davis testified that he was the First Sargent of the 136th Supply Squadron and Mr. Burgamy's superior and that on one occasion he called Mr. Burgamy aside and reprimanded him for wearing his hat improperly. He states that they had an altercation and that Mr. Burgamy's responses were impertinent and improper. He drew up charges on this matter, but his then immediate superior, Lieutenant Roberts, tore them up and would not process them. Sgt. Davis states that Mr. Burgamy was a bad influence on the men

18/ None of these individuals were called to testify concerning these counselling sessions.

that worked with him and made them unhappy and dissatisfied. On another occasion Sgt. Davis and Mr. Burgamy had words because Mr. Burgamy protested Sgt. Davis' use of profane language after he, Sgt. Davis, had received an injection.

Col. Millson testified that Mr. Burgamy was told on one or two occasions that his attitude and training were sufficiently bad to result in his non-reenlistment. However, no record of these alleged counselling sessions, shortcoming or failure to complete the CDC were entered on Mr. Burgamy's military Form 623 19/ nor any where else on Mr. Burgamy's military record. There was a Military "Personal Information Form" prepared by Captain Temmesfield, at the time one of Mr. Burgamy's military superiors, which noted on a line called "Personal interest, hobbies" that Burgamy was "Member of American Federation of Government Employees." Mr. Burgamy gave Capt. Temmesfield some of the information needed to fill out the form in about May of 1972, but did not tell him about the Union. Mr. Burgamy was given a copy of this form at the last UTA he attended.

C. Appeal of Refusal to Reenlist Mr. Burgamy

By letter dated September 6, 1972, addressed to the Commander of the 136th Air Refueling Group Mr. Burgamy sought Review of Col. Millson's decision in accordance with Section 1104 of the Texas Code of Military Justice. This letter was acknowledged by Maj. General Ross Ayers, the Adjutant General of the Texas Air National Guard by a letter of September 9, 1972, in which General Ayers advised Mr. Burgamy that if he desired to submit a "written statement, evidence in writing or a written brief to support your contentions," he should mail them no later than September 18, 1972. Mr. Burgamy in a letter dated September 14, asked Maj. General Ayers to investigate the matter personally. The letter states that the information Maj. General Ayers had on hand was not sufficient and that Mr. Burgamy can support his case with "witness and testimony". He requested that he and his representative be present during the personal investigation.

Maj. General Ayers replied by letter dated September 22, 1972,

19/ A form that presumably provides space for notations and comments concerning a persons performance, skill level, etc.

which stated:

- "1. I have considered your request under Section 1104 of the Texas Code of Military Justice. Accordingly, a review of your military service has been conducted, and I find that you have failed to progress in training and other related military matters as you agreed to do.
- 2. I have reviewed all of the information in your file and the letter submitted by you dated 15 September 1972.
- 3. I have decided, under criteria set forth in ANGM 39-09, paragraph 2-1, that your commander's decision regarding your application for reenlistment was correct and his action is hereby sustained."

There was apparently no further appeal available.

Discussion and Conclusion

- I. Was Mr. Burgamy denied Union representation in violation of Sections 19(a)(1) and (6) of the Order

The record establishes that Mr. Burgamy was denied Union representation by management officials on two occasions.20/ On the first day he attempted to talk to Maj. Honea concerning changes in his job. Maj. Honea would not allow the Union representative to be present. Upon discovering that a grievance concerning the job change was filed Maj. Honea did, the very next day meet with Mr. Burgamy and his Union representative concerning the grievance. In so far as this is alleged to be a refusal of the Respondent to allow Mr. Burgamy to be represented by the Union in a grievance, under the Respondent's own grievance procedure, it is concluded that it was at most a misunderstanding by Maj. Honea as to whether a grievance was

20/ Although there were some allegations that Mr. Burgamy may have been denied Union representation on other occasions the credited evidence only established two such instances.

pending. It was remedied immediately, therefore with respect to the grievance. If any rights of the employees or the Union as protected by the Order, were interfered with it was to an insignificant degree. In so far as this meeting was to be as Maj. Honea originally considered it to be, an informal chat or conversation concerning the job changes, the Union was not entitled by virtue of Section 10(e) to be present ^{21/} and hence Mr. Burgamy was not entitled to have a Union representative present at such informal conversations. U.S. Department of Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278.

The second incident occurred in connection when Col. Millson, Mr. Burgamy's third line supervisor, called in Mr. Burgamy to a counselling session concerning his being out of uniform. Mr. Burgamy was denied permission to have a Union representative present at this meeting. Mr. Burgamy feared that some adverse action might be taken and at the the meeting he was asked to sign certain statements concerning his alleged misconduct. As a result of the meeting Mr. Burgamy received an "Adverse Personnel Action" letter of June 1. These counselling sessions were conducted by supervisors, involved discussion of employee short-comings, and on occasion resulted in and involved formal or informal adverse personnel actions being taken against employees. They could and did result in the filing of grievances by the employees in question. The counselling sessions involved working conditions and work performance. In the incident in question Mr. Burgamy was summoned to the office of his third line supervisor and confronted with allegations that he had violated the base wide uniform requirements.^{22/} Statements were attempted to be taken and as a result of the counselling session Mr. Burgamy received the "Adverse Personnel Action" letter dated June 1, 1973. This matter led to a formal grievance being filed. It is concluded that this counselling session was a "formal discussion" within the meaning of Section 10(e) of the Order. Cf. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242 and U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, supra. Therefore the Union was entitled

^{21/} It is not being decided whether the job changes were matters that the Union was entitled to bargain about.

^{22/} Mr. Burgamy had already discussed this matter with his two lower level supervisors.

to be present and the refusal to allow it to represent Mr. Burgamy at the counselling session violated Section 19(a)(6) of the Order. Similarly it was concluded that Mr. Burgamy was entitled to be represented by the Union at the counselling session and the refusal to permit it violated Section 19(a)(1) of the Order. U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, supra. ^{23/} It is further concluded that there was a general policy against permitting Union representatives at such counselling sessions and that, for the aforesaid reasons, such a policy violates Sections 19(a)(1) and 19(a)(6) of the Order. At the counselling session with Maj. Honea, Mr. Burgamy's 2nd line supervisor, concerning his abusive language when protesting the refusal to allow a Union representative at the grievance meeting Mr. Burgamy was told that he didn't need a Union representative. It was noted, despite this, that he did go and get a Union representative who remained while Maj. Honea read Mr. Burgamy the reprimand letter that he proposed to put in Mr. Burgamy's personnel file. Again this matter led to a formal grievance being filed. This statement by Maj. Honea would naturally discourage Mr. Burgamy from exercising his right to be represented at the counselling session by his collective bargaining agent and thereby violates Section 19(a)(1) of the Order.

^{23/} Even if these counselling sessions were not considered "formal discussions" within the meaning of Section 10(e), they are the type of meetings concerning an employee's working conditions and possible adverse actions, that, in order to effectuate the purpose of the Order, require a conclusion that the employee is entitled to representation by his collective bargaining agent. Refusal to permit such representation violates Sections 19(a)(6) and 19(a)(1) of the Order. Although not controlling precedent, the reasoning of the cases in the private sector seems persuasive, e.g., Quality Manufacturing Co., 195 NLRB No. 42 and Mobil Oil Corp., 196 NLRB No. 144.

See Arkansas National Guard, A/SLMR No. 53.

II. Was Mr. Burgamy discharged in Violation of Section 19(a)(2) of the Order.

A. Reviewability of the Decision not to Reenlist Mr. Burgamy

It is the Respondent's contention that the decision not to reenlist Mr. Burgamy as a member of the Texas Air National Guard is not reviewable under Executive Order 11491 because membership, enlistment, and reenlistment in the Air National Guard has been delegated to the States and is their sole responsibility. 24/ The Activity further contends that because the Federal law requires that civilian employees of the National Guard be members of the National Guard, 25/ Mr. Burgamy's discharge as a civilian employee because he was no longer a member of the National Guard was required by law and is therefore also non-reviewable.

These contentions are rejected at least in so far as they may affect the discharge of Mr. Burgamy from his civilian employ. The Assistant Secretary has held in both representation and unfair labor practice situations that the Order applies to civilian employees of the National Guard and protects the rights of the employees. 26/

24/ 32 USCA, App. Section 564.14(b) and Section 564.18(b) and 32 USCA Section 302.

25/ 32 USCA Section 709.

26/ Mississippi National Guard A/SLMR 20; Department of Defense, Florida Army National Guard A/SLMR 38; Ohio Air National Guard A/SLMR 44; California Army National Guard A/SLMR 47; Arkansas National Guard A/SLMR 53; Alabama National Guard A/SLMR 67; Virginia National Guard A/SLMR 69; Georgia National Guard 74; Illinois Air National Guard A/SLMR 101; Illinois Air National Guard A/SLMR 105 and A/SLMR 225; California Air National Guard A/SLMR 252; Pennsylvania National Guard A/SLMR 254; and California Air National Guard A/SLMR 147 and A/SLMR 259.

In such circumstances it would wholly frustrate the purpose and aims of the Order, if it and related statutes and laws were read to permit the Texas Air National Guard to avoid the requirements of the Order and the protection afforded civilian employees merely be affecting the employee's military status. Therefore, although perhaps the decision not to reenlist Mr. Burgamy may not in and of itself be reviewable under the Order, in the classical sense, (i.e., a remedial order that would order the Texas Air National Guard to reenlist him and not affect the civilian employment) it is reviewable to the extent of determining whether the military discharge was being used to interfere with and coerce civilian employees of the Texas Air National Guard in the exercise of their rights as protected by the Order and to ultimately accomplish Mr. Burgamy's discriminatory discharge from his civilian employ. 27/

The Order, therefore, must permit a determination to be made as to whether the reasons upon which the decision not to reenlist Burgamy was based were mere pretexts and whether the actual reason was because Mr. Burgamy had engaged in activity protected by the Order and it was recognized that the military discharge would necessarily result in his discharge from his civilian employ by the National Guard.

The Respondent contends that in any event Section 19(d) of the Order 28/, because there was an appeals procedure available to Mr. Burgamy with respect to the decision of the Texas Air National Guard not to reenlist him. 29/ would bar any review of the decision

27/ The cases cited by the Respondent in its support of the contentions that the decision by the Adjutant General of the Air National Guard not to reenlist Mr. Burgamy are inapposite. Although it should be noted that in v Major General Sylvester T. Del Crso, Adjutant General of Ohio, et al (Case No. CA 69-382) (ED. Ohio 1971), the court did in fact review whether the evidence established that the Ohio National Guard abused its discretion by discharging Plaintiff because of his Union activities. The court found that "Plaintiff was not denied reenlistment because of Union activities."

28/ Section 19(d) provides: "Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section but not under both procedures. Appeals or grievance decisions shall not be construed as unfair labor practice decisions under this Order nor as precedent for such decisions. All complaints under this section that cannot be resolved by the parties shall be filed with the Assistant Secretary."

29/ Mr. Burgamy was advised that he had no appellant rights with respect to his discharge from his civilian employ.

not to reenlist Mr. Burgamy. The appeals procedure is set forth in Section 1104, Texas Code of Military Justice. 30/

In the subject case Mr. Burgamy, upon requesting review of Col. Millson's decision not to reenlist him, was advised by the Adjutant General "Should you desire to submit any written statement, evidence in writing or a written brief to support your contentions, please mail them no later than 18 September 1972." Mr. Burgamy wrote back on September 15, 1972 stating that the record, as it then existed was not sufficient and that he could support his case with "witness" and testimony at Hensley Field. Mr. Burgamy further requested that he and his representative be allowed to be present at the investigation. The Adjutant General in his letter of September 22, 1972 sustained the decision not to reenlist Mr. Burgamy. He did not address himself to Mr. Burgamy's request for an opportunity to be present and submit testimony and his position 31/ nor did he give Mr. Burgamy an opportunity to submit evidence or set forth his position in another form.

It is concluded that the record does not establish that Section 1104 Texas Code of Military Justice in its face or as interpreted permitted Mr. Burgamy to seek consideration of whether he was denied reenlistment in the Texas Air National Guard because he engaged in activity protected by the Order. Therefore the record fails to establish that, within the meaning of Section 19(d) of the Order, the issue of whether Mr. Burgamy was denied reenlistment for discriminatory and unlawful reasons under the Order, could be raised under "an appeals procedure." 32/ Therefore it is concluded that Section 19(d) of the Order does not bar consideration of whether Mr. Burgamy was denied reenlistment for discriminatory reasons and in order to affect his civilian employment.

30/ Section 1104 provides:
Complaints of Wrongs

Sec. 1104. Any member of the state military forces who believes himself wronged by his commanding officer, and who upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the Governor or Adjutant General.

31/ The Adjutant General did state that he reviewed the file and "the letter by you dated 15 September 1972."

32/ United States Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272 is distinguishable because the Assistant Secretary made a finding that the appeals procedure, on its face, permitted the unfair labor practice issues to be raised. In the subject case the provisions are so vague and the procedures apparently so amorphous that it can not even be determined whether any real "appeals procedure" actually exists.

B. The Discharge

The reason given by the Respondent for its refusal to reenlist Mr. Burgamy was primarily his failure to complete a CDC. Yet the evidence establishes that there was at least some confusion as to how long Mr. Burgamy had to complete this course. Further I find that Mr. Burgamy was not advised of the possible consequences of his failure to complete the CDC. 33/

Long time employees and members of the Texas Air National Guard testified that they never recalled any other case in which a person was denied reenlistment because of a failure to complete a CDC. The record disputes Col. Millson's statement that all persons had to complete a CDC in his speciality or be discharged. One employee, an Air Technician for 18 years and a member of the Texas Air National Guard for 19 years testified that he had never completed a CDC in his speciality. 34/ The other reasons given to Mr. Burgamy for the decision not to reenlist him were his failure to respond to the "counselling" and his "impertinent manner in dealing with superior officers and airmen." However, the only examples of such conduct presented at the hearing were his failure to wear the proper uniform at the first UTA he attended 35/, the incident that occurred with Sargent Davis concerning the improper wearing of his hat soon after Mr. Burgamy joined the 136th 36/ and his protesting to Sgt. Davis, concerning Sgt. Davis' use of profanity when receiving an injection.

Col. Millson's testimony establishes that it was very difficult distinguishing when he and others were acting and performing in their

33/ Although Col. Millson and others allegedly counselled Mr. Burgamy as to what would happen if he failed to complete the course, Mr. Burgamy denies any such counselling. I credit Mr. Burgamy's version because neither Col. Millson nor anyone else made any entries on any personnel record noting Mr. Burgamy's training deficiencies and the counselling meetings. The forms had space for such entries. It is further noted that none of the other persons responsible for his training who also allegedly counselled Mr. Burgamy with respect to the CDC requirements were called as witnesses. It is apparent that if this training was so important that it would justify not reenlisting Mr. Burgamy, it only seems logical that he not only would have been counselled and warned but that adequate records and notes of such counselling and warnings would have been made.

34/ Mr. Burgamy did infact complete one CDC in his speciality.

35/ He apparently always wore the correct uniform after that.

36/ That however, was a single incident, no further action was taken and there was no notation with respect to it made on any of Mr. Burgamy's records.

capacity as civilian employees of the Texas Air National Guard and in their capacity as members of the Texas Air National Guard. Col. Millson was Mr. Burgamy's superior with respect to both his military and civilian duties and Col. Millson made the determination not to reenlist Mr. Burgamy.

Col. Millson and his subordinates were clearly displeased with certain aspects of Mr. Burgamy's civilian employment. He filed more grievances than any other employee and insisted upon having the Union represent him. He and the Union pursued these grievances vigorously. In fact Col. Millson accused both Mr. Burgamy and the Union of harassing him and Mr. Burgamy's other supervisors by the processing of these grievances. He accused the Union of soliciting these grievances. Further the record established that Mr. Burgamy used to complain to his supervisors about the working conditions and often insisted that the Union be present while he presented such complaints. Similarly during counselling sessions, when there was a likelihood of a reprimand or some other such action, Mr. Burgamy insisted that the Union be present to represent him. This was not permitted on one occasion and Col. Millson indicated he did not approve of Mr. Burgamy's insistence on Union representation at counselling sessions. Mr. Burgamy was clearly, because of his "grievances" 37/ and his insistence upon Union representation, considered a troublemaker and disruptive force with respect to his civilian employment in the Texas Air National Guard. As discussed above the insistence upon Union representation during grievances and counselling sessions is a right protected by the Order.

It is concluded that the record as a whole establishes that the latter conduct by Mr. Burgamy with respect to his civilian employment was what actually motivated Col. Millson in determining not to reenlist Mr. Burgamy in the Texas Air National Guard. Col. Millson it is concluded took this action not because of Mr. Burgamy's failure to complete the CDC and the other reasons given by Col. Millson, but rather because Col. Millson did not approve of Mr. Burgamy's conduct with respect to his civilian employment and because he knew it would necessarily result in Mr. Burgamy's being discharged from his civilian employment as an Air Technician.

This discharge of Mr. Burgamy for the reasons set forth above interfered with, restrained and coerced Mr. Burgamy and other civilian employees of the Respondent in the exercise of their rights assured by the Order and discouraged his membership in the AFGE, and therefore constituted a violation of Sections 19(a)(1) and 19(a)(2) of the Order.

37/ In the broad sense.

It is concluded based on the foregoing that the discharge of Mr. Burgamy by the Texas Air National Guard because he engaged in the above conduct which is protected by the Order, violates Section 19(a)(1) and (2) of the Order.

C. The Remedy

In light of the conclusion that Mr. Burgamy was denied reenlistment in the Texas Air National Guard in order to bring about his discharge from his civilian employment in violation of Sections 19(a)(1) and 19(a)(2) of the Order, the question of appropriate remedy is raised.

Since the Order only applies to Mr. Burgamy's civilian employment it is concluded that the remedy in this case should be limited. Therefore, it will be recommended that Respondent should offer Mr. Burgamy his former or substantially equivalent employment as a civilian employee of the Texas Air National Guard. 38/ It is further concluded that in order to place Mr. Burgamy in the same position he would have been in, had he not been discharged in violation of Sections 19(a)(1) and 19(a)(2) of the Order, the Respondent should reimburse him and make him whole for any wages and earnings he lost as a result of the discriminatory discharge 39/ less his interim earnings. The remedy has long been recognized in the private sector as appropriate to remedy discriminatory discharges, e.g., F. W. Woolworth Co., 90 NLRB 289; Golden Hours Convalescent Hospital, 182 NLRB 817 and NLRB v. Seven-Up Bottling Company, 344 US 344. Similarly Mr. Burgamy is entitled to be paid a reasonable interest on the sum he is to receive for the period of time he was denied the use of these back wages. 40/ It is concluded that reasonable interest is 6% per annum.

RECOMMENDATIONS

Having found Respondent has engaged in various conduct which is violative of Sections 19(a)(1), (2) and (6) of the Order, I recommend that the Assistant Secretary of Labor for Labor-Management Relations adopt the following order designed to effectuate the purpose of Executive Order 11491:

38/ It is presumed that the Texas Air National Guard will do all things legally necessary to effect this reemployment.

39/ The period covered would be from September 30, 1972, the date of Mr. Burgamy's discharge, until the date he is offered reinstatement.

40/ Although not binding precedent, the reasoning in Isis Plumbing & Heating Company, 138 NLRB 716 seems persuasive.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor Management Relations hereby Orders that the Department of Defense, National Guard Bureau, Texas Air National Guard shall:

1. Cease and desist from:

- (a) Conducting counselling sessions and other formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the collective bargaining unit without giving Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.
- (b) Refusing the request made by Mr. James Burgamy to be represented by a Shop Steward of the Texas Air National Guard Councils of Locals, American Federation of Government Employees, AFL-CIO, or any other representative designated by said labor organization, at any counselling session or other formal discussion between management and Mr. James Burgamy, convened for the purpose of discussing grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the collective bargaining unit.
- (c) Maintaining a policy or rule which does not permit employees to be represented by the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO at counselling sessions or other formal discussions concerning grievances, personnel policies and practices or other matters affecting general working conditions of employees in the collective bargaining unit.

- (d) Discouraging membership in Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, or any other labor organization by discrimination in regard to hire, tenure, promotion or other conditions of employment.
 - (e) Interfering with, restraining, or coercing Mr. James Burgamy or any other employee in the bargaining unit by denying them the right to be represented by a Shop Steward of the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO or any other individual designated to act as a representative of said labor organization, at any counselling session, meeting or formal discussion between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the collective bargaining unit.
2. Take the following affirmative action in order to effectuate the purpose and provisions of the Executive Order:
- (a) Offer to Mr. James Burgamy immediate and full reinstatement to his former job, and if that job no longer exists to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole by paying to him a sum of money equal to that which he would, but for discriminatory discharge, have earned in Respondent's employ between the date of the discharge and the date of Respondent's offer of reinstatement, less his net earnings elsewhere during said period; the sum so paid to draw interest at the rate of 6 percent per annum until paid.
 - (b) Notify Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the collective bargaining unit by its own chose representative.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

(c) Post at all its facilities in which employees in the collective bargaining unit represented by the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, work copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Adjutant General of the Texas Air National Guard and they shall be posted and maintained by him for sixty(60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Adjutant General and the Commanding Officers at each installation shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

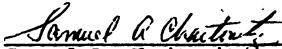
WE WILL NOT conduct counselling sessions and other formal discussions between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the collective bargaining unit without giving Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, the opportunity to be represented as such discussions by its own chosen representative.

WE WILL NOT refuse the request made by Mr. James Burgamy to be represented by a Shop Steward of the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, or any other representative designated by said labor organization, at any counselling session or other formal discussion between management and Mr. James Burgamy, convened for the purpose of discussing grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the collective bargaining unit.

WE WILL NOT maintain a policy or rule which does not permit employees to be represented by the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO at counselling sessions or other formal discussions concerning grievances, personnel policies and practices or other matters affecting general working conditions of employees in the collective bargaining unit.

WE WILL NOT discourage membership in Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, or any other labor organization by discrimination in regard to hire, tenure, promotion or other conditions of employment.

Dated at Washington, D.C.
July 27, 1973



Samuel A. Chaitovitz
Administrative Law Judge

WE WILL NOT interfere with, restrain, or coerce Mr. James Burgamy or any other employee in the bargaining unit by denying them the right to be represented by a Shop Steward of the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO or any other individual designated to act as a representative of said labor organization, at any counselling session, meeting or formal discussion between management and employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the collective bargaining unit.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER II491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
NORTON AIR FORCE BASE, CALIFORNIA
A/SLMR No. 337

WE WILL offer to Mr. Burgamy immediate and full reinstatement to his former job, and if that job no longer exists to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole by paying to him a sum of money equal to that which he would, but for discriminatory discharge, have earned in Respondent's employ between the date of the discharge and the date of Respondent's offer of reinstatement, less his net earnings elsewhere during said period; the sum so paid to draw interest at the rate of 6 percent per annum until paid.

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, AFL-CIO, Local 1485 (Complainant) against the Department of the Air Force, Norton Air Force Base, California (Respondent). The complaint, as amended, alleged, among other things, that the Respondent violated Section 19(a)(1) of the Order by assisting and permitting the National Federation of Federal Employees (NFFE), Independent, Local 687, to distribute its newspapers in areas where the Complainant has exclusive recognition; and by allowing NFFE to distribute its newspapers in Building 502, the location of the Civilian Personnel Office, while not allowing the Complainant to do so. The Administrative Law Judge issued a Report and Recommendation in which he recommended that the complaint be dismissed in its entirety.

WE WILL notify the Texas Air National Guard Council of Locals, American Federation of Government Employees, AFL-CIO, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions or employees in the collective bargaining unit by its own chose representative.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge. Thus, the Assistant Secretary affirmed the Administrative Law Judge's finding that: (1) the record did not establish that the Respondent authorized, approved, knew in advance, or in any way was responsible for the few isolated incidents where NFFE newspapers were found in AFGE exclusive areas; and (2) given no disagreement by the parties over the general terms of the Respondent's distribution policy, the Respondent properly applied its general policy--limiting the distribution of a labor organization's literature to those areas where the employees are exclusively represented by that labor organization--by not allowing the Complainant to distribute its newspapers in Building 502 where NFFE held exclusive recognition.

(Agency or Activity)

Dated: _____

By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2511, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
NORTON AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-3620(26)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1485

Complainant

DECISION AND ORDER

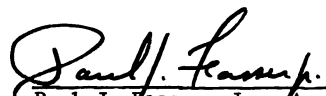
On October 25, 1973, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-3620(26) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 8, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
WASHINGTON, D.C. 20210

DEPARTMENT OF THE AIR FORCE
Norton Air Force Base, California

Respondent

and

CASE NO. 72-3620(26)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1485 AFL-CIO

Complaint

Captain Gordon B. Finley, Jr. Esq.
Captain Charles A. Wiest, Esq.
Headquarters, 22nd Air Force/JA
Travis Air Force Base, California 94535
For Respondent

Dolph David Sand, Esq.
Staff Counsel
American Federation of Government Employees
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
For Complainant

BEFORE: Samuel A. Chaitovitz
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Complaint issued on May 8, 1973, by the Regional Administrator of the United States Department of Labor, Labor Management Services Administration, San Francisco Region.

American Federation of Government Employees, Local 1485, AFL-CIO (herein called the Complainant or AFGE) initiated the matter by filing a complaint on April 7, 1972, against the Department of the Air Force, Norton Air Force Base (herein called the Respondent or Activity) alleging that the Activity violated Sections 19(a)(1) and (3) of the Order by assisting and permitting Local 687 of the National Federation of Federal Employees (herein called NFFE) to distribute its newspapers in areas where AFGE had exclusive recognition; allowing NFFE to distribute newspapers in the Personnel Building while refusing to allow AFGE to distribute its newspaper in that building; and by permitting NFFE to conduct extended membership campaigns while denying the same privileges to AFGE.^{1/} The complaint was amended by AFGE by letter dated March 12, 1973, deleting "reference to violation of Section 19(a)(3)" of the Order.^{2/}

A hearing was held before the undersigned on June 11, 1973, in Los Angeles, California. AFGE and the Activity were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter both Complainant and Respondent were afforded an opportunity to file briefs.^{3/}

-
- ^{1/} At the hearing, no evidence was introduced concerning the membership drive issues. A motion by the Activity to dismiss these allegations was not opposed or objected to by AFGE and was granted by the undersigned.
 - ^{2/} The Notice of Hearing on Complaint therefore only referred to the allegation that Section 19(a)(1) of the Order had been violated.
 - ^{3/} Complainant did not file a brief. Respondent's brief was filed August 31, 1973. Although Captain Finley represented the Activity at the hearing because of Captain Finley's transfer, Respondent substituted Captain Wiest after the hearing closed and Captain Wiest submitted the brief.

Upon the entire record in this case, from his observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, the undersigned makes the following findings, conclusions and recommendations:

Findings of Fact

In June 1970, a representation election was held among a residual unit of the civilian employees at the Norton Air Force Base.^{4/} This election was inconclusive and a runoff election was conducted about one month later. NFFE received a majority of the votes cast and on March 30, 1971, a Certification of Representative to this effect was issued by the Los Angeles Area Administrator of the Labor Management Services Administration of the Department of Labor.

By letter dated April 9, 1971, the Activity advised AFGE of the NFFE certification. The letter also advised AFGE that pursuant to the Order and Air Force Manual the dues withholding arrangement had to be revised and further that "The termination of formal recognition will limit your activities to your exclusive units. Henceforth, distribution of your organization newspapers and other literature regarding your activities must be confined to those exclusive units."^{5/}

^{4/} Exempted from the unit were those employees employed in the following units which were represented by AFGE:

- 1. Fire Department, 63rd Civil Engineering Squadron;
- 2. 63rd Security Police Squadron;
- 3. 1965th Communication Squadron (In some of the documentary exhibits, this is apparently referred to as the 2193rd Communication Squadron);
- 4. Nonappropriated Fund employees; and
- 5. Warehouse employees of the Army and Air Force Exchange Service.

^{5/} At that time the Air Force Manual 40-13 chapter 1, paragraph 1-4(a) provided:

"Subject to these restrictions, to normal security limitations, and reasonable restrictions with regard to the frequency, duration, locations, and number of persons involved in such activities, labor organization representatives may, upon request, post or distribute literature or hold organization meetings at the activity. Permission may be withdrawn, however, with respect to any such activities which interfere with the work of the activity. Permission is not extended for such activities

The Civilian Personnel Office (CPO) at Norton Air Force Base is situated in Building 502. As a result of the representation election described above, NFFE had been certified and recognized as the exclusive collective bargain representation of the qualified civilian employees in the CPO.^{6/} Approximately 75 percent of the civilian employees at Norton Air Force Base have business in this building at sometime during their government service. On or about September 1971 AFGE became aware that NFFE had a pile of its newspapers "The Federal Employee," stacked for free distribution in the lobby of Building 502.^{7/} Subsequently as new editions of "The Federal Employee" were issued, they were placed for free distribution in the lobby of Building 502. AFGE was denied permission to place newspapers there because NFFE had exclusive recognition in Building 502.^{8/}

On one occasion in September 1971, a stack of NFFE newspapers was found in Building 477. AFGE is the exclusive representative of the civilian-employees in that building and NF represents no employees located there. AFGE complained to the Activity about the presence of the NFFE newspapers in Building 477. The newspapers were immediately removed by AFGE and the newspapers did not reappear. No evidence was introduced that the Activity placed these newspapers or authorized, condoned or even knew in advance that NFFE papers would be left in Building 477.^{9/}

Footnote 5 continued

in a unit where another labor organization has been granted exclusive recognition unless a valid, timely challenge to such recognition has been filed and rules for election campaigning adopted."

Reference to this limitation on distribution of union publications where another union is the exclusive representat was deleted in May 1972. The distribution policy was still followed at the Norton Air Force Base.

- 6/ AFGE does not have exclusive recognition for any employees in Building 502.
- 7/ On occasion these newspapers contained application for membership in NFFE.
- 8/ There is some conflict in the testimony whether AFGE repeatedly asked permission and whether they complained about the refusal to allow AFGE to leave papers in Building 502 while allowing NFFE to do so. The Activity's witness testified concerning the period after December 1971 that AFGE when complaining about the NFFE newspaper in Building 502 merely complained about the fact that NFFE won the representation election. Although the difference in the various versions are not too great, I credit the version of the AFGE witness to the effect that repeated requests for permission to distribute their newspaper were made and complaints were made about the refusal to grant such permission.
- 9/ No evidence was submitted as to who was responsible for the placement of these NFFE newspapers.

Individual copies of NFFE newspapers were found on a few occasions in other buildings where AFGE was the exclusive representative. No evidence was introduced that the Activity placed these newspapers or authorized, condoned or knew in advance of these incidents.^{10/}

AFGE complained to the Activity about the above incidents as alleged violations of the distribution rule. AFGE was advised that an investigation would be conducted by the Activity. No evidence was introduced as to the extent of any such investigation.

On at least one occasion during the period in question, the AFGE newspaper was placed in an area where NFFE was the exclusive representative.^{11/} AFGE removed these papers when requested to do so by the Activity.

In Building 534, AFGE represents the civilian employees of the 1965th Communication Squadron^{12/} and leaves its newspapers in the lobby. Also located in Building 534 is the Employees Credit Union and it is open to and used by the employees of the entire base. All employees of the post can come and relax at the Galaxy Club, a type of restaurant, or cocktail lounge located on the grounds of the Norton Air Force Base. The Galaxy Club employees are represented by AFGE. AFGE has not left its papers at the Galaxy Club, although they have not been forbidden to do so and the AFGE vice president didn't know why their papers were not distributed at the Galaxy Club.

Contention of the Parties

AFGE contends that the Activity violated Section 19(a)(1) by: (1) allowing NFFE to distribute its newspapers in areas where AFGE is the exclusive representative and (2) not allowing AFGE to distribute its newspapers in the CPO, while allowing NFFE to distribute its newspapers there.

- ^{10/} No evidence was submitted as to who was responsible for the placement of these NFFE newspapers.
- ^{11/} The "SAMSO complex".
- ^{12/} 1965th is located in a number of buildings.

With respect to the latter point AFGE contends that the CPO is a unique area and, even though NFFE represents the employees located there, to allow NFFE this advantage of distributing its newspapers violates Section 19(a)(1).^{13/} AFGE made it quite clear, however, it was not alleging as a violation of the Order that the Air Force Policy and the existing practice at the Activity of limiting a labor organization's right to distribute literature solely to those areas where the labor organization was the exclusive representative. Rather AFGE contends solely that the application of the policy to the CPO, an allegedly unique area, violates Section 19(a)(1) of the Order.

The Activity contends that it did not violate Section 19(a)(1) of the Order because the application of its literature distribution policy to the CPO was proper and because it was not responsible for the distribution or appearance of the NFFE newspaper in the areas represented by AFGE. The Activity further contends that AFGE's unfair labor practice charges were untimely filed and that NFFE was a necessary party to the subject proceeding.^{14/}

Conclusions of Law

AFGE has made it quite clear that it is not attacking, or alleging as a violation of the Order, the Activity's general policy of limiting the distribution of a labor organization's literature to those areas where the employees are exclusively represented by that labor organization. Neither AFGE nor the Respondent addressed itself, in briefs or oral argument, to any attack on this general distribution policy. Therefore, I conclude that this matter is not before me and no conclusion as to its legality is made herein. However, without ruling upon it, for the purposes of writing this decision only, this distribution policy will be considered to be lawful and not in violation of the Order.

^{13/} The allegation that Section 19(a)(3) of the Order had been violated had been withdrawn from the complaint by AFGE and had not been included in the Notice of Hearing.

^{14/} NFFE did not make an appearance and was not represented at the subject hearing.

With respect to the Activity's contention that the subject unfair labor practice complaint was not timely filed, the alleged incidents involving the refusal to allow AFGE to place its newspapers in Building 502 commenced in September 1971, as did the other incidents involving the placing of the NFFE papers in the AFGE areas. The unfair labor practice charges were sent by AFGE to the Activity on October 7, 1971, and February 4, 1972, and the unfair labor practice complaint was filed on April 7, 1972, all within the time requirements set forth in §203.2 of the Rules and Regulations. The Activity alleges that the date of alleged violation should not be September 1971, but rather April 9, 1971, when AFGE was advised of the distribution policy. However, as discussed above, AFGE is not attacking the general distribution policy. It is limiting itself to the alleged conduct of the Activity in refusing to allow AFGE to place its newspapers in the CPO and in permitting NFFE to place its newspapers in the AFGE areas. It is therefore concluded that the subject unfair labor practice charges and complaint were not untimely within the meaning of the Rules and Regulations,^{15/} since they specifically bring into issue the legality of specific incidents that commenced in September 1971.

The record establishes only a few isolated incidents where this general distribution rule was possibly violated by NFFE newspapers being placed in areas where the employees are represented by AFGE. In all the incidents except one, it involved only one or two papers. There was no evidence as to who left these newspapers;^{16/} they could have been left by an employee who had been passing by. The one exception involved the NFFE papers in Building 477. The record herein does not establish that the Activity authorized, approved, knew in advance or in anyway was responsible for any of these incidents. Further, the record does not establish that the Activity in any way refused or failed to enforce its general distribution policy fairly. In light of the foregoing, it is concluded that with relation to these incidents the Activity did not engage in any conduct which violated Section 19(a)(1) of the Order.

^{15/} This is not in anyway meant to indicate whether any attack on the existing and continuing distribution policy, would be barred by the time limitations set forth in the Rules and Regulations.

^{16/} It should be noted that no unfair labor practice complaint was filed against NFFE.

The Activity's literature distribution policy, which is not under attack and is assumed to be lawful under the Order, by its terms, applies to the CPO and Building 502. To find the application of this policy to the CPO unlawful, while not finding the underlying policy unlawful, would, in effect, require a rewriting of the clear terms of the general policy.^{17/} The Order does not bestow upon the undersigned the authority to rewrite the terms of such policies. Therefore, the policy with respect to the CPO cannot be found to be unlawful without a finding that the entire policy by its terms is unlawful. Something that is not alleged, was not argued and therefore, as discussed above, I am not prepared to do. I am thus constrained to conclude that the policy with respect to the CPO, in the framework of the general literature distribution policy does not interfere with employees exercise of their rights as protected by the Order.

In any event, it is concluded that the record does not establish that the CPO and Building 502 are so unique as to justify a finding that, assuming the basic policy is lawful, the application of the literature distribution violates Section 19(a)(1) of the Order. AFGE urges such a finding is justified because 75 percent of all civilian employees appear at the CPO at some time during their careers. Therefore, allowing NFFE exclusive right to distribute its newspapers gives NFFE an unfair advantage.^{18/}

However, the same consideration would apply to the Credit Union in Building 534 and the Galaxy Club, two areas open to and visited by employees from all over the base, where AFGE, by virtue of its representative status, has exclusive rights to distribute its newspapers. AFGE did not file a brief and did not in its oral argument indicate how or why the CPO should be distinguished from the Credit Union or the Galaxy Club.

^{17/} There was no allegation and no evidence submitted to the effect that the limitation on AFGE with respect to the CPO was based on any consideration other than the terms of the general literature distribution policy. Similarly there was no evidence submitted that this general policy was not intended to apply to the CPO or that it was being applied to AFGE but not to other labor organizations.


^{18/} Even though NFFE represents the employees of the CPO.

In the circumstances here present, therefore, I conclude that the Respondent Activity's application of the literature distribution policy to the CPO and Building 502 did not constitute a violation of Section 19(a)(1) of the Order.^{19/}

RECOMMENDATION

In view of the findings and conclusions made above it is recommended that the Assistant Secretary of Labor for Labor Management Relations dismiss the complaint in its entirety.

Entered at Washington, D.C., this 25th day of October, 1973.


 Samuel A. Chaitovitz
 Administrative Law Judge

^{19/} In view of this finding it is unnecessary to decide whether NFFE was a necessary party to this proceeding and whether the formal papers should have been served upon it.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTIONS
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NORTHWEST AREA EXCHANGE (AAFES)
A/SLMR No. 338

This case arose as a result of representation petitions filed by the American Federation of Government Employees, AFL-CIO, Local 1504 (AFGE), Service Employees International Union, AFL-CIO, Local 49 (SEIU 49), and Service Employees International Union, AFL-CIO, Local 92 (SEIU 92).

The AFGE requested a unit of all regular full-time and regular part-time employees, including military personnel in either of the foregoing categories, employed by the Northwest Area Exchange, Army-Air Force Exchange Service (AAFES). The SEIU 92 requested a unit of all employees at the Vancouver Barracks AAFES Exchange and SEIU 42 sought a unit of all employees of the Kingsley Field AAFES Exchange, both of which are satellite exchanges of the Northwest Area Exchange.

The Assistant Secretary found that the unit petitioned for by the AFGE was appropriate for the purpose of exclusive recognition, noting the parties' agreement as to the scope of the unit sought as well as the centralized nature of personnel and labor relations policies within the Northwest Area Exchange and the fact that employees at the various locations throughout the Northwest Area Exchange share the same general working conditions.

The Assistant Secretary further found that the separate units of employees petitioned for respectively by SEIU Local 49 and SEIU Local 92 constituted appropriate units. In this connection, particular note was taken of the facts that the employees in the claimed satellite units have the same immediate terms and conditions of employment, that they are separated geographically from other employees of the Northwest Area Exchange and that they do not interchange with employees of the other components of the Northwest Area Exchange. It was further noted that the authority to hire and discipline exists at the local level, with final approval for such actions resting in the General Manager.

The Assistant Secretary further found that off-duty military personnel who worked the requisite number of hours so as to be included in the categories regular full-time and regular part-time should be included within the units found appropriate and that because neither temporary part-time nor on-call employees have a reasonable expectancy of continued employment, such categories should be excluded from these units.

Under these circumstances, the Assistant Secretary ordered elections in the units found appropriate.

NORTHWEST AREA EXCHANGE, 1/
 (AAFES)

Activity

and

Case No. 71-2611

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, AFL-CIO, LOCAL 1504 2/

Petitioner

NORTHWEST AREA EXCHANGE,
 (AAFES)

Activity

and

Case No. 71-2618

SERVICE EMPLOYEES INTERNATIONAL UNION,
 AFL-CIO, LOCAL 92 3/

Petitioner

NORTHWEST AREA EXCHANGE,
 (AAFES)

Activity

and

Case No. 71-2619

SERVICE EMPLOYEES INTERNATIONAL UNION,
 AFL-CIO, LOCAL 49 4/

Petitioner

-
- 1/ The name of the Activity appears as amended at the hearing.
 - 2/ The name of this Petitioner appears as amended at the hearing.
 - 3/ The name of this Petitioner appears as amended at the hearing.
 - 4/ The name of this Petitioner appears as amended at the hearing.

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Daniel Kraus. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject cases, including the brief filed by the Service Employees International Union, AFL-CIO, Locals 49 and 92, hereinafter called, respectively, SEIU Local 49 and SEIU Local 92, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In Case No. 72-2611, the American Federation of Government Employees, AFL-CIO, Local 1504, hereinafter called AFGE, seeks an election in a unit of all regular full-time and regular part-time employees, including off-duty military personnel in either of the foregoing categories, employed by the Northwest Area Exchange, but excluding temporary full-time employees, temporary part-time employees, casual and on-call employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order. 5/ In Case No. 71-2618, SEIU Local 92 seeks an election in a unit of all employees of the Vancouver Barracks, Army-Air Force Exchange Service (AAFES) Exchange at Vancouver, Washington, Building 805, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order. In Case No. 71-2619, SEIU Local 49 seeks an election in a unit of all employees of the Kingsley Field AAFES Exchange, Klamath Falls, Oregon, Building 114 and Building 120, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

The Northwest Area Exchange contends that the unit sought by the AFGE is appropriate. On the other hand, it contends that the units sought by SEIU Locals 49 and 92 are not appropriate because they are not comprised of employees who share a clear and identifiable community of interest, and, further, such fragmented units would neither promote effective dealings nor efficiency of agency operations. 6/

5/ The unit description appears as amended at the hearing.

6/ There is no history of bargaining with respect to the employees covered by the petitions filed in the subject cases.

The Northwest Area Exchange is an administrative subdivision of the Golden Gate Region, which encompasses the entire West Coast. Its headquarters is located at Fort Lewis, Washington. In addition to its headquarters operation, the Northwest Area Exchange operates eight satellite exchanges located in the states of Washington and Oregon. 7/ There are numerous site exchanges which are annexed to the eight satellites. 8/ Approximately 750 employees are employed at the various locations.

The mission of the Northwest Area Exchange is to provide quality merchandise and services at reasonable prices to members of the military and authorized patrons on premises throughout the Northwest Area Exchange Service. A General Manager, stationed at the Fort Lewis headquarters, is in overall charge of the five primary functions performed by the Exchange: accounting, food operations, personnel, retail operations and service operations. Reporting to the General Manager is an Operating Manager for each subdivision. 9/

Among the employees included in the claimed unit are retail sales clerks, stock handlers, cashier checkers, general clerks, cooks, food service helpers, pump island attendants, mobile unit operators, and counter attendants. With respect to the duties of these employees, the evidence reveals that retail operation employees perform sales and other related functions; food service operation employees are engaged in the preparation and sale of foods and beverages; and pump island attendants dispense gasoline and oil to automobiles. The record reveals that these employees are all subject to the same general working conditions and overall supervision, labor relations policies, grievance procedures, leave policies, disciplinary policies, promotion policies and training. Availability of fringe benefits is governed uniformly by an employee's classification category (e.g., regular full-time, regular part-time, temporary, or on call).

7/ Of the seven satellite exchanges located in the State of Washington, Fort Lewis, McChord Air Force Base, Madigan Hospital and Fort Lawton are located in the Seattle-Tacoma area, while Yakima Firing Center, Spokane Area Exchange and Vancouver Barracks are geographically separated by considerable distances. The one satellite exchange in the State of Oregon is located at Kingsley Air Force Station.

8/ Site exchanges are located at Nanaimo, Vancouver Island, British Columbia; Neah Bay, Washington; Kingston, Washington; Mt. Hebo, Oregon; North Bend, Oregon; Walla Walla, Washington; Othello, Washington; and Umatilla, Oregon.

9/ The Spokane Area Exchange is the only exchange within the Northwest Area Exchange which has an Exchange Manager. Further, the Spokane Area Exchange, unlike the smaller satellites, employs a Personnel Supervisor as well as several clerical employees.

The evidence further establishes that local managers, such as those located at the Vancouver and Kingsley satellites, have the authority to hire, fire, discipline and counsel employees, subject to final approval by the General Manager. In this connection, the record shows that most hiring occurs among potential employees residing in the same geographic area in which a particular exchange is located. Further, there is little or no employee interchange between the headquarters operation and the satellites and sites; there is no day-to-day contact; reduction-in-force actions are on a local rather than an area-wide basis; and job posting is accomplished on a local basis. Moreover, as noted above, the record reveals that there is a substantial geographic distance between headquarters and certain of the satellites and sites, including the Vancouver and Kingsley Exchanges. Specifically, in this regard, the Vancouver Exchange is located some 175 miles from headquarters and the Kingsley Exchange is in excess of 400 miles from headquarters at Fort Lewis.

Under all of the circumstances, and noting the Activity's agreement that the unit sought by the AFGE is appropriate, as well as the centralized nature of personnel and labor relations policies within the Northwest Area Exchange and the fact that employees at the various locations throughout the Area Exchange share the same general working conditions, I find that the employees in the unit sought by the AFGE share a clear and identifiable community of interest, and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I find that the unit sought herein by the AFGE is appropriate for the purpose of exclusive recognition under the Order and I shall direct an election in such unit. 10/

Also, I find that the units petitioned for by SEIU Local 49 and SEIU Local 92, respectively, constitute appropriate units. Thus, the record demonstrates that the employees in the claimed satellite units have the same immediate terms and conditions of employment, that they are widely separated geographically from other employees of the Northwest Area Exchange, and that they do not interchange with employees of the other components of the Northwest Area Exchange. Moreover, the evidence establishes that the authority to hire and to discipline exists at the local level, with final approval for such actions resting with the General Manager. Under these circumstances, I find that the employees in the units sought by SEIU Local 49 and SEIU Local 92 share a clear and identifiable community of interest. Moreover, the evidence did not establish that such units would fail to promote effective dealings and efficiency of agency operations. 11/

10/ Cf. Army and Air Force Exchange Service, Vandenberg Air Force Base Exchange, Vandenberg Air Force Base, California, A/SLMR No. 218.

11/ Cf. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC No. 71A-9.

The record reveals that the Northwest Area Exchange employs approximately 36 off-duty military personnel who, because of agency regulations, are classified as "temporary part-time." These employees perform substantially the same work, are paid according to the same wage scale, and are subject to the same working conditions as civilian employees. Under these circumstances, I find that if such off-duty military personnel have been employed for a sufficient number of hours to acquire regular full-time or regular part-time employee status, they should be considered as such for the purpose of inclusion in the units found appropriate. 12/

The AFGE and the Activity agreed to exclude from the claimed Area Exchange-wide unit temporary full-time employees, temporary part-time employees, casual and on-call employees. As the record reveals that neither temporary part-time nor on-call employees have a reasonable expectancy of continued employment, I find that such categories should be excluded from the units found appropriate. Further, inasmuch as the evidence establishes that there are no temporary full-time or casual employees presently employed by the Northwest Area Exchange, I shall not at this time make any findings with respect to whether they properly come within the excluded category of employees based on their job status at the Activity. 13/ Although the petition, as amended at the hearing, contained reference to confidential employees, there is no record evidence herein that there are employees in this classification. Accordingly, I make no finding with respect to the confidential employee classification.

Having found that the employees petitioned for by SEIU Locals 49 and 92 may, if they so desire, constitute separate appropriate units, I shall not make any final unit determination at this time, but shall first ascertain the desires of the employees by directing elections in the following voting groups:

12/ It has been found previously that off-duty military personnel, who work a sufficient number of hours to be classified as either regular full-time or regular part-time, may not be excluded from a unit on the basis of agency regulations which categorize such personnel as "temporary part-time" employees regardless of the time they work or otherwise automatically exclude them from bargaining units. See, e.g., Army and Air Force Exchange Service, Fort Huachuca Exchange Service, Fort Huachuca, Arizona, A/SLMR No. 167.

13/ Cf. Alaskan Exchange System, Base Exchange, Fort Greely, Alaska, A/SLMR No. 33; and Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, A/SLMR No. 190.

voting group (a): All regular full-time and regular part-time employees, including off-duty military personnel in either of the foregoing categories, employed by the Northwest Area Exchange, Army and Air Force Exchange Service, located at Kingsley Field, Klamath Falls, Oregon, excluding temporary part-time employees, on-call employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

Voting group (b): All regular full-time and regular part-time employees, including off-duty military personnel in either of the foregoing categories, employed by the Northwest Area Exchange, Army and Air Force Exchange Service, located at Vancouver Barracks, Vancouver, Washington, excluding temporary part-time employees, on-call employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

Voting group (c): All regular full-time and regular part-time employees, including off-duty military personnel in either of the foregoing categories, employed by the Northwest Area Exchange, Army and Air Force Exchange Service, excluding all employees in voting groups (a) and (b), temporary part-time employees, on-call employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

If a majority of the employees voting in group (a) selects the labor organization (SEIU Local 49) seeking to represent them separately, they will be taken to have indicated their desire to constitute a separate appropriate unit and the Area Administrator supervising the election is instructed to issue a certification of representative to the labor organization seeking to represent them separately. However, if a majority of the employees voting in group (a) does not vote for the labor organization (SEIU Local 49) which is seeking to represent them in a separate unit, the ballots of the employees in such voting group will be pooled with those of the employees voting in group (c). If a majority of employees in voting group (b) selects the labor organization (SEIU Local 92) seeking to represent them separately, they will be taken to have indicated their desire to constitute a separate appropriate unit and the Area Administrator supervising the election is instructed to issue a certification of representative to the labor organization

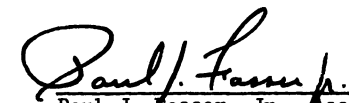
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seeking to represent them separately. However, if a majority of the employees voting in group (b) does not vote for the labor organization (SEIU Local 92) which is seeking to represent them in a separate unit, the ballots of the employees in such a voting group will be pooled with those of the employees voting in group (c). The employees in voting group (c) shall vote whether or not they desire to be represented by the AFGE. 14/

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible in voting group (a) shall vote whether they desire to be represented for the purpose of exclusive recognition by Service Employees International Union, AFL-CIO, Local 49; by American Federation of Government Employees, AFL-CIO, Local 1504; or by neither. Those eligible in voting group (b) shall vote whether they desire to be represented by Service Employees International Union, AFL-CIO, Local 92; by American Federation of Government Employees, AFL-CIO, Local 1504; or by neither. Those eligible in voting group (c) shall vote whether or not they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, AFL-CIO, Local 1504.

Dated, Washington, D.C.
January 8, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

14/ If the votes of voting group (a) and/or (b) are pooled with the votes of voting group (c), they are to be tallied in the following manner: In voting groups (a) and/or (b), the votes for SEIU Local 49 and SEIU Local 92, respectively, the labor organizations seeking separate units, shall be counted as part of the total number of valid votes cast but neither for nor against the AFGE, the labor organization seeking to represent the Area Exchange-wide unit. All other votes are to be accorded their face value. I find that, under the circumstances, any unit resulting from a pooling of votes as described above constitutes an appropriate unit for the purpose of exclusive recognition under the Order.

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UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER CLARIFYING UNIT OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF AGRICULTURE,
 UNITED STATES FOREST SERVICE,
 ANGELES NATIONAL FOREST,
 PASADENA, CALIFORNIA
 A/SLMR No. 339

This case involved two petitions for clarification of unit (CU), filed by National Federation of Federal Employees, Local 1650 (NFFE). In this regard, the NFFE seeks to clarify an existing exclusively recognized unit by: (1) adding to the unit "permanent" employees appointed for less than 13 pay periods per year and "temporary" employees hired annually for periods not to exceed 180 days, and (2) having certain employees declared not to be supervisors and, thus, not excluded from the unit.

The "temporary" employees hired for periods not to exceed 180 days, and "permanent" employees appointed for less than 13 pay periods per year, supplement the regular permanent complement of employees at the Activity because of the seasonal nature of fire hazards which is a major concern of the Activity. The Assistant Secretary determined that in many respects employees in these categories were similar to the unit employees. However, it was noted that these two categories of employees specifically were excluded from the unit as originally established. The Assistant Secretary stated that a CU petition is inappropriate for the purpose of adding to the unit categories of employees previously excluded specifically by the unit definition, even where the categories involved may arguably have been included appropriately within the unit when such unit was established. Accordingly, he ordered that the CU petition seeking to clarify the unit to include these two categories of employees be dismissed.

The second CU petition involved employees classified as Supervisory Forestry Technician, a group not specifically referred to in the original unit description. During the fire season, these employees direct the activities of seasonal employees. The NFFE contends that these employees are not supervisors; that, for the most part, they supervise no employees except during the fire season when they act as work leaders; and that, during the remainder of the year, some of them act as a work leader for only one employee. The Assistant Secretary concluded that, during the fire fighting season, Supervisory Forestry Technicians exercise duties indicating that they have supervisory status within the meaning of Section 2(c) of the Order. However, except for certain activity related to fire season work and certain follow-up activity after the conclusion of the fire season, maintenance work is the primary duty of the Supervisory Forestry Technicians in the off-season and the evidence did not establish that the Supervisory Forestry Technicians perform supervisory functions in the off-season period in connection with maintenance work. Accordingly, the Assistant Secretary found that the Supervisory Forestry Technicians should be excluded from the unit during the period when they are exercising supervisory functions, and should be included in the unit during those periods when they exercise no supervisory functions, and he ordered that the unit be clarified to reflect this situation.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
 UNITED STATES FOREST SERVICE, ANGELES
 NATIONAL FOREST, PASADENA, CALIFORNIA

Activity

and

Case Nos. 72-3983 and
 72-3985

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
 LOCAL 1650

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer John J. Shea. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, the Assistant Secretary finds:

The Petitioner, National Federation of Federal Employees, Local 1650, herein called NFFE, seeks clarification of an existing exclusively recognized unit. By its amended petition in Case No. 72-3983, the NFFE seeks to add to its existing unit "temporary" employees hired annually for periods not to exceed 180 days and "permanent" employees appointed for less than 13 pay periods per year. The current exclusively recognized unit excludes both of these categories of employees. 1/

1/ The certification of representative, dated June 29, 1971, describes the unit as:

All nonprofessional employees of the Department of Agriculture, U.S. Forest Service, Angeles National Forest, Pasadena, California, including temporary employees with an appointment of one year or more, excluding managers, supervisors, guards, persons performing Federal personnel work in other than a purely clerical capacity, professional employees, permanent employees appointed for less than thirteen full-time pay periods per year, and temporary employees with an appointment of less than one year.

At the hearing, it was determined that "temporary employees with an appointment of less than one year" are actually appointed for less than 180 days within the year. These two descriptions refer to the same employees and are used interchangeably.

In Case No. 72-3985, the NFFE seeks to have certain employees of the Activity declared not to be supervisors and, thus, not excluded from the unit.

"Temporary" employees hired annually for periods not to exceed 180 days and "permanent" employees appointed for less than 13 pay periods per year.

The Activity is a national forest which covers some 691,000 acres. It employs approximately 300 to 350 regular permanent employees. Because of the seasonal nature of fire hazards, approximately 250 "temporary" employees are hired annually for a period not to exceed 180 days. 2/ In addition, there are employed approximately 20 "permanent" employees whose appointments are for less than 13 (2 week) pay periods per year. The fire season generally runs from mid-May to mid-November.

The "temporary" employees and the "permanent" employees who work less than 13 pay periods per year have many similar duties and similar conditions of employment both as to each other and to other employees who are included within the currently recognized unit. Thus, their duties relate primarily to fire control, and they have the same supervision and receive the same pay as regular employees of similar experience. Although the "temporary" employees accrue leave and sick pay, they are not entitled to participate in Government life insurance, or health or retirement programs. Nor do the "permanent" employees who work less than 13 pay periods participate in Government life or health insurance programs.

The "temporary" employees are hired pursuant to authority granted by the U.S. Civil Service Commission. They are hired from lists accrued and maintained by individual Ranger District Offices, and except for some 20 limited duration appointments involving maintenance work rather than fire control, none of the "temporary" employees apply for positions through the U.S. Civil Service Commission, as would the regular employees and the "permanent" employees who work less than 13 pay periods per year. The record indicates that the "temporary" employees, as well as the disputed "permanent" employees, have a reasonable expectancy of future employment. Thus, many of the "temporary" employees are rehired annually, and they are given credit for prior experience so that they may be rehired at progressively higher grades. 3/ At the hearing, the Activity stated that it did not object to the inclusion of these two categories of employees in the established unit.

It has been indicated in previous decisions that a petition for clarification of unit (CU) is a vehicle to be used only in certain specific circumstances. 4/ Thus, a CU petition may be used to resolve uncertainties

2/ Their tours of duty may be extended to up to 220 days in emergencies.

3/ For example, in 1971, 57 percent of the "temporary" employees were rehires. In 1972, 42 percent of the "temporary" employees were rehires and for the first 7 months of 1973, 71 percent were rehires.

4/ See Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160.

relating to unit inclusions or exclusions of categories of employees, when the certified or exclusively recognized unit description does not on its face resolve such questions. 5/ In this regard, a CU petition could be used to resolve the supervisory status of disputed employees or to determine whether certain employees fall within the classifications described in the certification or recognition. However, such a petition is inappropriate for the purpose of adding to the unit categories of employees which were previously excluded specifically by the unit definition, even where the categories involved may arguably have been included appropriately within the unit when such unit was established. As it is clear that the two categories of employees sought to be included by the CU petition in Case No. 72-3983 were excluded expressly in the certification of representative, 6/ I find that such petition was inappropriate in the circumstances of this case and, therefore, I shall order that it be dismissed.

Supervisory Forestry Technicians.

In Case No. 72-3985, the NFFE seeks to clarify the status of certain employees classified as Supervisory Forestry Technicians 7/, whom the Activity would exclude from the unit as supervisors. The NFFE contends that these employees are not supervisors; that, for the most part, they supervise no employees except during the fire season when they act as work leaders for approximately four or five seasonal employees; and that, during the remainder of the year, some of these Supervisory Forestry Technicians act as a work leader of only one employee.

The Activity is divided into five districts, each headed by a District Ranger. Between the District Ranger and the Supervisory Forestry Technicians there are several levels of supervision. Thus, each district is further divided into from two to six stations, with the Supervisory Forestry Technicians being the senior employees at nearly all of these stations. In the Angeles National Forest there are 26 stations in all, most of which are geographically isolated from the offices which house the Supervisory Forestry Technicians' supervisors.

5/ The NFFE cited U.S. Department of Agriculture, Regional Forestry Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88, to support its position that the "temporary" employees herein should be included in the exclusively recognized unit. As that case involved a determination of an appropriate unit pursuant to an RO petition and not the clarification of an existing recognized exclusive unit, its holding with respect to "temporary" employees was considered inapposite in the instant proceeding.

6/ Compare, California Air National Guard Headquarters, 163rd Fighter Group, Ontario International Airport, Ontario, California, A/SLMR No. 252.

7/ Unlike the categories described above, this group of employees is not specifically referred to in the original unit description. Thus, the CU petition in Case No. 72-3985 was considered to have been appropriately filed.

During the May to November season, fire control is the principal concern at the stations and, in this period, most of the Supervisory Forestry Technicians are in contact with their own supervisors irregularly, often only by telephone. During the fire season, each Supervisory Forestry Technician is responsible at his station for a crew of employees of varying size, most of whom are seasonal employees. The record reveals that, with respect to the seasonal employees, the Supervisory Forestry Technicians participate in interviewing, hiring, and discharge of such employees, handle their grievances, evaluate their performances, make recommendations for their promotions, use independent judgement in making work assignments, approve limited amounts of leave, and generally are responsible for their safety and training. Further, some Supervisory Forestry Technicians have recommended cash awards for such employees, which recommendations have been followed.

The record indicates that during the season, approximately 20 percent of the Supervisory Forestry Technicians' time is spent performing administrative tasks, with the rest of their time spent working with the crew assigned to their respective stations. Prior to the season, and in cooperation with their own supervisors, Supervisory Forestry Technicians plan the work to be done for the season, set priorities, and participate in interviewing and rating applicants for seasonal jobs. The record indicates, however, that except for this preparation activity related to fire season work and certain follow-up activity after the conclusion of the fire season, maintenance work is the primary duty of the Supervisory Forestry Technicians in the off-season. The evidence does not establish that the Supervisory Forestry Technicians perform supervisory functions in the off-season in connection with their maintenance work.

Based on the foregoing circumstances, I find that the Supervisory Forestry Technicians perform supervisory functions within the meaning of Section 2(c) of the Order during the fire fighting season. However, I find also that the record does not establish that the Supervisory Forestry Technicians, as a group, perform in a supervisory capacity with respect to other employees of the Activity during the remainder of the year when their primary function is the performance of maintenance work. Employees with different responsibilities in different periods of the year, such as these, have, in the past, been found by the Assistant Secretary to be "seasonal supervisors." And although such "seasonal supervisors" may properly be excluded from the unit during the period when they are exercising supervisory functions, they should be included in the unit during those periods when they exercise no supervisory functions. ^{8/} Accordingly, I shall order that the unit be clarified to reflect the foregoing situation.

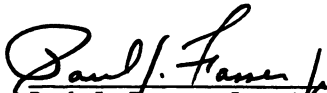
^{8/} See Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, A/SLMR No. 212.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 72-3983 be, and it hereby is, dismissed.

IT IS HEREBY FURTHER ORDERED that the unit sought to be clarified by the petition in Case No. 72-3985 be, and it hereby is, clarified to include in said unit employees classified as Supervisory Forestry Technicians during that portion of the year when they exercise no supervisory authority, and to exclude these employees from the unit during that portion of the year when they exercise supervisory authority.

Dated, Washington, D.C.
January 8, 1974


Paul J. Vasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF AIR FORCE,
WARNER ROBINS AIR MATERIEL AREA (WRAMA),
COMMISSARY STORE 2853RD AIR BASE DIVISION,
ROBINS AIR FORCE BASE, GEORGIA

UNITED STATES DEPARTMENT OF AIR FORCE,
WARNER ROBINS AIR MATERIEL AREA (WRAMA),
COMMISSARY STORE 2853RD AIR BASE DIVISION,
ROBINS AIR FORCE BASE, GEORGIA
A/SLMR No. 340

Respondent

and

Case No. 40-4611(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 987

Complainant

DECISION AND ORDER

On August 30, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

1/ The Complainant made an untimely request for an extension of time in which to file exceptions.

The proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, AFL-CIO, Local 987 (Complainant). The complaint alleged that the Respondent Activity, through the statements and actions of the Commissary Store Manager and the Assistant Manager at a meeting held on September 28, 1972, with two cashier employees and a shop steward, violated Section 19(a)(1) and (6) of the Order, as amended. Specifically, it was contended that the Commissary Store Manager and the Assistant Manager, by characterizing the shop steward as a problem maker who was attempting to do management's job, implied to the employees involved that the Respondent sought to interfere with the relationship between the employees and their exclusive representative. It also was alleged that the Respondent Activity improperly required additional steps in the processing of a grievance contrary to the terms of the existing negotiated grievance procedure, denied appropriate official time for the preparation of a grievance, and discouraged the pursuit of a grievance by such tactics as the "high pressure" questioning of the grievants and urging them to contact the Personnel Office or utilize EEO procedures rather than their shop steward. The Administrative Law Judge recommended dismissal of the complaint in its entirety because he concluded that the Complainant had not sustained the burden of proving its allegations.

The Assistant Secretary, noting that six days prior to the filing of the charge in this matter a grievance addressing the same issues raised by the charge and the subsequent complaint was filed with the Respondent, concluded that, pursuant to Section 19(d) of the Order, he was without authority to consider the subject matter of the complaint. Accordingly, he ordered that the complaint be dismissed in its entirety.

The complaint herein alleges that the Respondent, through the statements and actions of the Commissary Store Manager and the Assistant Manager at a meeting held on September 28, 1972, with two cashier employees and a shop steward, violated Section 19(a)(1) and (6) of the Order, as amended. Specifically, it is contended that the Commissary Store Manager and the Assistant Manager, by characterizing the shop steward as a problem maker who was attempting to do management's job, implied to the employees involved that the Respondent sought to interfere with the relationship between the employees and their exclusive representative. It also is alleged that the Respondent improperly required additional steps in the processing of a grievance contrary to the terms of the existing negotiated grievance procedure, denied appropriate official time for the preparation of a grievance, and discouraged the pursuit of a grievance by such tactics as the "high pressure" questioning of the grievants and urging them to contact the Personnel Office or utilize EEO procedures, rather than their shop steward.

The evidence establishes that on October 6, 1972, six days prior to the filing of the charge in this matter, a grievance addressing the same issues raised by the charge and the subsequent complaint was filed with the Respondent. As did the charge and complaint, the grievance alleged that during the above-noted September 28, 1972, meeting, the Commissary Store Manager and the Assistant Manager alternately questioned the employees without giving them an opportunity to reply; told the employees' designated representative and steward that she was trying to take over the Commissary and do management's job; and informed the employees present at the meeting that the employees did not have a problem and that management would determine when there was a problem. The grievance alleged further that the Commissary Store Manager and his Assistant interfered with the employees' right to choose their own representative, that they used coercion in an attempt to interfere in the presentation and preparation of the employees' grievance, that they interfered with the employees' right to present their grievance above the first level supervisor, and that they denied the employees the opportunity to prepare a formal grievance.

In my view, Section 19(d) of the Order is dispositive of the instant complaint. 2/ Thus, under the circumstances of this case, it is clear

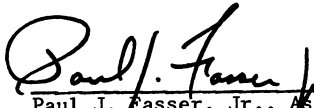
2/ Section 19(d) provides, "Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. Appeals or grievance decisions shall not be construed as unfair labor practice decisions under this Order nor as precedent for such decisions. All complaints under this section that cannot be resolved by the parties shall be filed with the Assistant Secretary." (Emphasis added.)

that the issues raised by the Complainant in its complaint herein were raised previously in a grievance filed with the Respondent. Accordingly, pursuant to Section 19(d) of the Order, I am without authority to consider the subject matter of the complaint and, therefore, shall order that it be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-4611(CA) be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.
January 8, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR MANAGEMENT RELATIONS
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210

- 2 -

CASE NO. 40-4611(CA)

Warner Robins Air Materiel Area (WRAMA)
United States Department of Air Force
Commissary Store 2853rd Air Base Division,

Respondent

and

Local 987, American Federation of
Government Employees, AFL/CIO,

Complainant

BEFORE: Rhea M. Burrow
Administrative Law Judge

APPEARANCES:

Michael A. Deep, Esq.
Jackie K. Cooper, Esq.
Office of Staff Judge Advocate
WRAMA/JA
Robins Air Force Base, Georgia 31098

For the Respondent

Bobby L. Harrage
Special Assistant, AFGE Local 987
P. O. Box 1079
Warner Robins, Georgia 31091

and

John R. Brooks, President
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P.O. Box 1079
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For the Complainant

Pursuant to a Notice of Hearing issued on February 12, 1973, by the Regional Administrator of the Labor Management Services Administration, Atlanta Region, a hearing was held in the above entitled matter on April 17 and 18, 1973, at Perry, Georgia. The Notice of Hearing specified that "A hearing should be held with reference to violations of section 19(a)(1) and (6) of Executive Order 11491," (herein called the Order).

The proceeding was initiated under the Order by the filing of a complaint on December 18, 1972, by American Federation of Government Employees, AFL/CIO, Local 987 (herein called Complainant) against Warner Robins Air Materiel Area, U.S. Department of Air Force, Commissary Store 2853rd Air Base Division, Robins Air Force Base, Georgia (herein called Respondent, or WRAMA).

The complaint as amended 1/ alleges that on September 28, 1972, the WRAMA 2853rd Air Base Division Commissary Store Managers expressed their "opinions" of Mrs. Green; 2/ as a problem-maker and trying to do management's job infers to employees that they may be better off if not associated with Mrs. Green or at least worse off by designating her as their representative. Such actions inherently discourages membership in a labor organization in violation of section 19(a)(1) of the Order. In addition, interfering with the employee-representative relation, requiring additional steps in the processing of a grievance in the presence of a negotiated grievance procedure, denying appropriate official time for the preparation of a grievance, discouraging the pursuit of a grievance with such tactics as "high pressure" questioning of the grievants, and the urging to contact Personnel rather than to shop steward or to use EEO procedures interferes with, restrains and coerces the employees in the exercise of their rights in violation of section 19(a)(1) of the Order. Notwithstanding the aforementioned violations of the Order, such action constitutes a failure to consult, confer or negotiate with a labor organization as required in violation of section 19(a)(6) of the Order. At the beginning of the hearing counsel for the Complainant stated that in trying to informally resolve the matter charged in its letter of October 12, 1972, the employer failed to offer a reasonable resolution to the complaint.

1/ The initial complaint was erroneously filed at the Regional Office, U.S. Department of Labor, and to correct the first amended complaint was filed with the Regional Administrator on January 10, 1973. The second amended complaint was filed January 15, 1973, and withdrew that part of the charge alleging violation of section 19(a)(2) of the Order.

2/ Gwendolyn R. Green, Local 987 AFGE steward.

That Respondent denies a violation of the Order and contends:

- (1) That the commissary store managers bent backward to establish good labor management relationship and this is known to the union and the stewards;
- (2) That the entire matter has a connotation much different than a violation of the Executive Order;
- (3) That management has done everything possible to get along with stewards and they have not been degraded; that the Respondent has bent over backwards to resolve the matter but without success.

At the hearing, representatives appeared on behalf of both the Complainant and Respondent. The parties were afforded full opportunity to be heard, to examine, and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Post-hearing briefs were submitted by counsel for the Complainant and the Respondent.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the evidence adduced at the hearing, I make the following findings, conclusions, and recommendations.

I

The Issue

The issue presented for consideration in this proceeding is:

Whether the commissary managers made statements or acted in such a matter at the meeting held on September 28, 1972, as to violate section 19(a)(1) and (6) of the Order.

The Respondents motion to dismiss the proceeding referred to me by the Regional Administrator and renewed at the hearing is not shown to have been predicated on an approval of settlement under the Regulations pursuant to 29 CFR 203.6(a)(3) and should be denied.^{3/} There was disagreement as to whether the method of apology sought by Complainant following findings reported by an investigating committee.

^{3/} 29 CFR 203.6(a)(3) provides:

- (a) The Regional Administrator shall take action which may consist of the following as appropriate:
 - (2) Dismiss the complaint.
 - (3) Approve a written settlement agreement between the parties or written offer of settlement by the Respondent, made anytime prior to the close of a hearing, if any.

had been complied with and determination of whether there had been compliance with demands made by Complainant depended in part upon testimony and credibility of witnesses at the hearing. No offer of settlement was made at the hearing. Hence, no settlement agreement or offer of settlement was approved by the Regional Administrator prior to the close of the hearing and dismissal of the case on basis of Respondent's motion is recommended; the Regional Administrator is a necessary party to such action. The evidence does show that there was in fact substantial compliance by Respondent with all of the demands for settlement made by the union. However, in view of the disposition recommended in this case on the merits the question of whether the settlement agreement should be approved by the Assistant Secretary is rendered moot.

II

The Commissary Store

Warner Robins Air Materiel Area with headquarters located at Robins Air Force Base, Georgia, is a major military center servicing "customers" throughout the world for aircraft maintenance, supply, logistics management, weapons and procurements necessary to United States military operations. A Major General is in command of the base. WRAMA in performing its mission at Robins Air Force Base employs over 16,000 civilian employees plus 5,000 military personnel. The land area encompassed by the base is roughly five miles long and two miles wide, with over 1,000 buildings ranging from enormous air craft hangers and warehouses to minor administrative buildings.

The commissary store is not involved in the operations and responsibilities of WRAMA. It is simply a supermarket food store located in a single building where the wives of military personnel, active duty and retired, come to shop for groceries. The volume of business is eight to nine million dollars per year. Approximately 80 persons are employed to carry out the \$700,000 per month commissary store operation including meat cutters, stock handlers and sales-store checkers.

Julian Byron Love, the commissary store manager, and Eugene T. Hamlin, the assistant manager, are the persons alleged to have committed the unfair labor practices herein on September 28, 1972, in the presence of Jane B. Floyd, Sheryl Gail Youngblood, and Gwendolyn R. Green, all sales-store checkers; Mrs. Green is also an AFGE Local 987 steward.^{4/}

^{4/} At the hearing Mrs. Green testified that she became a shop steward at the commissary store about July 1972 (transcript, page 225).

The store operates on two shifts called the common and uncommon tours of duty. The common tour of duty worked from 0945 to 1830 on Monday and 0800 to 1645 from Tuesday through Friday. The uncommon tour of duty was from 10:45 to 19:30 Tuesday through Friday and 0800 to 1645 on Saturday. The normal rotation for the tours of duty established by Air Force Regulations was six weeks.

III

Events Relating to September 28, 1972, Meeting:

Mrs. Jane B. Floyd and Mrs. Sheryl Gail Youngblood were sales-store checkers at the WRAMA Commissary Store for about one and one-half and four years, respectively, prior to September 28, 1972. Sometime in January 1972 Mrs. Youngblood had enrolled in school for an educational course and about June 1972, Mrs. Floyd also started school. The schools that they attended were sponsored by the state and the courses for which each employee was enrolled was for her own self-improvement and entirely unrelated to their work on WRAMA operation.

After entering school, Mrs. Floyd and Mrs. Youngblood requested that their work be arranged to permit them to attend scheduled evening classes. The testimony of record reveals that at no time did management fail to make arrangement for them to attend school. In fact, it shows that whenever they were on a tour of duty which conflicted with their school program they were placed on an established tour of work from 0800 to 1645 on the days there was a conflict in work and their school schedule. This tour of work was utilized to make special arrangement for the sales-store checkers and/or employees who were attending school. This arrangement had continued until about a week before the September 28 meeting for Mrs. Floyd but as to Mrs. Youngblood, arrangement had been made for the days that she had a conflict in classes to work the specially arranged tour for the entire year.

Immediately prior to September 28, 1972, Mrs. Floyd stated that she and Mrs. Youngblood had gone to see Mr. Hamlin about arranging on those days that they went to school to get off early so they could be at their school classes on time. Mr. Hamlin fixed up the tour of duty so that they came in at 8:45 a.m. and left at 5:30 p.m. ^{5/} This was a temporary arrangement to accommodate Mrs. Floyd and Mrs. Youngblood until early October when there was a tour of duty change.

^{5/} Transcript, pages 105 and 106.

Mr. Love, commissary manager, had been on leave for two weeks prior to September 28, 1972, and returned to work on that day. Mr. Hamlin, his assistant, was attending EEO school on the day that Mr. Love returned to work and did not report to the commissary until about 3:15 p.m. when his classes were over. Upon return from vacation, Mr. Love noticed or discovered that the temporary tour of work which had been scheduled for Mrs. Floyd and Mrs. Youngblood by Mr. Hamlin while he was on leave was not an authorized one by WRAMA; he immediately contacted personnel and took action to convert it to one that was approved so the ladies would get paid; they had already worked one week on this tour. Approval, was secured and they were paid.

On the morning of September 28, 1972, Mrs. Green, a shop steward of Local 987 came to Mr. Love and requested a meeting with Mrs. Floyd and Mrs. Youngblood. It was immediately scheduled for 3:30 p.m. without any discussion as to the subject matter or problem.

When Mr. Hamlin arrived at the commissary shortly before the meeting was scheduled, Mr. Love inquired if he was aware of any problem that had developed as to Mrs. Floyd and Mrs. Youngblood while he had been on leave. Mr. Hamlin reported that he was unaware of any problem and they decided to meet with the steward and employees at the appointed time.

The five, Mr. Love, Mr. Hamlin, Mrs. Floyd, Mrs. Youngblood, and Mrs. Green, met in Mr. Love's office, also referred to at the hearing as the vault, which was described as a small room about 8 by 10 feet in size. Mrs. Floyd and Mrs. Youngblood testified that they had been instructed by Mrs. Green not to say anything at the meeting and they did not do so; Mrs. Floyd testified that Mr. Hamlin only asked one question at the meeting and that was what is the problem? Mrs. Youngblood testified that she heard Mr. Hamlin make one statement and that was this was an EEO case. She also testified as follows:

"Q. Did you hear a statement to the effect that Mrs. Green was trying to do management's job?

A. I heard one to the effect that she was trying to take over.

Q. Trying to take over the Commissary.

A. Yes.

Q. Who made that statement, do you recall?

A. Mr. Love.

Q. Mr. Love. Was this in the meeting of September 28?

A. No sir, it was prior to that.

Q. Prior to that meeting. Was it ever suggested to you by either one of your supervisors that you should seek assistance from Personnel or EEO rather than Mrs. Green or the Union?

A. Only at the meeting it was suggested it was an EEO problem."6/

On cross examination she stated that she was not sure who had made the statement.

Mrs. Green described the meeting as follows:

"Q. At this meeting on September 28, you stated that these gentlemen asked questions?

A. Yes sir.

Q. Would you speak, please, from your recollections, which gentleman asked you questions?

A. They were--Mr. Hamlin was generalizing. He was reared back in his chair. And mostly what he was saying was that I was trying to take management's job, trying to do management's job, they were asking cashiers questions, but I had told the cashiers that I would do their talking since I had not found out all the facts, that we could not hold this meeting correctly. I tried to adjourn the meeting one time before I adjourned it and things were going so fast that I couldn't."7/

All present at the meeting indicated that Mrs. Green abruptly terminated the meeting without permitting Mrs. Floyd or Mrs. Youngblood to answer the inquiry as to what was the problem and also that Mrs. Green would not or did not answer the inquiry. In answer to an inquiry from the Administrative Law Judge as to whether she ever went back to the commissary managers to tell them what the facts were before any charges were filed she first answered: "I couldn't because I never got the chance." And when directed to answer yes or no and not evade the question she stated she couldn't answer and when directed to do so, she declined."8/

6/ Transcript, pages 194 and 195.

7/ Transcript, page 255.

8/ Transcript, page 267.

Mr. Love testified that he scheduled the meeting for 3:30 p.m., September 28 at the request of Mrs. Green to meet with Mrs. Floyd and Mrs. Youngblood; no reference was made prior to or during the meeting of any grievance and he and Mr. Hamlin decided to attend the meeting shortly before it was scheduled to ascertain if the employees had any problem bothering them that they could resolve. All parties arrived for the meeting about the same time and Mr. Love and Mr. Hamlin inquired as to what was the problem. Mrs. Floyd and Mrs. Youngblood did not participate in the discussion as they were instructed by Mrs. Green not to do so as she would do the talking. The meeting only lasted 5 minutes as it was terminated by Mrs. Green before anyone could ascertain any information as to what problem was involved. Mr. Love testified that he did not state at the meeting that this was an EEO problem and the only words mentioned as to EEO was the fact that I told them that Mr. Hamlin had gone to EEO school and I had not had a chance to discuss the meeting with him until he returned. Payroll data was also introduced at the hearing to refute that Mrs. Floyd and Mrs. Youngblood had taken annual leave to attend school as contended but had actually been on special tours of duty which had been arranged for them and for which they were paid."9/

Mr. Love also testified that there had been no grievance made by or on behalf of Mrs. Floyd or Mrs. Youngblood prior to or at the September 28, 1972 meeting."10/

IV

Allegations and Proof

The regulations of the Assistant Secretary for Labor Management Relations require that: "The Complainant shall bear the burden of proof at all stages of the proceeding, regarding matters alleged in the complaint...."11/

9/ This was also brought out on cross-examination of Mrs. Floyd and Mrs. Youngblood.

10/ Transcript, pages 35, 44, and 56.

11/ 29 CFR Part II, 203.5(c).

Section 19(a)(1) and (6) of the Order are stated to have been violated and are as follows:

"Sec. 19. Unfair labor practices. (a) Agency management shall not--
(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this order;

"(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order."

The complaint alleges (a) that on September 28, 1972, the Respondent expressed the opinion of Mrs. Green as a problem-maker trying to do management's job and this infers they might be better off if not associated with Mrs. Green or worse off by designating her as their representative.

Mrs. Floyd stated that the only statement made by Mr. Hamlin at the meeting was that he asked the question, "What is the problem?" that she heard the statement made at the meeting that this was an EEO problem, but did not know who made it; that Mr. Love also asked what was the problem and remarked that Mrs. Green was trying to do management's job; she did not hear any statement that Mrs. Green was trying to take over the commissary. ^{12/} A review of Mrs. Floyd's testimony does not reveal that she testified that the Respondent expressed an opinion of Mrs. Green as being a problem maker.

A review of Mrs. Youngblood's testimony quoted in Section III of this decision and the record relating to this allegation reveals that it was at a different meeting altogether that Mr. Love had told her they had had more problems since she officially took over as steward. ^{13/} She further testified that she mentioned to Mr. Love on September 28, 1972, in requesting permission for a meeting that the cashiers were dissatisfied with their "educational fulfillment" because that was all she knew about it at that time. Also, she stated that she attempted to meet with Mrs. Youngblood and Mrs. Floyd the following morning after the September 28 meeting but Mr. Hamlin denied her permission. A short time later after a call to the union office had been made, they all went to the union office and this was when a grievance was prepared. ^{14/}

^{12/} Transcript, page 97.
^{13/} Transcript, page 229.
^{14/} Transcript, pages 230 and 231.

Mr. Hamlin testified that he attended EEO classes on September 28, 1972, and reported to the commissary at 3:15 p.m. and was informed of the meeting scheduled at 3:30 p.m. When he arrived, Mr. Love asked him if he knew of a problem with Jane Floyd and Sheryl Youngblood and he replied that he didn't. Mr. Love suggested that we get all of them in the office and find out what the problem is, and settle it. Mrs. Youngblood was standing nearby and was requested to call Mrs. Floyd and Mrs. Green to the office. When they arrived, he asked if anyone cared to tell him what the problem was. Before anyone could answer, Mrs. Green adjourned the meeting and he only asked the one question. He stated that he had placed Mrs. Floyd and Mrs. Youngblood on the two week temporary unauthorized tour at Mrs. Floyd's request when she reported they had a conflict in schedule of classes and that they would then revert to their regular shift.

A number of witnesses including Mrs. Muriel E. Ingram who rode to work with Mrs. Green testified that she became disappointed when she did not get the cashier-supervisor job in November 1971, and her attitude changed toward everyone including Mr. Love. Mrs. Ingram stated that she and Mrs. Green used to talk about everything but after she didn't get the promotion, she seemed to ignore me from one day to the next. Mrs. Hazel Estes testified that she and Mr. Hamlin were present at a meeting several days before the hearing when Mrs. Floyd was getting ready to leave her employment and at that time she stated Mr. Hamlin had only asked one question at the September 28 meeting:

..."What was the problem? And she did also state that she went to Gwen and asked her on this about the going to school What could ^{be} done, this administrative leave. And at that time, she had no intentions of a grievance or carrying it this far."^{15/}

Mr. Hamlin stated that Mrs. Floyd stated to him sometime after the September 28 meeting that "Sheryl and I had been discussing it, this incident, and she said that we had realized whata stooge we'd been." Also, that on the day she left employment at the commissary, Mrs. Floyd told him and Mrs. Estes that she and Sheryl felt that Gwen had used them.^{16/}

^{15/} Transcript, page 371.
^{16/} Transcript, pages 151 and 152.

Counsel for Complainant in his brief cited Article 16 of the Agreement as providing:

"...A grievance is a matter of personal concern or dissatisfaction to an employee or group of employees acting as individuals...which has not been resolved, and which has been submitted for Management's consideration..." (Underscoring supplied.)

The evidence does not establish that the particular matter of concern or dissatisfaction to the sales-store checkers in this case had been submitted for management's consideration prior to the September 28, 1972, meeting and attempt by the commissary officers to ascertain the specific problem or educational matter of concern involved was thwarted by the union steward, Mrs. Green, at the September 28 meeting when she abruptly terminated the meeting at which the two commissary officers, she, and the two employees concerned were present.

In evaluating the testimony as to the September 28, 1972, meeting, I credit the testimony of Mrs. Floyd, Mrs. Youngblood, Mr. Love, and Mr. Hamlin as most nearly reflecting what occurred therein. Mrs. Green's demeanor on the witness stand was unimpressive; she was evasive in answering questions, seemed more interested in the union procedure and asserting her rights as a steward than resolving the matter of concern referred to her; she seemed unconcerned that the commissary officers had not been apprised of the employee matters in which they had legitimate interest; and, her appraisal of events was exaggerated^{17/} or inaccurate when weighed with other evidence of record.

The oral testimony and documentary evidence or record does not support the complaint that at the meeting on September 28, 1972, the Respondents expressed their opinion of Mrs. Green as a problem-maker trying to do management's job.

Viewing the record in its entirety it appears that (1) Mr. Love and Mr. Hamlin had arranged a schedule of work to accommodate the employees Mrs. Floyd and Mrs. Youngblood on the days they had school classes to get off in time for them to attend school; (2) that a conflict arose during the two week period that Mr. Love was on vacation and Mr. Hamlin approved a temporary plan that permitted them

^{17/} Mr. Floyd testified that Mr. Hamlin did not say anything at the meeting other than to ask the question: "What is the problem?" And Mrs. Youngblood heard him say this was an EEO case. I credit Mr. Love's and Mr. Hamlin's testimony that the only EEO matter mentioned was the school which Mr. Hamlin was attending.

to attend classes without being charged leave; (3) the plan was not one authorized by the Base Command and when Mr. Love returned from leave, he contacted personnel and had a plan authorized that would permit the employees to be paid without delay; (4) that attending school beginning the October term 1972 concerned Mrs. Floyd, but this was not the matter her testimony indicates she mentioned to Mr. Love regarding the two week period that temporary arrangement for her school program had been made by Mr. Hamlin; (5) until the grievance was filed the testimony of record does not indicate that the commissary officers were aware of any specific matter of concern or dissatisfaction that had been presented to them and left unresolved.

What occurred as can best be ascertained is that a breakdown in communications caused principally by an inexperienced union steward who for unexplained reasons did not aid or cooperate on presenting or making known to the commissary officers the matter of concern of the employees she represented; further, at the meeting, on September she would not permit them to explain the matter to them in her presence and she never informed them later of the matter after the meeting and they learned of the specific problem after a grievance was filed on October 6, 1972.

The facts and circumstances as to the incidents relating to the employees school situation were ballooned out of all proportion to the employees' matter of concern. The allegations in the complaint are exaggerated and attribute to the commissary managers' action and conduct for which the union steward was primarily responsible.

(b) It is also alleged that interfering with employer-representative relation, requiring additional steps in the processing of a grievance in the presence of a negotiated procedure, denying of official time for the preparation of a grievance and discouraging the pursuit of grievance with such tactics as high pressure questioning of grievants and urging them to contact Personnel rather than the shop steward or to use EEO procedures, interferes with, restrains and coerces the employees in the exercise of their rights in violation of Section 19(a)(1) of the Order.^{18/}

^{18/} Section 1(a) of the Order provides in part that: "Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from such activity, and each employee shall be protected in the exercise of this right...."

The discovery of a matter of personal concern or dissatisfaction to an employee or group of employees acting as individuals is a subject of mutual interest to agency management and union representatives, not one exclusive of the other; there is also mutual responsibility in sharing and resolving such matters of concern that affect employees and their working conditions. Certainly in the incipient or the discovery stage of ascertaining a problem it is not improper for agency management to inquire at a meeting where the employees concerned are present with their union steward as to what is the problem or matter of concern. Complainant argues that since Mr. Love and Mr. Hamlin were not invited to the September 28 meeting which had been set up by the union steward for her, Mrs. Floyd and Mrs. Youngblood, their presence and questioning of the ladies constituted a violation of the Order. More important than their uninvited appearance is whether under the circumstances there was an interference, restraint or coercion of employees in the exercise of rights assured them under the Order.

Viewing the record from the time Mrs. Floyd and Mrs. Youngblood entered school, it discloses that there was never an occasion when Mr. Love and Mr. Hamlin failed to make arrangement for them to have time off to attend classes, without being charged annual leave, and their actions over the extended period appear to have been those of cooperation and lending assistance rather than hindering or impeding their school program. It is not demonstrated that management by attending the meeting scheduled on September 28 intended or acted in a manner other than to assist the union representative and the employees to resolve whatever matter that may have been of concern to them. Certainly no improper motives are substantiated on the basis of their prior relationship with the employees or by their action at the meeting. Whatever Mrs. Green's reasons may have been for abruptly terminating the meeting it appears blatant from the evidence in this case for Complainant to attribute, fault, taint or blame to management for her provocative action. Neither did Complainant or Mrs. Green offer at the hearing a plausible explanation for such action. Testimony of several other witnesses including a chief union steward at the commissary lend support to the course of conduct for many years followed by Mr. Love and Mr. Hamlin in dealing with employees and their cooperative and mutually respectful effort with the union in resolving problems.

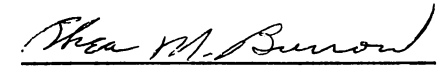
I find under the circumstances of this particular case, that Mr. Love and Mr. Hamlin were attempting to help or assist the employees Mrs. Floyd and Mrs. Youngblood and the union steward at the time of the September 28 meeting which was terminated by Mrs. Green; further, that Complainant has not sustained its burden of proof in establishing that Respondent denied employees official time for preparation of a grievance or discouraged them from pursuit of a grievance by high pressure questioning and urging them to use EEO procedures or contact personnel rather than the union steward.

I also find from a review of the oral and documentary evidence that (c) the record does not establish that the Respondents failed to consult, confer, or negotiate with the Complainant union in violation of Section 19(a)(6) of the Order.

In view of the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that Respondent violated Section 19a(1) and (6) of the Order.

Recommendation

Upon the basis of the above findings, conclusion, and the entire record, I recommended that (1) the Respondents' motion to dismiss the proceedings be denied, and (2) that the complaint herein against the Respondent be dismissed.



Rhea M. Burrow
Administrative Law Judge

Dated at Washington, D. C. this 30th day of August 1973.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. DEPARTMENT OF INTERIOR,
 BUREAU OF INDIAN AFFAIRS,
 INDIAN AFFAIRS DATA CENTER,
 ALBUQUERQUE, NEW MEXICO
 A/SLMR No. 341

This proceeding arose upon the filing of an unfair labor practice complaint by the National Federation of Federal Employees, Local 40, Albuquerque, New Mexico (Complainant), against the U. S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico (Respondent). The complaint alleged essentially that the Respondent violated Sections 19(a)(1), (2) and (6) of the Order based on the announcement and promulgation by the National Office of the Bureau of Indian Affairs of a new policy of Indian preference in employment in derogation of the rights of non-Indians; the contravention of the parties' negotiated agreement by promulgation of the new policy; and the Respondent's failure to consult or negotiate with the Complainant concerning the new policy.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent did not violate Sections 19(a)(1) and (2) of the Order for the reasons alleged. Thus, it was noted that the promulgation of the new National Office policy was not an act of the Respondent Activity nor an act over which it had control. Further, the evidence did not support the contention that the mere announcement of the policy interfered with, restrained, or coerced any employees in the exercise of their rights assured by the Order. Nor was there any evidence of discrimination based on union status or union activities.

The Assistant Secretary also found, in agreement with the Administrative Law Judge, that the Respondent violated Section 19(a)(6) of the Order based on its failure to meet and confer within the meaning of Section 11(a) to the extent consonant with law and regulations, as to the procedures the Respondent's management intended to observe in effectuating the new policy and on the impact of such policy on adversely affected employees. Moreover, in the Assistant Secretary's view, such violative conduct had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order. Accordingly, he found that the Respondent's improper conduct herein also violated Section 19(a)(1) of the Order.

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF INTERIOR,
 BUREAU OF INDIAN AFFAIRS,
 INDIAN AFFAIRS DATA CENTER,
 ALBUQUERQUE, NEW MEXICO

Respondent

and

Case No. 63-4128(CA)

NATIONAL FEDERATION OF FEDERAL
 EMPLOYEES, LOCAL 40,
 ALBUQUERQUE, NEW MEXICO

Complainant

DECISION AND ORDER

On September 26, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding, among other things, that the Respondent, U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendation. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, to the extent consistent herewith.

The complaint herein alleging that the Respondent violated Sections 19(a)(1), (2) and (6) was based upon the announcement and promulgation of a new policy by the Bureau of Indian Affairs National Office of Indian preference in employment in derogation of the rights of non-Indians; the contravention of the parties' negotiated agreement by promulgation of the new policy; and the Respondent's failure to consult or negotiate with the Complainant concerning the new policy.

The Administrative Law Judge recommended that the 19(a)(1) and (2) allegations be dismissed. He concluded, however, that the Respondent's conduct herein constituted a violation of Section 19(a)(6) of the Order.

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendation and I shall repeat them only to the extent necessary.

The Complainant is the exclusive representative of the Respondent Activity's employees. A 2-year negotiated agreement between the parties was approved on November 18, 1970, and a supplemental agreement was executed on January 5, 1971. In August, 1972, the Respondent notified the Complainant of its desire to terminate the existing agreement on November 18, 1972. Subsequently, on November 21, 1972, the parties signed a memorandum of understanding extending the old agreement until a new agreement had been negotiated and approved.

The negotiated agreement contains three provisions which are pertinent to the instant case:

Section 1.7 - CONTROLLING AUTHORITY

In the administration of all matters covered by the agreement, employer and NFFE Local 40 shall be governed by the provisions of any existing or future laws, executive orders, including E.O. 11491, Standards of Conduct for Employee Organizations, code of Fair Labor Practices and regulations, including policies set forth in the FPM and regulations of the Department of the Interior, Bureau of Indian Affairs, Indian Affairs Data Center, which may be applicable. This agreement and any supplementary agreements, memorandas of understanding and amendments shall be at all times applied subject to such laws, executive order, regulations and policies. However, the parties agree that NFFE Local 40 has the right to negotiate within the scope of E.O. 11491 on any and all problems or matters defined hereinafter as negotiable in this Agreement. (emphasis supplied)

Section 3.1 - MANAGEMENT RIGHTS

..... However, employer agrees to consult and/or negotiate with NFFE Local No. 40 prior to making any changes in personnel policies, practices and procedures that are applicable to employees covered by the agreement. Employer further agrees to furnish two copies of any proposed changes in aforementioned personnel policies, practices and procedures to NFFE Local No. 40 for review and consultation at least 10 work days prior to the proposed effective date.

Article 7.1A - PROMOTIONS

..... Consideration will be made without regard to any non-merit factors, such as race, color, religion, sex, national origin, politics, physical handicap, family relationships, marital status, personal favoritism, age or membership in an employee organization.....

On June 23, 1972, the Secretary of the Interior announced his approval of the Bureau of Indian Affairs policy to extend Indian preference to training and to filling vacancies, by original appointment, reinstatement or promotion. Notification of the new policy was sent to all Bureau field offices, including the Respondent Activity. The notice indicated the new policy would become effective immediately within the Bureau of Indian Affairs and was to be incorporated into all existing programs, including the promotion program. It stated also that careful attention must be given to protecting the rights of non-Indian employees. On June 28, 1972, the Respondent addressed a memorandum to "all employees" quoting the above notice in its entirety. Thereafter, the Department and the Bureau issued additional instructions on implementing the new policy, including some which indicated that the impact of the new policy required a special sensitivity to assure equitable application of the preference policy within prescribed limits. The Respondent and the Complainant had numerous conversations about the new policy and also about the Complainant's suggestions concerning ways to alleviate the new policy's adverse effect on non-Indians. Throughout these conversations, however, the Respondent's Personnel Officer maintained that he was without authority to do anything because the new policy left him no discretion and no room for negotiation.

With respect to the alleged violation of Section 19(a)(1), the Complainant contends that the Order was violated in this regard by virtue of the National Office's promulgation of the new and expanded policy of Indian preference in derogation of the rights of non-Indians. In this connection, I agree with the conclusion of the Administrative Law Judge that the promulgation of the new National Office policy was not an act of the Respondent Activity nor an act over which it had control. Also, I concur in his finding that the record fails to support the Complainant's contention that the mere announcement of the policy interfered with, restrained, or coerced any employees in the exercise of their rights assured by the Order. Accordingly, I adopt the Administrative Law Judge's recommendation to dismiss this alleged Section 19(a)(1) violation.

With regard to the Complainant's allegation that the Respondent violated Section 19(a)(2), I agree with the Administrative Law Judge's conclusion that while there was discrimination against non-Indian employees in regard to promotion and other conditions of employment as a result of the new National Office policy, such discrimination had no relationship to union status or union activities. Accordingly, I adopt

the Administrative Law Judge's recommendation that dismissal of the Section 19(a)(2) allegation is warranted.

With regard to the Respondent's alleged refusal to "consult or negotiate" concerning the new policy, the Administrative Law Judge found that the Respondent violated Section 19(a)(6) of the Order by taking the position that it was without authority to negotiate at the local level on the impact of the new policy.

In prior decisions it has been held that notwithstanding the fact that there is no obligation to meet and confer on a particular management decision, an exclusive representative should be afforded the opportunity to meet and confer, to the extent consistent with law and regulations, as to the procedures management intended to observe in effectuating its decision, and as to the impact of such decision on those employees adversely affected. 1/ As noted above, in the instant case, the change in personnel practices resulting from a new policy issued by the National Office of the Bureau of Indian Affairs was not an act of the Respondent Activity, nor an act over which it had control. Moreover, Section 1.7 of the parties' negotiated agreement provided, in pertinent part, that all parties to the agreement would be governed by future policies set forth in regulations of the Department of the Interior, Bureau of Indian Affairs, Indian Affairs Data Center, which may be applicable. Under these circumstances, I find that there was no obligation herein to meet and confer with the Respondent on the decision to establish the new Indian preference policy. However, as discussed above, there was an obligation to meet and confer, to the extent consonant with law and regulations, on the procedures the Respondent's management intended to observe in effectuating the new policy and on the impact of such policy on adversely affected employees. In this latter regard, I find, in agreement with the Administrative Law Judge, that the Respondent's failure to meet and confer on the above-noted matters within the meaning of Section 11(a) constituted a violation of Section 19(a)(6) of the Order. Further, I find that the Respondent's improper refusal to meet and confer with the Complainant necessarily had a restraining influence upon the unit employees and had a concomitant coercive effect upon their rights assured by the Order. Accordingly, I conclude that the Respondent's conduct herein also violated Section 19(a)(1) of the Order.

1/ See United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289 and Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329. See also Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31, and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56.

REMEDY

Having found that the Respondent has engaged in certain conduct prohibited in Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, shall:

1. Cease and desist from:

(a) Refusing to meet and confer, to the extent consonant with law and regulations, with the National Federation of Federal Employees, Local 40, or any other exclusive representative, concerning the procedures management intends to observe in effectuating the requirements of the new policy of Indian preference, and concerning the impact of such policy on adversely affected employees.

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

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Upon request, meet and confer in good faith, to the extent consonant with law and regulations, with the National Federation of Federal Employees, Local 40, or any other exclusive representative, concerning the procedures management intends to observe in effectuating the requirements of the new policy of Indian preference, and concerning the impact of such policy on adversely affected employees.

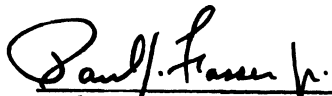
(b) Post at the U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Executive Officer of the Respondent and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices

to employees are customarily posted. The Executive Officer shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material. 2/

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint insofar as it alleges a violation of Section 19(a)(2) and additional violations of Section 19(a)(1) and (6), be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 9, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith to the extent consonant with law and regulations, with the National Federation of Federal Employees, Local 40, or any other exclusive representative concerning the procedures management intends to observe in effectuating the requirements of the new policy of Indian preference, and concerning the impact of such policy on adversely affected employees.

WE WILL, upon request, meet and confer in good faith, to the extent consonant with law and regulations, with the National Federation of Federal Employees, Local 40, or any other exclusive representative, concerning the procedures management intends to observe in effectuating the requirements of the new policy of Indian preference, and concerning the impact of such policy on adversely affected employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Executive Order.

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

2/ At footnote 10 of his Report and Recommendation, the Administrative Law Judge noted that he had "qualms" about the advisability of the posting of a notice in this case. I find that, under the circumstances of this case, the posting of a remedial notice to employees will effectuate the purposes and policies of the Order.

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri, 64106.

Case No. 63-4128(CA)

U. S. Department of Interior, Bureau of Indian Affairs,
Indian Affairs Data Center, Albuquerque, New Mexico,
Respondent

and

National Federation of Federal Employees, Local 40,
Complainant

REPORT AND RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Before: Milton Kramer, Administrative Law Judge

Appearances:

Linda Mizer
405 Conchas Ct., N. E.
Albuquerque, New Mexico 87123

Alice Smith
11504 Marquette, N. E.,
Albuquerque, New Mexico 87123
For the Complainant

George Cross
and
Carl McMullen
P. O. Box 2066
500 Gold St., S. W.
Albuquerque, New Mexico 87103
For the Respondent

September 26, 1973

Case No. 63-4128(CA)

U. S. Department of Interior, Bureau of Indian Affairs,
Indian Affairs Data Center, Albuquerque, New Mexico,
Respondent

and

National Federation of Federal Employees, Local 40,
Complainant

Statement of the Case

This case arises under Executive Order 11491. It was initiated by a complaint dated October 28, 1972 signed by the then President of Local 40 and filed October 31, 1972. The complaint alleges violations of Sections 19(a)(1), (2), and (6) of the Executive Order by Respondent. The violation of Section 19(a)(1) was alleged to consist of a promulgation by the national office of the Bureau of a new policy of Indian preference in employment in derogation of the rights of non-Indians. The violation of Section 19(a)(2) was alleged to consist of the promulgation of the new policy being in contravention of the negotiated agreement between Local 40 and the Respondent Data Center. The violation of Section 19(a)(6) was alleged to consist of Respondent refusing to consult or negotiate with Local 40 concerning the new policy of personnel practices.

The Area Administrator investigated the complaint in this case and in Case No. 63-4021(CA). On January 19, 1973 he issued a Notice of Hearing in this case to be held March 27, 1973. On February 15, 1973 he issued an order consolidating this case for hearing with Case No. 63-4021(CA) and the same day issued an Amended Notice of Hearing of both cases on March 27, 1973.

Hearings were held beginning on March 27, 1973 in Albuquerque, New Mexico. After the hearing in Case No. 63-4021(CA) had progressed for a while the parties advised me that they had agreed on a settlement of that case and that the Complainant would request the Regional Administrator for leave to withdraw that complaint. 1/ The hearing then commenced on this case on March 27, 1973 and concluded on March 28, 1973. Neither side was represented by counsel.

1/ Local 40 later advised me that because of a change of circumstances that settlement had failed to materialize and requested a rescheduling of the hearing. With the agreement of the Regional Administrator I severed the two cases and rescheduled a renewed hearing in Case No. 4021(CA). The parties again agreed on a settlement of that case in a written agreement in which Local 40 again agreed to request the Regional Administrator for leave to withdraw that complaint.

Motions for extension of time, consented to, were granted for good cause, and the time for filing briefs was extended to May 23, 1973. Timely briefs were filed, counsel filing one for Complainant.

Facts

The Complainant is the exclusive representative of Respondent's non-supervisory, non-managerial, and non-professional employees. 2/

In the Indian Reorganization Act of 1934 (25 USC Sections 462 et seq., 48 Stat. 985), Congress provided (in 25 USC Section 472) that qualified Indians may be appointed, without regard to the civil service laws, to positions in the Bureau of Indian Affairs and should have preference in appointment to vacancies in such positions. For some time this was not construed officially and was understood by some to call for preference of Indians only in initial appointments in the Bureau.

The collective bargaining agreement between Complainant and Respondent provided, under the caption "Promotions", that "consideration will be made without regard to any non-merit factor such as race, color, religion, sex, national origin...." 3/ The agreement provided also that in its administration the Activity and the Local would be governed by existing or future laws, executive orders, and Departmental regulations. 4/ It provided also 5/ that the Activity agreed to "consult and/or negotiate" with Local 40 prior to making any changes in personnel policies or practices, and that it would furnish the Local with two copies of any proposed changes in policies or practices at least ten days in advance of their effective date.

2/ Exh. S-4-2-3, sec. 1.4, p.3.

3/ The agreement was negotiated on August 3, 1970, approved by the Acting Commissioner of the Bureau on September 3, 1970, and approved by the Acting Director of Personnel, Department of Interior on November 18, 1970. This provision appears in a supplemental agreement of January 5, 1971. The original agreement provided that the subject of "promotions, re-promotions, reassignments" and certain other subjects would be covered by a supplemental agreement.

4/ Exh. S4-2-3, p.4.

5/ Exh. S4-2-3, p.7.

On June 23, 1972 the Commissioner of the Bureau sent a telegraphic communication to its field offices, including Respondent, announcing a new policy concerning Indian preference. 6/ It stated that the Secretary of the Interior had approved the Bureau's policy to extend the Indian preference, effective immediately, to training and to filling vacancies whether by original appointment, reinstatement, or promotion. It instructed that all employees and recognized unions should be immediately notified of the policy. It stated also that careful attention must be given to protecting the rights of non-Indian employees. On June 28, 1972 the Personnel Officer of the Respondent Activity, Carl McMullen, addressed a memorandum to "all employees" quoting in its entirety the communication from the Commissioner.

From time to time thereafter the Department and Bureau issued additional instructions implementing the new policy. In some of these the Department recognized, and the Bureau communicated to its field offices, that the impact of the new policy required a special sensitivity to assure the application of the preference on an equitable basis within the prescribed limits.

The Personnel Officer of the Respondent Activity was of the view that the newly announced national policy of the Bureau and its implementation was virtually an absolute bar to the appointment, promotion, or reinstatement of non-Indians to any position. The only situation in which he believed a non-Indian could be appointed or promoted was one in which no qualified Indian could be found for a position even after the position was "engineered", i.e., no qualified Indian could be found meeting the specified qualifications, the prescribed qualifications were then lowered, perhaps several times, until they could be lowered no more, and still no qualified Indian could be found. Thus he took the position that there was nothing about the new policy that could be the subject of meaningful consultation or negotiation, because he had no authority but to apply the mandate that came from a higher level. He did not refuse to talk to representatives of Local 40 and had many conversations with the President and Vice-President of Complainant about the new policy on Indian preference, but consistently took the position he was without authority to agree to anything about it because it left him no discretion.

Complainant suggested that non-Indians, faced with a virtual bar to promotion and even any other change in positions, have training for and be given assistance in "outplacement" or "lateral transfer", i.e., training for and assistance

6/ Exh. S5-A.

in obtaining positions outside the Bureau of Indian Affairs in the Department of the Interior or even outside the Department. The national office of the Bureau adopted a program for placing Indians in positions in the Federal Government outside the Bureau. The Complainant suggested to McMullen a similar program for non-Indian employees of Respondent. The Bureau proposed an outplacement program for non-Indians and solicited comments on its proposed program. Local 40 was asked for its comments but did not offer any. McMullen was of the view that since such a national proposed program was under consideration, he did not have authority to negotiate such a program on a local basis. However, he did discuss the subject with representatives of Local 40, but took the position he was without authority to do anything about it. The Bureau's proposed program was not placed in effect.

McMullen was of the view that there was no room but for one interpretation of the directive on the new Indian preference policy and thus no room for negotiation. Complainant introduced several Promotional Opportunity Bulletins of other offices of the Bureau for the purpose of showing differing interpretations of the new policy by different offices. 7/ I find that the seeming substantive differences in those Bulletins were due more to imprecision in draftsmanship than to differences in applying the new policy. The contrary conclusion, urged by Complainant, would show a flat violation of the policy by the other offices issuing the Bulletins, a conclusion I cannot reach on this record.

Discussion and Conclusions

Although the complaint asserts that Respondent violated three provisions of the Executive Order, only one of such contentions was supported at the hearing. The first contention in the complaint was that Section 19(a)(1) of the Order was violated by the promulgation by the national office of the new and expanded policy of Indian preference in derogation of the rights of non-Indians. The second contention was that Section 19(a)(2) was violated because the promulgation of the new policy was in contravention of the collective bargaining agreement between the parties. I find both these contentions to be without merit.

The promulgation of the new national policy was not an act of the Respondent nor an act over which it had any control. The promulgation of the new policy was, in substance, an announcement of a new understanding of 28 USC Section 472 of

7/ Exhibits C-4 through C-7.

the Indian Reorganization Act of 1934. 8/ If the announcement of the policy and the new interpretation of the statute had any coercive effect on any of Respondent's employees, such coercion was the result of legislation, not of unlawful conduct by Respondent. And the record does not support any contention that the mere announcement of the policy interfered with, restrained, or coerced any employees in the exercise of their rights under the Order, or had a tendency to do so. Therefore, there was no violation of Section 19(a)(1) for the reason given in the complaint.

Complainant's reliance in its brief on Veterans Administration Hospital, Charleston, S. Carolina, A/SLMR No. 87, for the proposition that a violation of Section 19(a)(6), assuming there was one, always implies a violation of Section 19(a)(1), is misplaced. In that case, the Activity unilaterally changed agreed-upon conditions of employment. That was found to constitute a violation of 19(a)(1) as well as 19(a)(6). In this case the complaint does not allege that the refusal to bargain was in violation of Section 19(a)(1), and, for that reason, I do not consider whether it was since in the light of my ultimate conclusions it is unnecessary to do so. There is no indication or contention that Respondent refused to bargain about anything else.

Nor was there a violation of Section 19(a)(2). To be sure, there was discrimination against non-Indian employees in regard to promotion and other conditions of employment, but the discrimination had no relationship to union status or activities. There was evidence that union membership was discouraged, but it was not the existence of the discrimination that discouraged it. The evidence was that it was the alleged inability of the union to engage in meaningful discussions with Respondent concerning the discrimination and its impact that discouraged membership.

The complaint alleges a violation of Section 19(a)(2) because the discrimination was a violation of the negotiated agreement. But the agreement itself provided that it was subject to existing laws and Departmental regulations. Since the

8/ Six months later the United States District Court for the District of Columbia held that the Act required preference in appointment to any vacancy no matter how created, and not only in initial appointments. Freeman v. Morton, Civil Action No. 327-71, Dec. 21, 1972 (not reported). Six months after that a three-judge District Court for the District of New Mexico held the Freeman decision "inoperative" because of the enactment of the Equal Employment Opportunity Act of 1972, P.L. 92-261. Mancini v. Morton, Civil No. 9626, dec. June 1, 1973, not yet reported.

discrimination was predicated on law and Departmental regulations, it was not in violation of the agreement. And Section 12(a) of the Order provides that every agreement is subject to laws and regulations of appropriate authorities and subsequent agency policies and regulations.

There was a violation of Section 19(a) (6) of the Order.

McMullen, the Personnel Officer, was the Respondent's spokesman. The evidence shows that although he did not refuse to talk with representatives of the union and indeed had many conversations with them concerning the new policy, he took the adamant position that he was without authority to negotiate or engage in any meaningful consultation concerning it. To him the directive of June 23, 1972 from the Commissioner of Indian Affairs and the subsequent directives were crystal clear and totally comprehensive; to him they left no interstices in any of their substantive provisions or their ramifications.

But the original directive itself stressed that "careful attention must be given to protecting the rights of non-Indian employees" and some of the subsequent instructions recognized and called the attention of the field offices to the consideration that the impact of the new policy required a special sensitivity to assure the application of the policy on an equitable basis within the prescribed limits. Apparently the Bureau did not consider the original directive and its subsequent explanations to be as all-pervasive as McMullen did. The Bureau's caution to its field offices to give careful attention to the rights of non-Indian employees in the application of the policy and to show a special sensitivity to its application on an equitable basis indicated that it thought the field offices had more to do than to apply mechanically a totally detailed and inflexible plan. But McMullen took the inflexible position that he was without authority to consult or negotiate with the union about any aspect of the plan or its impact, that he could listen but do nothing. Listening, with such an attitude, is not negotiating or consulting, but is a refusal to do so.

Throughout the proceeding the Complainant made it plain that it was not seeking to repel or obstruct the Indian preference but was concerned about the impact of the newly expanded policy on non-Indians. It wanted to discuss with management, among other things, the possibility of arrangements by which the Indian preference could be furthered by an incumbent non-Indian training an Indian for the incumbent's position with the incumbent transferring to another position, but McMullen's adamant attitude precluded meaningful conferring or negotiation along that line.

Another avenue that Complainant wanted to pursue with Respondent was a program for training non-Indians for, and

assistance in obtaining, positions outside the Bureau or even outside the Department, leaving their former positions open to being filled in accord with the Indian preference. This too would have furthered the spirit of the Indian preference. Complainant proposed this subject to McMullen. The Bureau had such a program for training of and assistance to Indians. The Bureau had also under consideration such a program for non-Indians. McMullen took the position that since such a program was pending consideration on a national level 9/ he did not have authority to negotiate concerning such a proposal on a local level. This was inexplicable on the basis of authority, and of itself was a violation of Section 19(a) (6). Accordingly, I conclude Respondent violated Section 19(a) (6).

I recommend that the complaint be dismissed insofar as it alleges violations of Sections 19(a) (1) and 19(a) (2) of the Executive Order, and that it be sustained insofar as it alleges violations of Section 19(a) (6).

The Remedy

Having refused to consult and negotiate, in violation of Section 19(a) (6), Respondent should be ordered to cease and desist from such refusal and to consult and negotiate in the future, and to post a notice 10/ that it will do so.

Suggested forms of an order and a notice are attached hereto.



MILTON KRAMER
Administrative Law Judge

September 26, 1973

9/ The program on a national level was never adopted.

10/ I have qualms about the advisability of posting a notice in this case. But I observe that heretofore it has been the consistent policy of the Assistant Secretary to require the posting of a notice in cases in which he found a violation of Section 19(a) even in cases in which I would not have so recommended. E.g., Headquarters, U. S. Army Aviation Systems Command, A/SLMR 168, affd. FLRC 72A-30.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations thereunder, the Assistant Secretary of Labor for Labor-Management Relations orders that Indian Affairs Data Center, Bureau of Indian Affairs, Department of the Interior, Albuquerque, New Mexico, shall:

1. Cease and desist from refusing to consult or negotiate with National Federation of Federal Employees, Local 40, concerning the methods of applying requirements of preference in employment it is required to give to any racial or other group, the impact of such applications, and arrangements for the relief of employees in the unit who may be adversely affected by such impact.

2. Upon request from Local 40, engage in consultation or negotiation concerning these matters.

3. Advise the appropriate officials of Local 40 that it is willing to consult and negotiate on these subjects.

4. Post copies of the attached Notice on forms to be furnished by the Assistant Secretary for Labor Relations at all places where notices to employees are customarily posted. Upon receipt of the forms they shall be signed by the Executive Officer of the Respondent and posted and maintained for thirty consecutive days. The Executive Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

5. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty days of the date of this Order what steps have been taken to comply with this Order.

Paul J. Fasser
Assistant Secretary of Labor
for Labor-Management Relations

October , 1973

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

1. We will not refuse to consult or negotiate with National Federation of Federal Employees, Local 40, concerning any matters affecting working conditions so far as may be required by Executive Order 11491, as amended.

2. Upon request from Local 40, we will engage in consultation or negotiation concerning any such matter.

Executive Officer

October , 1973

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
SOUTHWEST REGION, AIRWAY
FACILITIES SECTOR,
AIR ROUTE TRAFFIC CONTROL CENTER,
ALBUQUERQUE, NEW MEXICO
A/SLMR No. 342

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
SOUTHWEST REGION, AIRWAY FACILITIES
SECTOR, AIR ROUTE TRAFFIC CONTROL
CENTER,
ALBUQUERQUE, NEW MEXICO

Activity-Petitioner

and

Case No. 63-4499(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2760, AFL-CIO

Labor Organization

DECISION AND ORDER

This case involved a petition for clarification of unit, filed by the Activity, seeking clarification of an existing exclusively recognized unit, consisting of Clerk-Stenographers, a Supply Clerk and a General Supply Specialist. The Activity contended that the two Clerk-Stenographers are confidential employees, and that the General Supply Specialist is a supervisor within the meaning of the Order. Under these circumstances, it asserted that these employees should be excluded from the unit. The incumbent labor organization, American Federation of Government Employees, Local 2760, AFL-CIO, contended that the employees described above should not be excluded from the unit.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Joel D. Reed. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Assistant Secretary found that the two employees in the job classification of Clerk-Stenographer were not confidential employees and, therefore, should not be excluded from the unit. In this connection, he noted that the evidence established that neither employee acted in a confidential capacity to persons who formulate and effectuate management policies in the field of labor relations.

Upon the entire record in this case, including briefs filed by the Activity and the American Federation of Government Employees, Local 2760, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

The Assistant Secretary also found that the General Supply Specialist did not exercise any supervisory authority requiring the use of independent judgment, nor did he have the authority effectively to recommend any action within the meaning of Section 2(c) of the Order. Accordingly, he concluded that the General Supply Specialist was not a supervisor within the meaning of the Order.

The Activity, Department of Transportation, Federal Aviation Administration, Southwest Region, Airway Facility Sector, Air Route Traffic Control Center, Albuquerque, New Mexico, filed a petition for clarification of unit (CU) seeking clarification of an existing exclusively recognized bargaining unit. The exclusively recognized unit, which was certified on February 4, 1972, includes "clerk-stenographers, supply clerk and supply specialist." The Activity seeks to clarify the status of the two Clerk-Stenographers in the unit and the General Supply Specialist. It contends that the two Clerk-Stenographers are confidential employees and that the General Supply Specialist is a supervisor within the meaning of Section 2(c) of the Order. Under these circumstances, it asserts that these employees should be excluded from the exclusively recognized unit. The AFGE takes the position that the employees described above should not be excluded from the exclusively recognized unit.

Based on the foregoing, the Assistant Secretary found insufficient basis to support the Activity's position that the unit should be clarified to exclude these aforementioned employees and he, therefore, ordered that the petition be dismissed.

One of the two Clerk-Stenographers the Activity would exclude from the unit is a GS-4 Clerk-Stenographer on the Activity's Proficiency and

Evaluation Staff. This Staff is responsible for training and safety programs, as well as for the testing and certification of technicians. The Proficiency Development and Evaluation Officer (PDEO) who heads the Staff, in addition to the normal functions connected with his position, has, in the past, commented on collective-bargaining agreement proposals and, on one occasion, represented the Activity's Sector Manager during collective-bargaining negotiations. The evidence reveals that the Clerk-Stenographer on the Proficiency Development and Evaluation Staff performs the normal duties associated with the job classification of Clerk-Stenographer, including typing and filing. Further, she is the time and attendance clerk for the Staff, sits in close proximity to the PDEO's office, and has access to files in the PDEO's office except those which are sealed.

While employees who act in a confidential capacity with respect to persons who formulate and effectuate management policies in the field of labor relations have been excluded from exclusive bargaining units as confidential employees, it also has been found that where, as here, the evidence establishes that the essential basis for exclusion from the unit is that the employee involved merely has access to personnel or statistical records, exclusion from the unit as a confidential employee is not warranted. 1/ The record in the subject case does not establish that the Clerk-Stenographer on the Proficiency Development and Evaluation Staff serves in a confidential capacity to a person who formulates and effectuates management policies in the field of labor relations and that her inclusion in the unit would result in a conflict of interest between her normal duties and her unit membership. Accordingly, I find that the Clerk-Stenographer on the Proficiency Development and Evaluation Staff should not be excluded from the unit. 2/

The other disputed Clerk-Stenographer, whom the Activity would exclude from the unit as a confidential employee, is a GS-4 employee assigned to the Administrative and Logistics Staff. The record reflects that this Staff consists of a General Supply Specialist, an Administrative Officer,

1/ See Virginia National Guard Headquarters, 4th Battalion, 11th Artillery, A/SLMR No. 69; Portland Area Office, Department of Housing and Urban Development, A/SLMR No. 111; United States Department of Agriculture, Forest Service, Mark Twain National Forest, Springfield, Missouri, A/SLMR No. 303; Department of Transportation, Federal Aviation Administration, Flight Inspection District Office, Battle Creek, Michigan, A/SLMR No. 313; Department of the Navy, United States Naval Station, Adak, Alaska, A/SLMR No. 321.

2/ Compare Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230, where certain Clerk-Stenographers who performed clerical, administrative and secretarial duties for Field Office Chiefs were determined to be confidential employees. In that case, the record supported the agreement of the parties that the employees in question acted in a confidential capacity as immediate assistants to the senior management official at their respective field offices.

a Supply Clerk, the Clerk-Stenographer at issue, and a part-time Clerk-Stenographer.

While the Assistant Sector Manager, or in his absence, the Sector Manager, have rated this Clerk-Stenographer's performance and the latter has substituted for the Sector Manager's regular secretary during vacation periods for two to six weeks per year, and, at other times, has assisted the Sector Manager's secretary, the record reveals that, for the most part, this employee performs clerk-stenographic duties for the Administrative Officer or other employees assigned to the Administrative and Logistics Staff. In the performance of her regular duties, the evidence establishes that this Clerk-Stenographer has access to the office safe, but that she does not have knowledge of the contents of the materials contained in the safe. Further, the record reveals that the incumbent has overheard the Administrative Officer advise employees on certain aspects of the grievance procedure and has typed performance evaluations.

In my view, the evidence does not establish that this employee's normal day-to-day duties are of a confidential nature with respect to persons who formulate and effectuate management policies in the field of labor relations and that her inclusion in the unit would result in a conflict between her normal duties and her unit membership. Thus, although this employee has, on occasion, substituted for the Sector Manager's regular secretary and, at other times, has assisted the Sector Manager's secretary, the evidence does not establish that such job functions involve more than normal clerical duties. Nor does the evidence establish that this employee's short-term, occasional substitution for the Sector Manager's secretary was such that she assumed a confidential relationship with respect to the Sector Manager. Under all of the circumstances, I find that the Clerk-Stenographer on the Administrative and Logistics Staff is not a confidential employee and should not be excluded from the unit.

The General Supply Specialist, whom the Activity would exclude from the unit as a supervisor, also is assigned to the Administrative and Logistics Staff. The record reveals that he has never hired, transferred, suspended, laid off, recalled, promoted, or discharged any employees, nor does he possess the authority to perform any of the aforementioned acts. The record discloses that, on one occasion, the General Supply Specialist rated the performance of the Activity's Supply Clerk, with whom he shares an office, and that after the Supply Clerk complained about the rating, the Sector Manager and Assistant Manager reviewed the rating and had it changed. Aside from this one incident, the General Supply Specialist has never evaluated the performance of any employee, nor has he ever adjusted any employee grievances. The record reflects that most of the Supply Clerk's work is of a routine nature, within established agency procedures, and does not require special direction. In this regard, the General Supply Specialist may issue routine instructions on how to order specific items or to type up a certification of contractors' invoices, if service has been satisfactory, or he may routinely direct the Supply Clerk to order items on a priority basis.

January 25, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
KEESLER TECHNICAL TRAINING CENTER,
KEESLER AIR FORCE BASE
A/SLMR No. 343

In my view, the evidence herein is insufficient to establish that the General Supply Specialist exercises supervisory authority requiring use of independent judgment, or has the authority effectively to recommend any action within the meaning of Section 2(c) of the Order. Rather, I find that the record reveals that any authority exercised by the General Supply Specialist is routine in nature and does not include the authority to make effective recommendations in any of the areas set forth in Section 2(c) of the Order. Accordingly, I find that the General Supply Specialist is not a supervisor within the meaning of the Order and should not be excluded from the unit.

Under all of the circumstances outlined above, I find insufficient basis to support the Activity's position that the unit should be clarified to exclude the aforementioned Clerk-Stenographers and the General Supply Specialist. Therefore, I shall dismiss the instant CU petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-4499(CU) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 25, 1974


Paul J. Fesser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

This case involved an unfair labor practice complaint filed by Local 943, National Federation of Federal Employees (Complainant) against the Department of the Air Force, Keesler Technical Training Center, Keesler Air Force Base (Respondent), alleging that the Respondent violated Section 19(a)(1) of the Executive Order by (1) interfering with and restraining the Complainant in the exercise of its right to discuss and agree upon the duties and responsibilities with respect to a proposed position description; (2) coercing employees through a threat of punitive action if they continued to pursue the matter; and (3) punitively reassigning eight employees from Training Specialist GS-9 to Training Instructor GS-9.

On or about January 24, 1972, employees of the Respondent's Instructional Systems Development Team (ISD) made their supervisors aware that they were dissatisfied with their job description. Thereafter, the ISD team supervisor met with the eight members of the team and the chairman of the Union Grievance Committee and reviewed a new job description prepared by the supervisor. Sometime in late August or early September 1972, the ISD team members again expressed dissatisfaction with their job description. A series of eight or more meetings were initiated by their supervisor in an attempt to resolve the differences and, as a result of these meetings, with one exception, substantial agreement was reached as to what would be included in the job description. The one remaining area of disagreement involved the inclusion in the job description of a reference to "ATCM 20-1." The Activity's supervisor contended that "ATCM 20-1" apparently reflected a departmental curricular level, rather than the branch level at which the ISD team was assigned, and that he would not incorporate those duties referred to in "ATCM 20-1" in the job description. Although given the opportunity, no union officers or steward attended any of the subsequent meetings on this matter. Thereafter, another group meeting was held to discuss the job description with the employees agreeing previously not to raise the "ATCM 20-1" matter. When the "ATCM 20-1" matter was raised by an employee, the supervisor slammed his fist on the table and allegedly said to the employees in attendance, "If we forced him to include that statement in the position description and sign that it was correct, he would see that we were transferred back to the classroom as soon as possible." Further, the supervisor allegedly stated that regardless of

how the employees interpreted it - "they could go to the Union or Congress if they wished - he would transfer them to the classroom if the ATCM 20-1 had to be included in the position description."

The Administrative Law Judge recommended dismissal of the complaint in its entirety. In reaching his conclusion, he found that the above-noted statements were not retaliatory or in reprisal for employees having engaged in Section 1(a) activities. He found, further, among other things, that the evidence presented did not demonstrate that any acts on the part of the supervisor resulted in a threat to the employees involved or caused the Respondent to interfere with, restrain, coerce or discriminate against employees in violation of Section 19(a)(1) of the Order.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the case, and noting the Administrative Law Judge's credibility resolutions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge that the Complainant did not meet its burden of proving, by a preponderance of the evidence, that the Respondent violated Section 19(a)(1) of the Order. Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

-2-

A/SLMR No. 343

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
KEESLER TECHNICAL TRAINING CENTER,
KEESLER AIR FORCE BASE

Respondent

and

Case No. 41-3181(CA)

LOCAL 943, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On October 31, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation in the subject case, including the exceptions and supporting brief, and noting his credibility resolutions, I hereby adopt the findings, conclusions, and recommendation of the Administrative Law Judge that dismissal of the instant complaint is warranted because the Complainant did not meet its burden of proving by a preponderance of the evidence that the Respondent's conduct herein violated Section 19(a)(1) of the Order. 1/

1/ On page 6 of his Report and Recommendation, the Administrative Law Judge inadvertently noted that new classification standards were promulgated by the United States Civil Service Commission in February 1973, rather than in February 1972. This inadvertency is hereby corrected.

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a complaint filed on March 8, 1973, under Executive Order 11491, as amended, by the National Federation of Federal Employees, Local No. 943 (hereinafter called the Union) against the Department of Air Force, Keesler Technical Training Center, Keesler Air Force Base (hereinafter called the Respondent Activity), a Notice of Hearing was issued by the Regional Administrator for Labor-Management Services Administration, Atlanta Region on March 29, 1973, setting this case for hearing on May 10, 1973, for a Section 19(a)(1) violation. A hearing was held in this matter on May 10, 1973, in Biloxi, Mississippi on the complaint alleging:

"The complainants charge that interference and restraint was practiced by management in the exercise of complainants' rights to discuss and agree upon the duties and responsibilities for their proposed position description. Further, that management coerced the employees through a threat of punitive action, if they pursued the matter or made further complaints about the description of their duties and responsibilities for the proposed position description.

"These provisions were violated in the following respect: On 31 October 1972, at 11:32 a.m., in Room 235 of Allee Hall, Captain George B. Pregel, Chief, Branch 4, Electronics Principles Department, met with ISD team members to discuss the proposed position description. After discussion and agreement on the majority of the position description content, the question of one of two items to be resolved was raised. The part concerned the inclusion of reference to ATCM 20-1 in the Introduction. Captain Pregel forcefully informed the employees that if they insisted on the inclusion of that specific reference in their proposed position description he would see that all eight employees would be transferred back to the classroom as soon as possible. He also stated that he would not discuss the matter with the employees further.

"The complainants also find that the spirit and the letter of those Air Force Regulations which require supervisors or other persons acting in an official capacity to abstain from making overt threats to take any act of reprisal against employees because they intend to exercise their rights of appeal, was not enforced.

"As directed by TTOR letter, Position Description, Training Instructor GS-9, 21 November 1972, the eight employees were reassigned from positions of Training Specialist GS-9 to Training Instructor, GS-9. The complainants believe this action was punitive and demonstrated management's attempt to circumvent the recognition of a position description that would accurately describe the duties of these personnel."

All parties were represented and through Counsel were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issue herein. Oral argument was waived but both Complainant and the Respondent filed briefs for consideration of the undersigned.

From the entire record herein, including observation of witnesses and their demeanor, and all relevant evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

I

Background Information

In January 1972 several civilian employees who were at that time members of the Instructional Systems Development team (hereinafter referred to as ISD) Branch IV, Electronic Principles Department, at the school of Applied Aerospace Sciences, at Keesler Technical Training Center made their supervisors aware of their dissatisfaction with their job description by conversation with Frank Towell and by letters to their several Branch Chiefs dated January 24, 1972. Mr. Towell was Chief, Training Section for the Electronics Principles Department until he retired in February 1972 and Bill M. Jinks assumed the position. Mr. Jinks testified that this was not a supervisory position over the ISD team, but he did feel a formal organizational responsibility to it although the members of the team had no responsibility to him.^{1/}

^{1/} Tr. p. 199.

Mr. Jinks attempted to write a job description for the ISD team employees but was delayed due to his need to settle into his new position. This information was related to Dale M. Titler, one of the members of the employee team and Harold M. Hirn, Chairman of the Union Grievance Committee. Later contacts between Mr. Jinks and Mr. Hirn were informal in nature.

On or about April 10, 1972, Captain (now Major, and hereinafter referred to as Major) George B. Pregel became supervisor of the ISD team with consolidation of all team members under him as Chief of Branch IV, rather than two members being in each of the four branches of the Electronics Principles Department.^{2/} Shortly after his arrival Major Pregel, at a meeting with the team and Mr. Hirn, handed them the new job description that had been prepared by Mr. Jinks and Management; he explained and went over it with them and asked questions as to what they thought of it.^{3/} They had Mr. Hirn present at the time, Major Pregel testified at the hearing that as to Mr. Hirn's position: "I knew that he was a union representative and he was going to represent their part of the Union. And, if I may add, at that time and to the time in November^{4/} when Mr. Titler and Mr. Bowen were elected as officials of the Union, I didn't know any man in the unit was a union member per se. I thought he was representing them since they did not have to belong to the Union to be represented. I never did find out factually or actually whether anyone was a member or not." He further stated that it made no difference to him whether anyone was a member or not.

Sometime in late August or early September 1972, the ISD team members again expressed dissatisfaction with their job descriptions and Major Pregel initiated a series of meetings with them in an attempt to resolve the differences. He met with each member of the team individually at least twice and had about eight meetings with the group during the ensuing months before the final meeting held on October 31, 1972.^{5/} During this period he furnished members of the team copies of their

^{2/} Tr. pp. 150, 151.
^{3/} Testimony of Harold Hirn, Tr. p. 137, and Major Pregel, p. 152.
^{4/} November 1972 was date of appointment referred to as election.
^{5/} Tr. pp. 156, 157.

job descriptions, their inputs and listened to discussion and incorporated many of their ideas and changes in the job description being developed. The changes made resulted in at least three drafts being made in their job description. There seemed to be substantial agreement as to the proposed job description except that the team members were dissatisfied that ATCM 20-1 was not included. Mr. Titler testified that it was thought that this would identify the work that the ISD team members were doing and would result in the position description being reclassified from GS-9 to GS-11.^{6/} Major Pregel testified that he had discussed the matter of ATCM 20-1 individually with the members of the team and also at several team meetings. The reason given for not including it in the job description was because it reflected a job in a department curricular level and these gentlemen were assigned to a branch in an ISD team.^{7/} This matter had been discussed so many times that he had informed members of the team on several occasions that he would not discuss it further as it was a closed subject. Mr. Titler on October 31, 1972, asked for a meeting to be held with the group to discuss the job description. Upon his assurance that it did not include ATC Manual 20-1 and Electronics Principles course being a final or entire course, Major Pregel scheduled a meeting. Prior to the meeting, Major Pregel had asked Mr. Titler, "Are you sure because I don't want to have to go through a hassle where we will spend over a hour just arguing about the ATC Manual 20-1?" After setting up and arriving at the meeting, the two matters were on the agenda and Mr. Titler was stated to have said, "We just want to have it for the record."^{8/} Other witnesses verified the matter had been discussed at various meetings and that they had been informed there would not be further formal discussion of the matter by Major Pregel.

^{6/} Tr. p. 29.
^{7/} Tr. p. 184 and Respondent Exhibit No. 3.
^{8/} Tr. pp. 161, 162.

III

Summary of Stipulated Facts

At the hearing the Complainant and Respondent stipulated the following which are not in dispute:

1. On October 31, 1972, there was a meeting between Major George B. Pregel and a number of civilian employees who were all members of the Instructional Systems Development Team, Branch IV, Electronics Principles Department, United States Air Force School of Applied Aerospace Sciences, Keesler Technical Training Center, Keesler Air Force Base, Mississippi. This was one of a number of meetings between these employees and Major Pregel and these meetings, dealt with the contents of the job description for these employees.

2. Major Pregel was at that time the second line supervisor of these employees. All employees on the ISD team were GS-9 Training Specialists. On October 31, 1972, the employee members of the ISD team were Dale M. Titler, Donald M. Bowen, Alton R. Ball, Lee D. Johnson, Armas A. Johnson, Jones F. Mickael, Thomas J. Rhodeman, and Vivian B. Taylor. Alton Ball and James F. Mickael were not present at the October 31, 1972 meeting.

3. All employees attending the October 31, 1972 meeting were individually and collectively protected by Section 1(a) of Executive Order 11491, as amended.

In addition to the above, testimony and documentary evidence of record reveals that the Union held exclusive recognition at Keesler Air Force Base; that none of the ISD team employees were, Union officers on October 31, 1972, and that W.E. Tullos had resigned as President of the Union in September 1971 and the Union was apparently without a full complement of officers until November 8, 1972.^{9/}

III

Concurrent Developments and Action

In February 1973 new classification standards promulgated by the United States Civil Service Commission relating to use in the instruction and training area commonly referred to as the 1710-1712 series were received at Keesler Air Force Base.^{10/} There was some delay in implementing the standards

^{9/} Tr. pp 35, 37, 65, 223, and 231; Respondent's Exhibits Nos. 5, 6, and 7.

^{10/} Tr. p 237.

occasioned by the need to obtain clarification. Prior to the October 31, 1972 meeting of Major Pregel and the ISD Team employees, the Keesler Technical Training Center Commander (KTTC) and United States Air Force School of Applied Aerospace Science (USAF SAAS) Commander were briefed on this change.^{11/} As a result of the new Civil Service Commission classification standards about 149 GS-7 Training Instructor positions were elevated to GS-9 and about 23 GS-9 Supervisor Instructor positions were elevated to GS-11.^{12/} The effective date of the personnel actions was October 29, 1972.

Lee Johnson, one of the GS-9 team members, testified that during the time he was working on the ISD project and before October 29, 1972, you could either be a writer or work in special training or make a lateral transfer to a supervisor. The GS-7's were instructors with full-time duties in the classroom. Being a GS-9 was considered by him to add a little more prestige than project work directly with instructors.^{13/}

Bill M. Jinks, Chief of the Training Section for the Electronics Principles Department,^{14/} testified that the department had nine separate GS-9 position descriptions and for all practical purposes felt that they should be required to do the same type and level of work.^{15/} In November 1972, it was decided by the Commander, USAF SAAS, Mr. Granville O. Chastain, Civilian Personnel Officer, and independently by Mr. Jinks to have a standard job description for all of the new and old positions in the Electronics Principles Department.^{16/} After the job description was standardized all of the ISD team members who were in these positions as of October 31, 1972, were transferred to the new position as training instructors.^{17/}

IV

The October 31, 1972 Meeting

On October 31, 1972, Major Pregel called a meeting of the ISD team employees at the request of Dale M. Titler. ^{18/}

^{11/} Tr. pp 71, 239.

^{12/} Tr. pp 239.

^{13/} Tr. p. 94.

^{14/} The position was also commonly referred to as Principal Instructor in the department. Tr., p. 198.

^{15/} Tr. p. 204.

^{16/} Complaints Exhibit No. 2; Tr. 203, 204, 205, 241, 242, and 243.

^{17/} Tr. pp 34 and 68.

^{18/} Tr. pp 28, 162.

Those present included six of the eight members of the ISD team, James Michael and Alton Ball being absent.

Major Pregel reviewed two items that had been changed since an earlier meeting at which time there had been discussion of the items point by point. The two changes concerned (1) Our duties with regard to preparing items for surveying the sets courses and our part in assisting in the conducting of such surveys, and (2) Our position regarding Department requirement duties in identifying features of training to be used in the laboratory portions of the course. The group agreed in general that the changes were substantially correct and tentatively acceptable.

Mr. Titler, a member of the ISD team, then attempted to bring up the matter of ATCM 20-1 and the question of the members of the group being involved in a complete course of instruction as items on the agenda that were unresolved. At this point Major Pregel is stated to have slammed his fist on the table and said it was resolved. He pointed his finger at Mr. Titler and said that "if we forced him to include that statement in the position description and sign that it was correct he would see that we were transferred back to the classroom as soon as possible."

When Mr. Titler stated that this was a clear cut threat Major Pregel is reported to have said that regardless of how we interpreted it--we could go to the Union or Congress if we wished--he would transfer us if ATCM 20-1 had to be included in the position description. He further stated that he was through talking about this matter and when we wanted to see him to contact Sergeant Keller and arrange an appointment. Further, that he would expect our work from now on to reflect two years of experience and we should perform exactly as the job description is now written, as it would be reviewed by him and two members of curricula. He appeared highly agitated and in an upset emotional state.^{19/}

^{19/} The account of the October 31, 1972 meeting is in complainant's Exhibit No. 1 and Respondent's Exhibits Nos. 3 and 4. Apart from emphasis on certain points and gestures made by Major Pregel, the account of meeting is not in essential dispute, except that there is no reference in Major Pregel's statements to remarks that the members could go to the Union or Congress, and that he was agitated and in an emotional state.

Testimony at the hearing including that of Mr. Titler substantiated Major Pregel's statement that the group was advised prior to and at the October 31, 1972 meeting that the matter of ATCM 20-1 and the question of the members of the group being involved in a complete course of instruction had been previously discussed on several occasions and would not be included in their job description.

v

Section 19(a)(1) of Executive Order 11491 (hereinafter referred to as the Order) provides: "Agency management shall not (1) interfere with, restrain, or coerce an employee in the exercise of rights assured by the Order,"

The policy set forth in Section 1(a) of the Order states:

"Each employee of the Executive Branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in the Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage and discourage membership in a labor organization."

Section 11(b) of the Order provides that:

"In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices...."

Section 12(b)(1) and (2) of the Order provides that:

"Management officials of the agency retain the right, in accordance with applicable laws and regulations-

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees."

Section 203.14 of the Regulations of the Assistant Secretary for Labor Management Relations provide that "A complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of evidence."

VI

Concluding Findings and Discussion

(1) There were at least sixteen individual and eight group meetings between Major Pregel and members of the ISD team from April 10, 1972 when Major Pregel was assigned to Keesler Air Force Base to the October 31, 1972 meeting. Harold Hirn, Grievance Committee Chairman for NFFE Local 943 which held exclusive representation at Keesler Air Force Base, Mississippi, attended a group meeting with members of the ISD team after Major Pregel's arrival in April 1972 to urge correction of the ISD team members job description; he expressed opinion according to Major Pregel which was undisputed that it was unnecessary for him to attend further group meetings with Major Pregel although he was extended an invitation to do so.

(2) None of the eight members of the ISD team were officers in NFFE Local 943 during the numerous individual and group meetings from April 10 through October 31, 1972. The Union was also without a president during this period.

(3) The job description relating to assignment of work and the numbers, types, and grades of specific employees is a non-negotiable prerogative of Management under Sections 11(b) and 12(b)(1) and (2), of the Order and Dale M. Titler and Lee O. Johnson testified these rights were not at issue herein.^{20/} The job description preparation not being an activity of union import was not one by team members on behalf of NFFE Local 943. Even assuming arguendo that the matter of job description was one relating to personnel policies and practices and a matter affecting working conditions of employees under Section 11(a) of the Order, there were in fact bona fide group meetings held to confer with the ISD team members on the matters and policies in issue; the Union representative had expressed no desire to confer after attending one of the early group meetings although invited to do so. At the October 31, 1972 solicited meeting by the ISD team members the only position taken by Respondent, Pregel was to consider team views as to matters to be included in their job description other than inclusion of agenda that had been agreed would be excluded from discussion. It was bad faith on the part of the team members to have Major Pregel schedule a meeting for their benefit on assurance that certain subject matter previously discussed in detail would not be on the agenda and at the meeting insist that it be discussed. I find that but for the assurance, the meeting would not have been scheduled; that the action by or on behalf of team members insisting on discussion of the subject matter which had been agreed would not be included on the agenda was a deliberate attempt on their part to embarrass Major Pregel, and his response caused by their action was not out of line with the provocative insult.

(4) The background and circumstances leading to the October 31, 1972 meeting are not shown to be such as to have lead, or made Major Pregel aware of or have reason to believe that the ISD members with whom he met on October 31, 1972, were engaged in activity on behalf of NFFE Local 943 or other activities assured and protected by Section 1(a) of the Order. When scheduled, the meeting was like one in a series of prior meetings where job description was the subject without any reference to Union activity.

20/ Tr. pp 45 and 96. |

(5) Major Pregel's action and statements made at the October 31, 1972 meeting were not retaliatory or in reprisal for employees having engaged in Section 1(a) activities, but were prompted by a member or members of the team acting in bad faith by attempting to include agenda as the subject of discussion which had been agreed would not be discussed. His reaction under the circumstances did not interfere with, restrain, or coerce employees in the exercise of their rights under the Order.^{21/}

(6) Dale M. Titler, Donald Bowen and Lee O. Johnson were selected as officers in NFFE Local No. 943 eight days after the October 31, 1972 meeting and Alton Ball and James F. Mickael did not attend the October 31, 1972 meeting. I find that the evidence does not demonstrate that any acts on the part of Major Pregel as to the October 31, 1972 meeting resulted in a threat to these employees or caused the Respondent Activity to interfere with, restrain, coerce, or discriminate against them in violation of Section 19(a)(1) of the Order. I also find that there was no Section 19(a)(1) violation as to the three remaining members of the ISD team^{22/} with respect to the Section 1(a) rights assured by the Order.

(7) Major Pregel at the October 31, 1972 meeting is alleged to have made certain gestures and remarks which the complainant construed as a threat to take all ISD team employees out of the team and place them back in the classroom as training instructors.

There was testimony at the hearing on May 10, 1973 that Major Pregel frequently made gestures when speaking. Donald Bowen described Major Pregel's mannerism by stating that, "He has a knack of, shall I say, he couldn't talk if he couldn't use his hands."^{23/} His hand movement at the hearing were observed as an integral adjunct organ of speech and the difference in his gestures at the October 31, 1972 and prior group meetings was stated to have been that he pounded

21. Complainant has cited A/SLMR decisions Nos. 53 and 242 in support of its alleged violation of Section 19(a)(1) of the Order particularly as to Major Pregel's lack of intent to make a threat against employees. I do not find the facts and circumstances cited in the A/SLMR decisions analogous or applicable to those in this case.

^{22/} Armas Johnson, Thomas Rhodeman, and Vivian Taylor.

^{23/} Tr. p 72.

the table somewhat harder on the latter occasion. Considering the entire evidentiary record, I conclude that there was no 19(a)(1) violation of rights assured under Section 1(a) of the Order by reason of gestures made by Major Pregel at the October 31, 1972 meeting.

(8) On October 29, 1972 all GS-7 Training Instructors at United States Air Force School of Aerospace Science (USAF-SAAS) were elevated to GS-9. This resulted from implementation of new classification standards promulgated by the Civil Service Commission. Civilian employees including their representatives had been briefed on the changes, prior to October 29 and the meeting on October 31, 1972, of Major Pregel and the ISD team employees. As a result of the new classification standards about 149 GS-7 positions were elevated to GS-9 and about 23 GS-9 supervisory-instructor positions were elevated to GS-11.

There were about 29 GS-9 employees and 88 GS-7 instructors in the Electronics Principles Department in October 1972. The GS-7 employees were classroom instructors and the GS-9 employees were divided; eight or nine were assigned as instructor-supervisors and the others were instructors with duties requiring them to teach about sixty percent (60%) of the time and work on special projects such as writing training material forty percent (40%) of their time. The ISD project members were selected from the 20 GS-9 instructors that had been assigned to the project.^{24/}

Bill M. Jinks, Chief of Training Section for the Electronics Principles Department, testified that there were nine separate position descriptions for GS-9 Training instructors and it was felt that for all practical purposes they should be required to do the same level of work.^{25/} He was working on a common position description when he was presented one about November 21, 1972 prepared by the Civilian Personnel Office from the Operations Division of the School Headquarters. Subsequent to the adoption of the standard

^{24/} Tr. pp 205, 206.

^{25/} Tr. p. 204.

job description for all new and old GS-9 positions in the Electronics Principles Department all ISD team employees who were in those positions on October 31, 1972, were transferred during January 1973 to the new positions as training instructors. Several members of the ISD team testified that they were given the opportunity to request the shift and branch assignments they desired when their transfer was accomplished.

Several ISD team members testified that at the October 31 meeting, Major Pregel remarked that he would transfer the ISD team employees back in the classroom if they forced him to include the ATCM 20-1 in their job description. Major Pregel's account of the remark was that he would see the ISD employees back in the classroom rather than sign an inaccurate job description particularly as pertains to an inclusion of ATCM 20-1.

I find from a review of all the testimony and documentary evidence of record that the statement of Major Pregel more precisely represents the remarks made at the October 31, 1972 meeting.

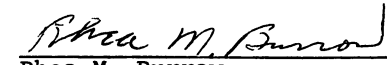
Because ISD team members are now classified along with other civilian training specialists as training instructors, they regard or infer that this was consumation by the Respondent of the alleged threat made by Major Pregel at the October 31, 1972 meeting. The disappointment of the ISD team members at not being reclassified to a higher grade when the training instructors were elevated to GS-9 two days prior to the October 31, 1972 meeting is understandable. However, their disappointment is not a reason to find that Major Pregel's remarks had anything to do with their reclassification as training instructors. In fact, the record clearly establishes that the decision to reclassify the position of training specialist to training instructor at the same grade level was made at a higher agency level from that of Major Pregel and without any information or recommendation on his part. In this connection there were persons other than the ISD team members involved in the reclassification of job position to training instructor.

CONCLUSION

In view of the entire record, I conclude that the complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated Section 19(a)(1) of the Order.

RECOMMENDATION

Upon the basis of the above findings, conclusion and the entire record, I recommend that the Assistant Secretary dismiss the complaint.


Rhea M. Burrow
Administrative Law Judge

Dated: October 31, 1973

Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
 NAVAL AIR REWORK FACILITY,
 JACKSONVILLE, FLORIDA
 A/SLMR No. 344

DEPARTMENT OF THE NAVY,
 NAVAL AIR REWORK FACILITY,
 JACKSONVILLE, FLORIDA

This case arose as the result of a petition filed by the National Association of Government Inspectors and Quality Assurance Personnel, Unit No. 1 (Petitioner), seeking a unit of all professional employees (engineers) of the Quality and Reliability Assurance Department of the Activity.

The Activity took the position that the employees in the petitioned for unit do not share a community of interest separate and distinct from other professional employees of the Activity, and that such a unit would not promote effective dealings and efficiency of agency operations. The Petitioner, on the other hand, contended that the employees in the unit sought, together with the nonprofessional Quality Assurance Specialists in the Quality and Reliability Assurance Department (who already were represented in a separate unit by the Petitioner), shared a clear and identifiable community of interest separate and distinct from all other employees of the Activity.

The Assistant Secretary concluded that the professional engineers in the petitioned for unit did not share a community of interest separate and apart from other professional engineers of the Activity. In reaching this conclusion, he noted that the claimed employees and the professional engineers in the Weapons Engineering Department and in the Production Engineering Department were subject to the same personnel policies and procedures; were within the same area of consideration for promotion and reduction-in-force actions; enjoyed similar job classifications; performed substantially similar job functions; and worked together closely in achieving their individual missions as well as the overall mission of the Activity. Accordingly, and noting also that, in his view, such a fragmented unit would not promote effective dealings and efficiency of agency operations, the Assistant Secretary ordered that the petition be dismissed.

Activity

and

Case No. 42-2301(RO)

NATIONAL ASSOCIATION OF
 GOVERNMENT INSPECTORS AND
 QUALITY ASSURANCE PERSONNEL,
 UNIT NO. 1,
 JACKSONVILLE, FLORIDA

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Hazel M. Ellison. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, the National Association of Government Inspectors and Quality Assurance Personnel, Unit No. 1, seeks an election in a unit consisting of all professional employees of the Quality and Reliability Assurance Department of the Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida, excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards as defined in Executive Order 11491, as amended.

The Activity takes the position that the unit sought is not appropriate as the employees in the petitioned for unit do not share a community of interest which is separate and distinct from that of other employees of the Activity. The Activity further asserts that the unit sought will not promote effective dealings and efficiency of agency

operations. The Petitioner, on the other hand, takes the position that the professional employees sought in the Quality and Reliability Assurance Department, together with the nonprofessional Quality Assurance Specialists in that Department who are already represented in a separate unit by the Petitioner, share a clear and identifiable community of interest separate from all other employees of the Activity. 1/

The Activity is a complex, highly integrated manufacturing facility charged with the mission of performing a complete range of rework operations on designated weapons systems, accessories, and equipment. In achieving this mission, the Activity manufactures parts and assemblies, provides engineering services in the development of changes of hardware design, and furnishes technical and other professional services on aircraft maintenance and logistic problems. In addition, the Activity performs other levels of aircraft maintenance and such other functions as directed by the Naval Air Systems Command.

The Activity is under the authority of a Commanding Officer and an Executive Officer. Reporting directly to the Commanding Officer and Executive Officer are three officers who direct the main organizational components of the Activity, i.e., the Management Services Officer and Controller, the Engineering and Quality Officer, and the Production Officer. These three main organizational components are divided into two or more departments, headed by Department Supervisors. A department is subdivided further into two or more divisions headed by Division Chiefs, with the divisions being subdivided further into two or more branches headed by Branch Chiefs.

The Activity employs approximately 2700 employees, of whom approximately 35 to 40 are military personnel with the balance being civilian employees. Of the civilian complement, approximately 650 employees are classified as General Schedule with the balance being Wage Grade employees. The employees sought by the Petitioner herein are a group of five professional engineers 2/ who are organizationally located in the Quality

1/ The record reveals that currently there are four labor organizations holding exclusive recognition at the Activity in four separate bargaining units. They are: (1) the National Association of Government Employees, which represents a unit of approximately 1800, primarily Wage Grade, employees; (2) the National Association of Planners, Estimators and Progressmen, which represents a unit of approximately 75-80 employees; (3) the National Association of Aeronautical Examiners, which represents a unit of approximately 40-45 employees; and (4) the Petitioner herein, which currently represents a unit of approximately 80-85 non-professional Quality Assurance Specialists, employed in the Activity's Quality and Reliability Assurance Department.

2/ The parties stipulated that these employees are professional employees within the meaning of the Order.

Control Engineering Branch. This Branch is one of three branches comprising the Quality Engineering and Analysis Division which, with two other divisions, comprise the Quality and Reliability Assurance Department. The Quality and Reliability Assurance Department, along with the Weapons Engineering Department, are under the Engineering and Quality Officer.

The Quality and Reliability Assurance Department is charged with the responsibility of effecting the quality assurance program for the entire Activity. In carrying out these responsibilities, the divisions of the Department are given separate but related responsibilities. Thus, the Quality Management Division is concerned primarily with the administrative aspects of developing and designing the quality assurance program; the Quality Verification Division is responsible for the physical, "eyeball" inspection of the various products produced by the Production Department; and the Quality Engineering and Analysis Division is the technical arm of the Department and provides technical guidance and establishes standards for the rest of the Department. Employees in the Aircraft Components Analysis Branch and the Aircraft and Engines Analysis Branch of the Quality Engineering and Analysis Division are responsible for developing quality documentation and standards for verifying rework by production personnel and they provide guidance to the Quality Verification Division. The employees in the Quality Control Engineering Branch of the Quality Engineering and Analysis Division perform engineering and technical functions associated with the production process performed throughout the plant. They also provide technical assistance in establishing and conducting maintenance programs regarding all of the equipment subject to the Activity's operations.

The record reveals that the five professional engineers whom the Petitioner seeks to represent are the only professional employees in the Quality and Reliability Assurance Department. The balance of the employees in the Department are nonprofessionals, the bulk of whom are classified as Quality Assurance Specialists, and, as noted above, currently are represented by the Petitioner. The record reveals that most of the remaining professionals employed by the Activity are found in the Weapons Engineering Department, which also is under the Engineering and Quality Officer, and in the Production Engineering Department, which is responsible to the Production Officer. In these organizational components are employees who are classified as professional engineers of various specialized disciplines, as well as physical science professionals, such as metallurgists and chemists. 3/

3/ The record reveals no prior or current bargaining history with respect to any of the Activity's 80-85 professional employees, including the employees sought herein.

The prime functions conducted within the Quality Control Engineering Branch, in which the five petitioned for Quality Assurance engineers are located, are the performance of a "process review" and the conducting of investigations into maintenance problems. In performing these functions, a thorough and complete background in engineering and physical science principles is required. Thus, a professional engineer normally is required to perform these functions. ^{4/} In performing a process review, the Quality Assurance engineer is concerned primarily with the facilities and equipment, as well as the manufacturing process, utilized by the Production Department in producing the various parts and components. In this regard, the Quality Assurance engineer interacts closely with the engineers of the Production Engineering Department. On the other hand, when conducting a maintenance investigation, the Quality Assurance engineer is primarily concerned with the maintenance and performance of the various parts and components and, in this regard, interacts closely with engineers in the Weapons Engineering Department. The record discloses that while the Quality Assurance engineers work in close cooperation with a variety of personnel in all other departments, the majority of their time is spent in interaction with other engineers of the Weapons Engineering Department and the Production Engineering Department. The evidence further establishes that the office area in which the Quality Engineering and Analysis Division is located in the main building of the Activity, as well as in the adjacent hangar building, and that the office areas for the professional employees employed in the Weapons Engineering Department and the Production Engineering Department are located in the main building, approximately 100 to 200 feet away from the office area of the Quality Engineering Analysis Division. Moreover, essentially all of the employees of the Activity enjoy common personnel policies and job benefits, and the areas of consideration for promotion and reduction-in-force actions are Activity-wide for the Activity's professional engineers, whereas the areas of consideration are division-wide for the Quality Assurance Specialists.

Based on all of the foregoing circumstances, I find that a unit limited to the professional engineers of the Quality and Reliability Assurance Department of the Activity is not appropriate for the purpose of exclusive recognition. In this regard, particular note was taken of the facts that the professional employees of the Quality and Reliability Assurance Department, the Production Engineering Department and the Weapons Engineering Department are subject to the same personnel policies and procedures which are administered centrally; the areas of consideration for promotion and reduction-in-force actions include the engineers sought to be represented herein, as well as the engineers in the two other above-noted Departments; the three Departments include employees who enjoy similar job classifications and substantially similar job functions; and the professional engineers of all three Departments work together closely in achieving their individual missions, as well as achieving the common overall mission of the Activity.


^{4/} The record discloses that, in addition to the five professional engineers assigned to the Quality Control Engineering Branch, there are two Quality Assurance Specialists who also are assigned to this Branch.

Under these circumstances, I find that the professional engineers of the Quality and Reliability Assurance Department of the Activity do not have a clear and identifiable community of interest separate and distinct from other professional engineers located at the Activity. Further, in my view, such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-2301(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 25, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTION
 OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ARMY AVIATION SUPPORT FACILITY,
 VIRGINIA NATIONAL GUARD
 A/SLMR No. 345

This case involved a representation petition in which the Association of Civilian Technicians, Incorporated (ACT) sought a unit of all Wage Grade and General Schedule Federal technician employees of the Army Aviation Support Facility located at Richard E. Byrd International Airport, Sandston, Virginia.

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In reaching this determination, he noted that the Activity operates independently of other organizations located at Byrd International Airport; is separated from other Virginia Army National Guard units; and performs a unique function not performed anywhere else in the Virginia Army National Guard. Moreover, he found that transfer or interchange between the employees in the claimed unit and other Virginia Army National Guard employees is minimal and that all of the claimed employees work in the same geographic area, are in the same area of consideration for purposes of reduction-in-force actions, are under the same Technicians Personnel Office, and have limited contact with employees of other Virginia Army National Guard units.

In these circumstances, the Assistant Secretary concluded that the employees in the petitioned for unit shared a clear and identifiable community of interest and that such a unit would promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AVIATION SUPPORT FACILITY,
 VIRGINIA NATIONAL GUARD

Activity

and

Case No. 22-3949(RO)

ASSOCIATION OF CIVILIAN TECHNICIANS,
 INCORPORATED (ACT)

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Anna B. Boswell. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Petitioner, Association of Civilian Technicians, Incorporated (ACT), herein called ACT, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The ACT seeks an election in a unit of all Wage Grade and General Schedule Federal technician employees of the Army Aviation Support Facility located at Richard E. Byrd International Airport, Sandston, Virginia, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. The Activity takes the position that the unit sought by the ACT is inappropriate inasmuch as the claimed employees share the same mission, are covered by the same personnel policies, practices, and procedures, and have the same overall supervision as all employees of the Virginia Army National Guard. Under these circumstances, the Activity asserts that the only appropriate unit would be a residual unit of all unrepresented employees in the Virginia Army National Guard.

The mission of the Virginia Army National Guard is to provide a combat-ready force where needed for the national defense and, at other times, to serve under the Governor of Virginia in the event of a State emergency. The Adjutant General of the State of Virginia has overall administrative control and supervision of all activities within the Virginia Army National Guard. In this regard, he has final authority in the areas of assignment, promotion, discipline, or separation of technicians, as well as the responsibility for establishing the basic workweek, prescribing hours of duty and the final resolution of any unresolved grievance. The Technicians' Personnel Office operates on a centralized basis, performing the administrative and personnel functions, including labor-management relations functions, for the Adjutant General. 1/ There are approximately 530 technicians employed in the Virginia Army National Guard. 2/

The Activity is located on 95 acres in the southeast corner of the Richard E. Byrd International Airport, Sandston, Virginia. 3/ Overall responsibility for the Activity's operations lies with its Commander who directs the approximately 36 petitioned for technicians. The particular mission of the Activity is to administer all records pertaining to Army Aviation in the maintenance and flight areas and to perform maintenance on all aircraft assigned to various units in the Virginia Army National Guard. The record discloses that aircraft maintenance work performed by employees in the claimed unit is not performed at any other facility in the Virginia Army National Guard. Further, the command relationship of the Activity is separate and distinct from other Virginia Army National Guard units.

Technicians employed at the Activity and technicians employed in other Virginia Army National Guard units do not work together and have no immediate common supervision. The job descriptions for the claimed technicians employed at the Activity which pertain mainly to aircraft

1/ The Technicians' Personnel Office performs personnel administration with respect to both Virginia Army and Air National Guard personnel. In this connection, it maintains all of the technicians' personnel files, and all official personnel actions emanate from that Office.

2/ Approximately 124 of these technicians are represented exclusively in two separate bargaining units - the Combined Maintenance Shop and Annual Equipment Pool - by the National Association of Government Employees.

3/ The only other Virginia Army National Guard unit located at Byrd International Airport is the 224th Field Artillery Group. Also, the Virginia Air National Guard unit is located at Byrd International Airport.

maintenance are different (with the exception of possibly a few administrative positions) from the job descriptions of technicians employed in other units of the Virginia Army National Guard. And although under the Virginia Army National Guard promotion program the areas of consideration are statewide and final selection is made by the Adjutant General, the record shows that the Activity's Commander has been designated as the nominating officer for all vacancies occurring at the Activity. Moreover, for purposes of reduction-in-force actions the technicians employed at the Activity have a separate competitive area. The evidence establishes further that the incidence of transfer or interchange involving the claimed employees to other Virginia Army National Guard units has been minimal and that their contact with other Virginia Army National Guard units is infrequent.

Based on the foregoing, I find the unit sought is appropriate for the purpose of exclusive recognition under the Order. In this connection, the following factors were noted particularly: the Activity operates independently of other organizations located at Byrd International Airport; is separated from other Virginia Army National Guard units; and performs a unique function not performed anywhere else in the Virginia Army National Guard. Moreover, transfer or interchange of employees between the employees in the claimed unit and other Virginia Army National Guard employees is minimal and all of the claimed employees work in the same geographic area, are in the same area of consideration for purposes of reduction-in-force actions, are under the jurisdiction of the same Technicians' Personnel Office, and have limited contact with employees of other Virginia Army National Guard units. Under these circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All Wage Grade and General Schedule Federal technician employees of the Army Aviation Support Facility located at Richard E. Byrd International Airport, Sandston, Virginia, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the Association of Civilian Technicians, Incorporated (ACT).

Date^d, Washington, D.C.
January 25, 1974

Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, MEMPHIS
MILLINGTON, TENNESSEE
A/SLMR No. 346

The Petitioner, National Association of Government Employees, Local R5-66 (NAGE), sought an election in a unit composed of all nonsupervisory civilian employees. The Activity and the Intervenor, American Federation of Government Employees, Local 2172 (AFGE), were in essential agreement that the unit was appropriate but contended that the petition should be dismissed on the basis that an agreement bar existed at the time of filing. The Activity and the AFGE further contended that the NAGE had not submitted to the agency a roster of its officers and representatives, a copy of its constitution and by-laws and a statement of its objectives, and therefore was not in compliance with Section 7(b) of the Order and Section 202.2(a)(6) of the Assistant Secretary's Regulations.

Under all of the circumstances, the Assistant Secretary found that the petition herein was filed timely. In reaching this determination the Assistant Secretary found that the "untimeliness" of the petition was attributable, not to any gross laxity on the part of the NAGE, but to other factors beyond the NAGE's control including the misdirection of the petition by the U.S. Postal Service to another Federal activity. In these circumstances, the Assistant Secretary concluded that it was manifest that dismissal of the NAGE's petition on the basis of untimeliness would not effectuate the purposes and policies of the Order. Accordingly, he found that the NAGE's petition was filed timely.

Noting (1) the lack of any specific requirement in the Assistant Secretary's Regulations requiring that, upon the filing of a petition, a petitioner must serve simultaneously on an activity a current roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives; (2) the fact that such documents were admittedly served on the Activity herein; and (3) the absence of any evidence of prejudice to the parties, the Assistant Secretary concluded that dismissal of the subject petition based on alleged noncompliance with Section 7(b) of the Order and Section 202.2(a)(6) of the Assistant Secretary's Regulations was unwarranted.

Accordingly, and noting the agreement of the parties with respect to the appropriateness of the claimed unit and the fact that such unit has been in existence for a substantial period of time and has had a long collective-bargaining history, the Assistant Secretary concluded that the claimed unit was appropriate for the purpose of exclusive representation within the meaning of Section 10 of the Order. He, therefore, directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, MEMPHIS
MILLINGTON, TENNESSEE

Activity

and

Case No. 41-3378(RO)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-66

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2172

Intervenor

DECISION AND DIRECTION OF ELECTION

This matter is before the Assistant Secretary pursuant to Assistant Regional Director for Labor-Management Services Lem R. Bridges' Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon the entire record in this case, including the parties' stipulations of fact, accompanying exhibits and briefs filed by the American Federation of Government Employees, Local 2172, herein called AFGE, and the Activity, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, National Association of Government Employees, Local R5-66, herein called the NAGE, seeks an election in a unit of all nonsupervisory civilian employees at the Naval Air Station, Memphis, Millington, Tennessee, excluding management executives, employees engaged in Federal personnel work in other than a purely clerical position, supervisory employees who officially evaluate the performance of other employees, and professional employees.

The parties are in essential agreement as to the appropriateness of the claimed unit and the proposed exclusions. However, the Activity and the AFGE contend that the petition should be dismissed on the basis that an agreement bar existed at the time of filing. Additionally, the Activity and the AFGE contend that the NAGE had not submitted to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives in accordance with Section 7(b) of the Order. Moreover, they assert that NAGE's failure to submit the aforementioned materials constitutes noncompliance with Section 202.2(a)(6) of the Assistant Secretary's Regulations. 1/

Alleged Agreement Bar

The Activity and the AFGE claim that the NAGE's petition was filed untimely in that it was not filed during the "open period" provided for in Section 202.3(c) of the Assistant Secretary's Regulations. 2/

The record reveals that since June 25, 1963, the AFGE has been the exclusive representative of the employees in the claimed unit and that there have been five negotiated agreements covering such employees. The most recent agreement was executed on June 23, 1971, became effective on September 7, 1971, and was to expire on September 6, 1973.

On July 9, 1973, the subject petition was docketed by the Labor-Management Services Administration (LMSA) Area Administrator in

1/ Section 202.2(a)(6) provides that a petition by a labor organization for exclusive recognition shall contain the following: "A statement that the petitioner has submitted to the activity a current roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives;"

2/ Section 202.3(c) provides, in pertinent part: "When an agreement covering a claimed unit has been signed by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: (1) Not more than ninety (90) days nor less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed; . . ."

Nashville, Tennessee. The envelope containing the petition was postmarked dated "7-2-73" and addressed to "Area Administrator, Department of Labor, Labor-Management Services Administration, 786 U.S. Courthouse Bldg., 801 Broadway, Nashville, Tennessee, 37203." 3/ On noting the erroneous address, the U.S. Postal Service apparently forwarded the unopened envelope and its contents to "1600 Hayes St." in Nashville, the address of the Office of the Occupational Safety and Health Administration (OSHA). An unidentified employee of OSHA contacted the LMSA Nashville Area Office on July 6, 1973, and advised that OSHA was in receipt of mail for the LMSA Nashville Area Office. The mail then was forwarded to the LMSA Nashville Area Office. Subsequently, the original envelope and its contents were received by the LMSA Nashville Area Office on July 9, 1973, and, as noted above, the instant petition was docketed by the LMSA Area Administrator on that same date. 4/

On July 26, 1973, a notice of petition was posted by the Activity and on the same date the AFGE requested intervention in the subject proceedings. 5/ In a letter dated August 6, 1973, to the LMSA Area Administrator, the Activity objected to the NAGE's petition claiming that the petition was filed untimely and that the NAGE had not complied with Section 7(b) of the Executive Order and Section 202.2(a)(6) of the Assistant Secretary's Regulations. 6/

In a letter to the parties dated September 5, 1973, the Acting Assistant Regional Director for Labor-Management Services stated that, in his view, the petition herein was not filed untimely. He noted that the original petition was addressed to the LMSA Area Office in Nashville at its former address and was misdirected to another agency, where it was received timely. Under these circumstances, the Acting Assistant Regional Director for Labor-Management Services did not attribute any untimeliness to any gross laxity on the part of the NAGE, but to other factors beyond the NAGE's control.

3/ This was a prior address of the LMSA Area Office in Nashville. The LMSA Nashville Area Office had moved from this address in the spring of 1972.

4/ The petition subsequently was amended by the NAGE on July 13, 1973.

5/ On July 12, 1973, the AFGE had requested that renegotiations commence and, subsequently, a new agreement was concluded by the parties on July 17, 1973, and became effective, upon approval of the Office of Civilian Manpower Management, on August 20, 1973.

6/ Previously, on July 26, 1973, the AFGE had filed similar objections to the NAGE's petition.

The Activity, on the other hand, contends that the NAGE must snare a substantial burden for the failure of the petition to have been filed timely in accordance with the Regulations. It points to the fact that the Assistant Secretary's Regulations, published September 15, 1972, included the current address of the LMSA Nashville Area Office as well as the proper method for the filing of petitions.

Under all of the circumstances, I find that the petition herein was filed timely. Thus, as noted above, it is undisputed that the initial petition was postmarked dated July 2, 1973. In this regard, it is clear that the NAGE was reasonable in believing that such petition would reach the LMSA Nashville Area Office prior to the last date of the "open period," July 6, 1973. As to the misdirection of the NAGE's petition, the evidence reveals that the petition was sent by certified mail to the prior address of the LMSA Nashville Area Office and was thereafter apparently misdirected by the U.S. Postal Service to another Federal activity where it was received on July 6, 1973, still within the "open period." Subsequently, the petition was forwarded to the LMSA Nashville Area Office, where it was received and docketed on July 9, 1973. In my view, the "untimeliness" of the petition was attributable not to any gross laxity on the part of the NAGE, but to other factors beyond the NAGE's control, including the misdirection of the petition by the U.S. Postal Service to another Federal activity. Under these circumstances, it is manifest that dismissal of the NAGE's petition on the basis of untimeliness would work an injustice and would not effectuate the purposes and policies of the Order. Accordingly, I find that the NAGE's petition herein was filed timely.

Other Procedural Matters

As noted above, the Activity and the AFGE contend that the NAGE had not complied with Section 7(b) of the Order and Section 202.2(a)(6) of the Assistant Secretary's Regulations.

While there exists some dispute as to whether or not the NAGE, upon filing its petition, simultaneously submitted to the Activity a current roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives, it is undisputed that such documents were received by the Activity on or about August 30, 1973. Under these circumstances, and noting the lack of any specific requirement in the Assistant Secretary's Regulations that such documents be served simultaneously with the filing of a petition and the absence of any evidence of prejudice to any party herein, I find that dismissal of the subject petition based on alleged noncompliance with Section 7(b) of the Order and Section 202.2(a)(6) of the Assistant Secretary's Regulations to be unwarranted.

January 25, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTIONS
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

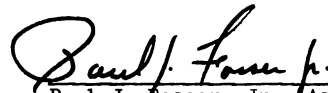
Based on the foregoing and noting the agreement of the parties with respect to the appropriateness of the claimed unit and the fact that such unit has been in existence for a substantial period of time and has had a long collective-bargaining history, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All civilian employees employed at the Naval Air Station, Memphis, Millington, Tennessee, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors 1/ and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Association of Government Employees, Local R5-66; the American Federation of Government Employees, Local 2172; or neither.

Dated, Washington, D.C.
January 25, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

7/ As noted above, the NAGE sought to exclude from the unit "supervisory employees who officially evaluate the performance of other employees." I view such a limited definition to be inappropriate and, therefore, will exclude from the unit all supervisory employees within the meaning of Section 2(c) of the Order.

GENERAL SERVICES ADMINISTRATION,
REGION 3
A/SLMR No. 347

This case involved a representation petition filed by the International Federation of Federal Police (IFFP) seeking an election in a unit of all Federal Protective Officers (FPO's) assigned to General Services Administration, Region 3, facilities at Wilkes-Barre and Harrisburg, Pennsylvania. The Activity agreed that the claimed unit was appropriate. The American Federation of Government Employees (AFGE) contended that the employees in the petitioned for unit did not share a community of interest in that the Activity's Harrisburg and Wilkes-Barre facilities were autonomous facilities separated by 100 miles.

With the exception of the FPO's in Wilkes-Barre, all FPO's under the jurisdiction of the Activity's Public Buildings Service's Philadelphia Area Office, which encompassed the State of Pennsylvania, were represented exclusively in three separate units. And, in all of these units, except for the mixed unit of FPO's and non-guard employees at Harrisburg represented by AFGE Local 2962, there were negotiated agreements currently in effect. Therefore, the instant petition included all FPO's under the jurisdiction of the Activity's Public Buildings Service's (PBS) Philadelphia Area Office, except for those in recognized units where agreement bars exist.

Under the circumstances, the Assistant Secretary found the claimed unit to be appropriate. In this regard, he noted particularly that the claimed unit included all of the FPO's under the jurisdiction of the PBS Philadelphia Area Office, except for those employees in exclusively recognized units where agreement bars existed; that the claimed employees were subject to the same overall direction and guidance and the same personnel practices and procedures; and that they were engaged in essentially the same job functions.

With respect to the existing mixed unit of the Activity's FPO's and non-guard employees located at Harrisburg, represented by AFGE Local 2962, the Assistant Secretary found, in accordance with Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, that severance of the FPO's was warranted and that AFGE Local 2962, a non-guard labor organization, would not be placed on the ballot. However, consistent with

his rationale in United States Department of the Army, Rocky Mountain Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, the Assistant Secretary determined that if the FPO's in the Harrisburg unit did not choose the IFFP as their exclusive representative, they would be viewed to have indicated their desire to remain in the existing mixed unit of FPO's and non-guard employees represented by AFGE Local 2962. If, on the other hand, the majority of the FPO's in the Harrisburg unit voted for the IFFP, there would be a pooling of the ballots with those voting in the residual Area-wide unit.

A/SLMR No. 347

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3

Activity

and

Case No. 20-3858(RO)

INTERNATIONAL FEDERATION OF
FEDERAL POLICE

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Terrence J. Martin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, International Federation of Federal Police, herein called IFFP, seeks an election in a unit of all guards, U.S. Special Police and Federal Protective Officers (FPO's) assigned to the General Services Administration, Region 3, facilities at Harrisburg and Wilkes-Barre, Pennsylvania, excluding supervisors, management officials, professional employees, and employees engaged in Federal personnel work in other than a purely clerical capacity. 1/

1/ Although the claimed unit includes the classifications of guard and U.S. Special Police, the record reveals that the Activity currently has no employees in these classifications at its Harrisburg and Wilkes-Barre locations. Accordingly, I shall make no finding with respect to their eligibility for inclusion in the claimed unit. Cf. Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, A/SLMR No. 190.

The Activity agrees with the IFFP that the claimed unit of FPO's is appropriate. 2/ On the other hand, the Intervenor, American Federation of Government Employees, AFL-CIO, herein called AFGE, takes the position that the employees in the petitioned for unit do not share a community of interest in that the Activity's Harrisburg and Wilkes-Barre facilities are autonomous facilities separated by 100 miles.

The General Services Administration (GSA), Region 3, is responsible for the management of Federal buildings within its geographic area. GSA, Region 3, is headquartered in Washington, D.C., and encompasses the States of Pennsylvania, Maryland, Virginia, West Virginia and Delaware, as well as Washington, D.C. All of the employees in the claimed unit are employed by the Public Buildings Service (PBS), a subdivision of the GSA. Within Region 3, the PBS has seven Area Offices, each headed by an Area Manager. The Philadelphia Area Office has jurisdiction over all PBS employees in the State of Pennsylvania. Under the Philadelphia Area Office there are five field offices, three located in Philadelphia 3/ and one each in Pittsburgh and Wilkes-Barre.

The record discloses that, with the exception of the FPO's at Wilkes-Barre, all FPO's and guards under the jurisdiction of the Philadelphia Area Office are represented exclusively by several AFGE locals. Specifically, AFGE Local 2962 represents all PBS employees, including the FPO's in Harrisburg; AFGE Local 2541 represents all PBS employees, including guards and FPO's in Pittsburgh; and AFGE Local 2061 represents a unit of all PBS Wage Grade employees, guards and FPO's in Philadelphia. 4/ In effect, the unit of 5 FPO's in Wilkes-Barre and approximately 18 FPO's in Harrisburg, sought by the IFFP in this matter, encompasses all of the FPO's under the jurisdiction of the Activity's PBS Philadelphia Area Office, except for those in recognized units where agreement bars exist.

The record reveals that the PBS Area Manager in Philadelphia has overall administrative and technical supervision over the PBS field offices in the State of Pennsylvania. In turn, the field offices are under the immediate supervision of Buildings Managers. Technical direction and support for protective activities are provided by the Activity's Federal Protective Service Division. Thus, "line" authority

2/ The parties did not dispute that FPO's are guards within the meaning of the Order. In this regard, Cf. General Services Administration, Region 2, New York, New York, A/SLMR No. 220, and General Services Administration, Region 9, San Francisco, California, A/SLMR No. 333.

3/ A facility in Harrisburg, Pennsylvania formerly constituted a separate field office, but currently is under the jurisdiction of one of the Philadelphia field offices.

4/ In the Pittsburgh and Philadelphia units there exist current negotiated agreements which would constitute agreement bars.

emanates from the PBS Area Manager through the Buildings Managers, while certain staff services are provided by the Federal Protection Service Division. The FPO's in Wilkes-Barre are supervised by an FPO Sergeant who reports to the Buildings Manager in Wilkes-Barre, and the FPO's in Harrisburg are supervised by an FPO Lieutenant and Sergeant who report to a Buildings Manager in Philadelphia. The Buildings Managers report directly to the PBS Area Manager in Philadelphia.

The Philadelphia PBS Area Manager is responsible for the overall staffing of the field offices under his jurisdiction. All requests for hiring and promotions must go through the Area Manager, although the final authority for approval of personnel actions is the Regional Office. Further, the Area Manager attempts to resolve grievances before sending them to the Regional Office and reviews all proposed disciplinary actions to make certain that all elements of the alleged offense have been proven prior to sending them to the Regional Office for final approval. The Area Manager also holds regular meetings with labor organizations within the Philadelphia Area having negotiated agreements in order to resolve any issues that may have not been resolved at the field office level.

Personnel services for the employees in the claimed unit are provided by the GSA Personnel Office in Philadelphia. The evidence establishes that this Office provides such services as: recruitment, placement, merit promotion, position classification, position and management studies, training, and, to some extent, labor-management relations, to all GSA employees in the State of Pennsylvania. Moreover, personnel folders for all Activity employees are maintained in this Office. The FPO's in the claimed unit wear the same uniforms, have arrest powers, have a common mission and perform essentially the same job functions.

Under all of the circumstances, I find that the employees in the petitioned for unit possess a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. Thus, the evidence establishes that the claimed unit includes all of the FPO's under the jurisdiction of the PBS Philadelphia Area Office except for those employees in exclusively recognized units where agreement bars exist; that the claimed employees perform essentially the same job functions; that all of the employees in the claimed unit are subject to the same personnel practices and procedures; and that all of the employees in the claimed unit are subject to the overall direction and guidance of the PBS Area Manager in Philadelphia. Accordingly, except as modified below, I shall direct an election in the petitioned for unit which I find to be appropriate for the purpose of exclusive recognition under the Order. 5/

With respect to the existing mixed unit of the Activity's FPO's and non-guard employees located in Harrisburg, Pennsylvania and currently represented by AFGE Local 2962, the Assistant Secretary held in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45,

5/ Cf. General Services Administration, Region 5, Chicago, Illinois, A/SLMR No. 265.

that where, as here, a timely petition seeks to sever a unit of all guard employees from an existing unit of guard and non-guard employees, such unit of guards is appropriate for the purpose of exclusive recognition. ^{6/} Under these circumstances, I find that the following employees in voting group (a) should be afforded the opportunity to express their desire as to whether or not they wish to be included within the claimed unit:

Voting Group (a): All Federal Protective Officers located in Harrisburg, Pennsylvania, employed by and assigned to the General Services Administration, Region 3, Philadelphia Area Office, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

Further, based on the foregoing, I find that the following employees in voting group (b) constitute a unit appropriate for the purpose of exclusive recognition within the meaning of the Order:

Voting Group (b): All Federal Protective Officers located in the State of Pennsylvania, employed by and assigned to the General Services Administration, Region 3, Philadelphia Area Office, excluding all guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 3, in Harrisburg, Pittsburgh, and Philadelphia, Pennsylvania, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

^{6/} In A/SLMR No. 45, the Assistant Secretary stated, in part, that "Sections 10(b)(3) and 10(c) of Executive Order 11491 clearly reflect the view that appropriate units should not be composed of mixtures of guards and non-guards and that non-guard labor organizations should not represent guards. In view of this clear mandate, I find that despite a history of representation in a combined unit, severance of the guard employees from the unit represented currently by the Intervenor is not precluded by my previously announced policy in U.S. Naval Construction Battalion Center, cited above." (Footnotes omitted) See also, in this regard, Defense Supply Agency, Defense Depot, Memphis, Tennessee, A/SLMR No. 107; General Services Administration, Region 2, New York, New York, cited above; and General Services Administration, Region 9, San Francisco, California, cited above.

In these circumstances, I will not make any final unit determination at this time, but shall first ascertain the desires of the claimed employees in voting group (a). As noted above, Section 10(b)(3) and 10(c) of Executive Order 11491, as amended, indicate that appropriate units established under Executive Order 11491 should not be composed of mixtures of guards and non-guards and that non-guard labor organizations should not represent guards. Accordingly, although AFGE intervened timely in the instant proceeding, I will not permit AFGE's name to be placed on the ballot. However, consistent with the rationale in United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, if a majority of the employees in voting group (a) does not choose the IFFP as their exclusive representative, they will be viewed to have indicated their desire to remain in the existing mixed unit represented by AFGE Local 2962. ^{7/}

The unit determination in the subject case is based, in part, then, upon the results of the election in voting group (a). However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of employees in voting group (a) votes for the IFFP, the following employees would constitute a unit appropriate for the purpose of exclusive recognition under the Order:

All Federal Protective Officers located in the State of Pennsylvania employed by and assigned to the General Services Administration, Region 3, Philadelphia Area Office, excluding all guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 3, in Pittsburgh and Philadelphia, Pennsylvania, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

2. If a majority of employees in voting group (a) does not vote for the IFFP, the following employees would constitute a unit appropriate for the purpose of exclusive recognition under the Order:

^{7/} If, on the other hand, the majority of the employees in voting group (a) votes for the IFFP, the labor organization which, in effect, is seeking to represent a residual Area-wide unit of FPO's, such votes will be pooled with those in voting group (b) with the votes for the IFFP being accorded their face value and the votes against severance from the mixed unit being counted as part of the total number of valid votes cast but neither for nor against the IFFP. Cf. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6 and General Services Administration, Region 9, San Francisco, California, cited above, at footnote 11.

All Federal Protective Officers located in the State of Pennsylvania, employed by and assigned to the General Services Administration, Region 3, Philadelphia Area Office, excluding all guards and Federal Protective Officers employed by and assigned to the General Services Administration, Region 3, in Harrisburg, Pittsburgh and Philadelphia, Pennsylvania, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

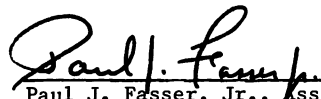
UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

CALIFORNIA NATIONAL GUARD
STATE MILITARY FORCES
SACRAMENTO, CALIFORNIA
A/SLMR No. 348

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the voting groups described above as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible in voting groups (a) and (b) shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the International Federation of Federal Police.

Dated, Washington, D.C.
January 25, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

This proceeding arose upon the filing of three unfair labor practice complaints by the National Association of Government Employees, Burbank, California (Complainant). The complaints allege, in substance, (1) that the Respondent Activity had taken reprisals against one of its employees in the form of letters warning the employee of unsatisfactory performance and abuse of sick leave because of his utilization of the contractual grievance procedure; (2) that the Respondent Activity unilaterally and without prior consultation with the Complainant, the exclusive representative, changed a contractual condition of employment; and (3) that the Respondent Activity's denial of military reenlistment in the California National Guard to one of its employees was in reprisal for his utilization of the contractual grievance procedure and for his filing of unfair labor practice complaints all in violation of Section 19(a)(1), (2), (4) and (6) of the Order.

With regard to the first allegation, the Assistant Secretary adopted the Administrative Law Judge's finding that the Respondent Activity's conduct violated 19(a)(1) of the Order. The Administrative Law Judge concluded that the evidence established that the warning letters issued to the employee involved were in reprisal for the latter's actions in filing a contractual grievance. In this regard, he noted that the record did not support the allegations of dereliction of duty or abuse of sick leave alleged in the warning letters. However, the Administrative Law Judge found no merit in the Complainant's contention that the warning letters were motivated by anti-union considerations.

As to the second allegation, the Assistant Secretary adopted the Administrative Law Judge's conclusion that the Respondent Activity violated Section 19(a)(1) and (6) of the Order by unilaterally changing an agreed-upon term of employment. In arriving at this conclusion, the Administrative Law Judge noted that the circumstances in the instant case were similar to those in Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, in which the Assistant Secretary also found violations of Section 19(a)(1) and (6) of the Order based on similar conduct.

As to the third allegation, the Administrative Law Judge concluded that further proceedings were unwarranted because, in his view, the evidence was insufficient to establish that the Respondent Activity's refusal to reenlist the employee involved was in reprisal for the latter's engaging in activity protected under the Order. In adopting the

Administrative Law Judge's conclusion in this regard, the Assistant Secretary noted particularly the Administrative Law Judge's credibility resolutions and stated that he could find no basis for reversing such resolutions.

A/SLMR No. 348

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CALIFORNIA NATIONAL GUARD
STATE MILITARY FORCES
SACRAMENTO, CALIFORNIA

Respondent

and

Case Nos. 72-3842,
72-3861, and
72-4128

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, BURBANK, CALIFORNIA

Complainant

DECISION AND ORDER

On October 24, 1973, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. The Administrative Law Judge found other alleged conduct of the Respondent not to be violative of the Order. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, including the exceptions and supporting brief filed

by the Complainant, I hereby adopt the findings 1/, conclusions 2/ and recommendations of the Administrative Law Judge. 3/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the California National Guard, State Military Forces, Sacramento, California, shall:

1. Cease and desist from:

1/ It was noted that in finding that there was insufficient evidence to sustain the allegation in the complaint in Case No. 72-4128, that the Respondent improperly refused to permit Woods to reenlist in the California National Guard because Woods had engaged in protected activity under the Order, the Administrative Law Judge relied particularly on the credited testimony of Colonel Christ, concerning the latter's dissatisfaction with the work performance of Sergeant Woods. The Assistant Secretary has stated previously "that as a matter of policy, [he] will not overrule a Hearing Examiner's [i.e. Administrative Law Judge's] resolution with respect to credibility unless the preponderance of all the relevant evidence convinces [him] that such resolution clearly was incorrect." Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180, at footnote 1. Under these circumstances, I find no basis in the record for reversing the Administrative Law Judge's credibility finding with respect to the testimony of Colonel Christ.

2/ Section 19(d) of the Order provides, in part, that "Issues which can be properly raised under an appeals procedure may not be raised under this section [19]..." The record in the instant case does not reflect whether or not there was an appeals procedure Sergeant Woods could have utilized as a result of the refusal to permit him military reenlistment. However, in view of the disposition herein on the merits, it was considered unnecessary to determine whether Section 19(d) had any applicability in this matter. Compare, Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336.

3/ With respect to the complaint in Case No. 72-3842, the Administrative Law Judge found that the Respondent violated Section 19(a)(1) by issuing certain warnings to Sergeant Woods. While he inadvertently failed to make specific findings with respect to the 19(a)(2) and (6) allegations in the same complaint, it is clear from a reading of his Report and Recommendations that the Administrative Law Judge intended to dismiss such additional allegations. Under these circumstances and as the record does not support the 19(a)(2) and (6) allegations in the complaint in Case No. 72-3842, such allegations are hereby dismissed.

a. Taking reprisals against any of its employees who have utilized their rights under the Executive Order to file a grievance under a negotiated grievance procedure.

b. Unilaterally changing the scheduling of the days off of its employees in violation of Article VI, Section 2 of its collective bargaining agreement or any other terms and conditions of employment, without meeting and conferring in good faith with Local R-12-123, National Association of Government Employees, its employees' exclusive bargaining representative.

c. Interfering with, restraining, or coercing employees by unilaterally changing their terms and conditions of employment without meeting and conferring in good faith with their exclusive bargaining representative.

d. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

a. Remove or expunge any reference to the August 29, 1972, warning letters issued to Sergeant Warren Woods from its files and submit to Sergeant Warren Woods a written acknowledgement of same.

b. Observe and adhere to all agreement provisions of the collective bargaining agreement in effect between the California National Guard and Local R-12-123, National Association of Government Employees, and meet and confer in good faith with its employee's exclusive bargaining representative, Local R-12-123, National Association of Government Employees, with respect to any change in terms and conditions of employment.

c. Post at its facilities for "A" Battery, 4th Missile Battalion, 251st Artillery Division, Stanton, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

d. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.

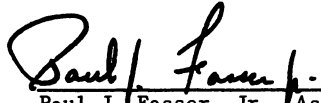
IT IS HEREBY ORDERED that the complaint in Case No. 72-4128, be, and it hereby, is dismissed.

APPENDIX

IT IS FURTHER ORDERED that in all other respects the complaint in Case No. 72-3842, be, and it hereby is, dismissed.

NOTICE TO ALL EMPLOYEES

Dated, Washington, D.C.
January 25, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, AS AMENDED, LABOR-MANAGEMENT RELATIONS
IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT take reprisals against any employees who utilize their rights under the Executive Order to file a grievance under a negotiated grievance procedure.

WE WILL NOT unilaterally change the scheduling of the days off of our employees in violation of Article VI, Section 2 of the collective bargaining agreement or any other terms and conditions of employment without meeting and conferring in good faith with Local R-12-123, National Association of Government Employees, our employees' exclusive bargaining representative.

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 Executive Order.

WE WILL remove or expunge any reference to the August 29, 1972, warning letters issued to Sergeant Warrent Woods from our files and submit to Sergeant Warren Woods a written acknowledgement of same.

WE WILL observe and adhere to all provisions of the collective bargaining agreement in effect between the California National Guard and our employees' exclusive bargaining representative, Local R-12-123, National Association of Government Employees, and meet and confer in good faith with such labor organization with respect to any change in terms and conditions of employment.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



(Agency or Activity)

Dated _____ By _____
(Signature)

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 its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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In the Matter of :
 :
 CALIFORNIA NATIONAL GUARD :
 STATE MILITARY FORCES :
 SACRAMENTO, CALIFORNIA :
 Respondent :
 :
 and :
 :
 NATIONAL ASSOCIATION OF :
 GOVERNMENT EMPLOYEES :
 BURBANK, CALIFORNIA :
 Complainant :
 :
.....
Case Nos. 72-3842
72-3861
72-4128

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Technician Personnel Officer
State Military Department

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Washington, D.C. 20005

For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to complaints first filed on October 2, 1972 ^{1/}, under Executive Order 11491, as amended, by the National Association of Government Employees, Burbank, California (hereinafter called the Union or Association) against California National Guard, State Military Forces (hereinafter called the Respondent or National Guard) a Notice of Hearing on Complaint was first issued by the Regional Administrator for the San Francisco Region on May 18, 1973. ^{2/}

The complaints allege, in substance, (1) that Respondent has taken various reprisals against Sergeant Woods because of his actions in utilizing the contractual grievance procedure and filing unfair labor practice complaints against the Respondent; and (2) that Respondent unilaterally and without prior consultation with the Union, the exclusive bargaining representative, changed a contractual condition of employment, all in violation of Sections 19(a)(1), (2), (4) and (6) of the Executive Order. ^{3/}

A hearing was held in the captioned matter on August 23, 1973, in Los Angeles, California. All parties were represented by counsel and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Subsequently, both parties filed briefs which have been duly considered.

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- ^{1/} The complaint in Case No. 72-3842, first filed on October 2, 1972, was subsequently twice amended on unspecified dates in 1973. The complaints in Case Nos. 72-3861 and 72-4128 were filed on October 11, 1972 and April 5, 1973, respectively.
 - ^{2/} The cases were consolidated for hearing by Orders dated May 18 and July 23, 1973. The Notice of Hearing was subsequently amended by Order dated August 14, 1973.
 - ^{3/} Complainant's counsel, in post hearing brief, contends for the first time that Respondent's failure to refer Sergeant Woods' grievance to a hearing examiner, per Woods' request, constitutes an independent violation of Sections 19(a)(1) and (6) of the Executive Order. Inasmuch as the matter was not so alleged as a violation in the consolidated complaint nor raised as a violation and fully litigated during the hearing, I find and conclude that the matter is not an issue before me, and make no legal conclusions with respect to same. Moreover, while evidence bearing on Woods' request and denial of same by Respondent was admitted at the hearing, such evidence was directed solely to the reasons underlying Woods' warnings and subsequent discharge. At no time during the hearing did complainant's counsel urge or indicate that such evidence supported an independent 19(a)(1) and (6) finding. In these circumstances, to now rely upon such evidence to establish an independent 19(a)(1) and (6) violation of the Executive Order by Respondent, without any advance notice, would constitute an abuse of due process.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence adduced at the hearing, I make the following, conclusions and recommendations:

Findings of Fact

Background

The National Guard employs various individuals in both civilian and military capacities. Employment in the former requires membership in the latter. Thus as will be discussed infra, absence of membership in a particular National Guard unit disqualifies an individual from employment in a civilian capacity from any work under the auspices of the particular National Guard unit. Additionally, the chain of command in both the civilian and military aspects of the various jobs involved appears to be identical, with the exceptions of the job titles or rank of the individuals involved. Thus Warren Woods, the alleged discriminatee herein, carried the rank of Sergeant in his military capacity and the title of Section Chief, a non-supervisory position for purposes of the Order, in his civilian capacity. It further appears that the duties involved in both capacities, i.e., civilian and military, were highly integrated. Being assigned to Battery A of the National Guard during the time the events leading up to the instant dispute took place, Woods was under the ultimate supervision of Captain Frank T. Poulalion, Battery Commander, Captain Poulalion held the civilian and/or technician title of Battery Supervisor. Below and above Captain Poulalion in the chain of command, in both civilian and military capacities, were Lieutenant Neill and Colonel Howard Christ, respectively. Colonel Christ held the titles of Battalion Commander and Battalion Supervisor. The mission of Battery A is to provide Air Defense Command with air defense weapons (Nike Missiles) in the defense of attacking aircraft. To this end the individuals employed therein, in both civilian and military capacities, are responsible for the technical maintenance of the military deployment of missiles. The Union is the exclusive bargaining agent under the provisions of Executive Order 11491 "for all employees of the 4th Missile Battalion, 251 Artillery" and party to a collective bargaining agreement with the Battalion dated July 19, 1971.

Warning of Unsatisfactory Performance.

On July 23, 1972, Sergeant Woods was called into the office of Captain Poulalion and informed by him that he, Woods, was about to be made the subject of an Article 15 disciplinary action for being late to a Battery formation. Captain Poulalion further informed Sergeant Woods that he was generally dissatisfied with his work performance and that he, Poulalion, wanted him to take a voluntary reduction with respect to his civilian employment as a technician from NGW-11 to NGW-8. During the ensuing discussion, Poulalion further informed Woods that if Woods would voluntarily accept the reduction in grade that he, Poulalion, would then forego the Article 15 action. Poulalion also informed Woods that he, Poulalion, was in a position to give him an unsatisfactory performance rating. The meeting or discussion ended with Woods agreeing to consider the matter

and report back his decision thereon later in the day. Subsequently, Woods discussed the matter with Claude Edgren, First Vice President of the Union, and it was decided that Woods should take the Article 15 rather than the downgrade and that the Union would file a grievance on his behalf. Woods informed Poulalion of his decision on the afternoon of July 23, 1972, and at a subsequent unspecified time received the Article 15 disciplinary action for arriving late at the reserve meeting.

Thereafter, on or about August 3, 1972, the Union initiated a grievance on Woods behalf concerning the July 23, 1972, discussion between Woods and Poulalion. By letter dated August 26, 1972, following an investigation of the grievance, Captain Poulalion received a formal written reprimand for "his injudicious actions" and "was admonished to cease immediately and hereafter the equivocal practice involving disciplinary or adverse actions against technician employees."

Three days after the issuance of the formal reprimand to Captain Poulalion, on August 29, Lieutenant Neill, Launching Area Supervisor, following consultation with Captain Poulalion, issued a Warning of Unsatisfactory Performance to Woods. The Warning criticized Woods' work performance and sick leave record. With respect to work performance the Warning cited two specific deficiencies disclosed during a July 22, 1972 inspection, i.e. dirty ram pressure probes and three loose screws on a missile access door. As to alleged sick leave abuse, the letter of warning stated that since September 1, 1971, Woods had used sick leave on eight different occasions. 4/

According to Woods' uncontradicted testimony the deficiencies cited in the Warning letter could occur at anytime and were not necessarily the product of a previous dereliction of duty on his part as Section Chief. Further, according to Woods' testimony, he was attending training school at Fort McArthur during the entire week preceding the July 22, 1972 inspection and was not at anytime during such week at the Missile Site. During his absence from the Missile Site, Woods' section was under the command and/or supervision of his subordinate, Sergeant Chagolian.

With regard to Woods' alleged abuse of sick leave, the official sick leave records of Woods indicated that he took a total of four days sick leave during the first eight months of 1972, only one of which occurred on a Monday following a weekend. However, as pointed out by Captain Poulalion, due to the nature of the operation the employees do not necessarily work a Monday through Friday work week. Thus on occasion employees might well work through a weekend and be given two days off during the middle of a week in lieu of their customary Saturday and Sunday off. According to Poulalion, whose testimony in this regard was not controverted, one of Woods' sick leave absences occurred on a Tuesday followed a Sunday and Monday non-working weekend. Poulalion further testified to the fact that Woods had been given an oral reprimand relative to the use of sick

4/ The parties stipulated that Sergeant Woods earns 13 days sick leave for each 12 month period.

leave in November of 1971, but that since such time his sick leave record "improved somewhat." Poulalion further acknowledged that there were probably other employees in his unit who had used more than four days sick leave since January 1972.

Unilateral Change in Work Schedule

The collective bargaining agreement in effect between the Union and the National Guard provides in Article VI, Section 2 as follows:

[Work] Schedule will be posted two weeks in advance, but may have to be revised to meet requirements imposed by higher headquarters if necessitated by unforeseeable circumstances. Efforts will be made by the Employer to avoid an undesirable inconvenience to individuals as a result of rescheduling. Additionally, changes, if made within one (1) week of the effective date, will be brought to the attention of the individual concerned by the Employer...

The record establishes that Claude Edgren, First Vice-President of the Union, and Sergeant Woods were, according to a posted work schedule, due to be off from work on Labor Day, September 4, 1972. 5/ It further appears that at least Edgren was also scheduled to be off on Sunday September 3, 1972, the day preceding Labor Day. Pursuant to such scheduling Edgren had planned a weekend excursion. However, upon reporting for work on September 2, 1972, Edgren and Woods noticed that the posted schedule had been changed without any prior notification to them. The unilaterally revised schedule caused both employees to work on Labor Day September 4, 1972.

Discharge of Sergeant Woods

On November 3, 1972, Sergeant Woods pleaded guilty in the Municipal Court of the North Orange County Judicial District of the State of California to driving on April 22, 1972 under the influence of intoxicating liquor, a misdemeanor. The presiding judge fined Woods \$735, imposed and suspended a 30 day jail sentence and put him on probation for one year. Subsequently, as will be noted infra, upon motion by Woods' attorney, Woods' probation was terminated on February 15, 1973. 6/

5/ The work schedule is normally posted two weeks in advance.

6/ The National Guard Rules and Regulations, Paragraph 13(d) NGR 601-200 provides: "Members of the CAL ARNG who have been convicted by Civil Court for other than a felony subsequent to their last enlistment, may not extend their enlistments unless a waiver of the offense is granted." According to the record, the granting of a waiver is within the sole prerogative of the commanding officer. In Woods' case, the waiver would be up to Colonel Christ.

On December 7, 1972, Captain Poulalion, in accordance with applicable regulations, submitted to the Commander, 4th Battalion, 251st Air Defense Artillery, a Request for Disciplinary Action against Woods. The request reads in pertinent part as follows:

On 27 November 1972, Warren Woods reported for duty two hours late. He failed to notify the unit of the reasons for his tardiness. Upon his reporting for duty, Warren C. Woods stated to his supervisor, 1LT Neill, that he had overslept. Due to a previous record of tardiness, LT Neill found the excuse unacceptable and Warren C. Woods was charged two hours leave without pay.

On 3 December 1972, Warren C. Woods was ordered to report for duty at 0630 hours on 5 December 1972, to supervise daily equipment checks in his missile section in preparation for a scheduled Logistics Readiness Evaluation conducted by Headquarters, 6th Region. He failed to notify the unit and subsequently reported at 0900 hours when the evaluation was in full progress. He failed to notify the unit as required. Subsequent to this incident, Warren C. Woods reported five minutes late for duty on 7 December 1972.

A letter of reprimand was given to Warren C. Woods on 24 April 1972 detailing previous offenses of habitual tardiness...

Request that a six day suspension be approved as provided for in National Guard Regulations...

The individual has been informed of this violation and is aware that disciplinary action may result therefrom. 7/

On January 24, 1973, Woods was informed that a three day suspension (rather than the six recommended) had been approved because of his failure to report on time on November 27 and December 3, 1972. He was further informed that the suspension was to be effective February 14, 15, and 16, 1973.

7/ Inasmuch as the complainant did not in anyway attack the truth of the matters stated in the aforequoted paragraphs of the December 7, 1972, letter, which was admitted into evidence without objection, I find that the matters alleged therein occurred as stated.

By letter dated February 2, 1973, Woods was informed by Colonel Christ that his current enlistment in the National Guard was to expire on February 21, 1973, that due to his conviction for drunken driving extension of his current enlistment would not be allowed without a waiver, that intiation of waiver was the prerogative of Christ's office and that Christ had determined that a waiver "will not be submitted." The letter went on to inform Woods that his "continued membership in this battalion in a military status is mandatory for retention as an Air Defense Technician."

By letter dated February 23, 1973, Sergeant Woods was informed by Colonel Self, Technician Personnel Officer as follows:

This office has received official notice of your loss of military membership in the California Army National Guard effective 21 February 1973. In accordance with existing regulations, this will advise you that your technician employment, therefore, will be terminated effective 27 March 1973.

In the interim, after being informed that Christ would not grant him a waiver, Woods took steps to enlist in another National Guard unit, namely the 351st Supply and Service Company. The Commander of the 351st Supply and Service Company requested the necessary waiver on February 22, 1973. The waiver was subsequently granted on March 7, 1973. Woods is currently a member of the 351st Supply and Service Company but is not employed by such unit in a civilian capacity.

With respect to the denial of a waiver for Woods, Colonel Christ credibly testified that he personally participated along with Captain Poulalion in the decision to deny the waiver, that he had known Woods for some ten years having directly supervised him when he was Woods' Battery Commander, that he had been dissatisfied with Woods' performance during such period and had gone so far as to transfer him on two occasions to less sensitive jobs which Woods' also failed to perform to Christ's satisfaction. Although Christ acknowledged giving Woods satisfactory ratings during the period in which he was under his ultimate command, Christ made it clear that such ratings were at best marginal. Christ further pointed out that in view of the nature of the work involved, i.e., the necessity to become operational on short notice, the reliability of his men must be above reproach. In this latter context he pointed out two occasions where he had denied waivers to individuals under his command.

CONCLUSIONS

Warnings and denial of reenlistment

Section 1(a) of the Order provides that each employee falling within its jurisdiction, i.e., executive branch of the Federal Government, shall have the right to freely and without fear of penalty or reprisal to form, join and assist a labor organization or to refrain from such activity, and each employee shall be protected in the exercise of such right. The Order further provides that any abridgement

of the aforementioned rights shall constitute an unfair labor practice within the meaning of Section 19(a) (1).

Once majority status is achieved by a labor organization, it is deemed the exclusive bargaining representative of all the employees in the unit and any benefits, etc., included in any subsequent collective bargaining contract flow to the employees since the union is at all times acting as their agent. By virtue of the Order itself, as amended, all collective bargaining contracts must contain a grievance procedure, utilization of which, in matters other than application and interpretation of the terms of the contract, is optional to the employees involved.

Based upon the aforementioned provisions, among others, of the Executive Order the Assistant Secretary has concluded that the filing of a grievance falls within the rights generally enumerated in Section 1(a) of the Order and the abridgement of same constitutes an unfair labor practice within the meaning of Section 19(a) (1). Department of Defense, Arkansas National Guard A/SLMR No. 53; National Labor Relations Board, Region 17, Footnote 3, A/SLMR No. 295. Accordingly, should it be determined that the issuance of the August 29, 1972, warning letters to Sergeant Woods and/or his subsequent denial of enlistment in the National Guard and consequent loss of civilian employment were in any way related to his action in filing a grievance or unfair labor practice complaint, then a violation of the Order is established.

With respect to the warnings for alleged unsatisfactory work and abuse of sick leave, I conclude, in agreement with the contention of the Complainant, 8/ that such warnings were in fact motivated, at least in part by Woods' action in filing a grievance. In reaching this conclusion I have relied primarily on the timing of the warnings, i.e. within three days of the reprimand of Captain Poulalion the absence of any substantial evidence indicating Woods' responsibility for the deficiencies disclosed by the July 22nd inspection and the fact that four absences (only two of which possibly occurred after a weekend) in an eight month period, standing alone, do not, constitute an abuse of sick leave.

8/ I find no merit to complainant's alternative contention that the warning was motivated in part by Poulalion's union animus. In this context I credit Poulalion's denial of same and note that the record testimony concerning any remarks made by Poulalion with respect to union membership were confined solely to statements of his opinion relative to the wisdom of including in the unit any individuals having subordinates under his command.

Concerning the timing of the warnings, the record establishes that Woods last utilized his sick leave during the 13th pay period, i.e., June 11 through June 24, 1972, some two months prior to the issuance of the warning for abuse of same. Additionally, no meaningful explanation appears in the record for the delay in issuing the sick leave warning or the warning relative to the alleged dereliction of duty disclosed by the July 22nd inspection. The alleged dereliction having occurred some thirty days earlier and at a time when Woods had no authority over the company, being, pursuant to instructions, in attendance at school during the entire week preceding the inspection.

Accordingly, in view of the foregoing and since the warnings do not in any event withstand scrutiny, I find that the issuance of the warnings to Sergeant Woods constituted a violation of Section 19(a) (1) of the Order, being in reprisal for his actions in filing a grievance.

With respect to the denial of Woods' reenlistment and consequent loss of civilian employment, a preponderance of the credited and uncontested evidence supports the conclusion that such actions on behalf of the Respondent were based solely on his work and/or attendance record and unrelated to the grievance or unfair labor practice complaint filed by the Union on Woods' behalf. In reaching this conclusion, I note that the Respondent's dissatisfaction with Woods job performance predated the filing of the grievance. In fact, it was the alternative offer of accepting a demotion rather than an Article 15 disciplinary action which gave rise to the grievance which underlies this proceeding. With regard to Woods' attendance record, the letter of December 7, 1972, the allegations of which are uncontested, cites at least four instances where Woods reported for duty late. Three of such instances occurred subsequent to the July altercation with Captain Poulalion. Additionally, according to the testimony of Colonel Christ, whom I find to be a most credible witness and who actively participated in the decision to deny Woods' reenlistment, during the 10 years or so that Woods had been under his command, Woods had failed to satisfactorily perform his job, causing Colonel Christ on at least two occasions to reassign him to other less critical jobs. Colonel Christ further testified that unlike other Guard units, his unit is set up for "nuclear capacity" and is expected to be operational within three hours notice. In view of the critical nature of the command the men employed therein must be highly dependable, a trait not evidenced by Woods.

In view of the foregoing and particularly the credited testimony of Colonel Christ, I find insufficient evidence to sustain the Section 19(a) (1), (2) and (4) allegations of the complaint concerning the denial of Woods' reenlistment and shall recommend that they be dismissed.

Unilateral Change in Work Schedule

According to the uncontested testimony of Woods and Edgren sometime during the week of August 28, 1972, the work schedule, which had been posted in accordance with Article VI, Section 2, of the collective bargaining agreement in effect between the Union and Respondent, was

unilaterally changed by Respondent's agents without any prior consultation with, or notice to, the affected employees. There is no contention by Respondent that the change was not a violation of the contractual provision or fell within the exception thereto, i.e. "unforeseeable circumstances."

In Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, a case involving similar if not identical circumstances, the Assistant Secretary concluded that such action by a Respondent constituted independent violations of Sections 19(a)(1) and (6) of the Order. In affirming the Administrative Law Judge's decision, the Assistant Secretary stated in pertinent part as follows:

The obligation of an agency or activity to consult, confer and negotiate with an exclusive representative and the privilege of such representative to negotiate a binding agreement would become meaningless if a party to such relationship was free to make unilateral changes in the agreement negotiated. Every dispute which arises as to interpretation or application of a provision of a negotiated agreement does not necessarily constitute a 19(a)(6) or 19(b)(6) violation simply because one party accuses the other of violating such agreement. However, where, without prior negotiations, a party initiates a course of action which clearly contravenes the agreed upon terms of its negotiated agreement...the bargaining requirements of the Order have been violated.

The Assistant Secretary went on to conclude that the Respondent not only violated 19(a)(6) but also 19(a)(1) since its action had the effect of evidencing to employees that it could act unilaterally with respect to negotiated terms and conditions of employment with regard to their exclusive representative.

Inasmuch as the Assistant Secretary's comments and conclusions are equally applicable to the facts disclosed herein and since there is no contention that the unilateral change in the work schedule was in any way based upon contractual interpretation, I find that the Respondent by unilaterally changing an agreed upon term of employment violated Sections 19(a)(1) and (6) of the Order.

RECOMMENDATIONS

Having found that Respondent has engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of the Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order. I also recommend that the Sections 19(a)(1), (2) and (4) allegations with respect to Sergeant Woods' denial of reenlistment and subsequent discharge be dismissed.


RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the California National Guard, State Military Forces, Sacramento, California, shall:

1. Cease and desist from:
 - (a) Taking reprisals against any of its employees who have utilized their rights under the Executive Order to file a grievance.
 - (b) Unilaterally changing the scheduling of the days off of its employees in violation of Article VI, Section 2 of its Collective Bargaining Agreement or any other terms and conditions of employment without consulting, conferring or negotiating with Local R-12-123, National Association of Government Employees.
 - (c) Interfering, with, restraining or coercing employees by unilaterally changing their terms and conditions of employment without consulting, conferring or negotiating with their exclusive bargaining representative.
 - (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section (1)(a) of Executive Order 11491, as amended.
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:
 - (a) Remove or expunge any reference to the August 29, warning letters issued to Sergeant Woods from its files and submit to Sergeant Woods a written acknowledgement of same.
 - (b) Observe and adhere to all provisions of the collective bargaining contract in effect between the National Guard and Local R-12-123, National Association of Government Employees and consult, confer and negotiate in good faith with Local R-12-123, National Association of Government Employees with respect to any change in terms and conditions of employment.
 - (c) Post at its facilities for "A" Battery, 4th Missile Battalion, 251st Artillery Division, Stanton, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor

for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

- (d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.


 BURTON S. STERNBURG
 Administrative Law Judge

Dated at Washington, D.C.
October 24, 1973

APPENDIX
 NOTICE TO ALL EMPLOYEES
 PURSUANT TO
 A DECISION AND ORDER OF THE
 ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
 and in order to effectuate the policies of
 EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT take reprisals against any employees who utilize their rights under the Executive Order to file a grievance.

WE WILL NOT unilaterally change the scheduling of the days off of our employees in violation of Article VI, Section 2 of the Collective Bargaining Agreement or any other terms and conditions of employment without consulting, conferring or negotiating with Local R-12-123, National Association of Government 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 Executive Order.

WE WILL remove or expunge any reference to the August 29, 1972, warning letters issued to Sergeant Warren Woods from our files and submit to Sergeant Warren Woods a written acknowledgement of same.

WE WILL observe and adhere to all provisions of the collective bargaining agreement in effect between the National Guard and Local R-12-123, National Association of Government Employees and consult, confer and negotiate in good faith with such organization with respect to any change in terms and conditions of employment.

(Agency or Activity)

Dated: _____

By _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION ON OBJECTIONS AND DIRECTION OF SECOND ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ANTILLES CONSOLIDATED SCHOOLS,
ROOSEVELT ROADS,
CEIBA, PUERTO RICO
A/SLMR No. 349

The subject case involved objections to an election filed by the Petitioner, Division Industrial, Technica Y Profesional de la National Maritime Union, AFL-CIO, alleging that statements made to eligible voters by a supervisor of the Activity constituted objectionable conduct which warranted setting aside the election and conducting a second election.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the election should be set aside. Thus, the Assistant Secretary concluded, in agreement with the Administrative Law Judge, that certain pre-election conduct of a supervisor of non-unit employees with respect to a unit employee improperly affected the results of the election. Moreover, contrary to the Administrative Law Judge, the Assistant Secretary concluded that statements made by the same supervisor to another unit employee on the day prior to the election, - that the Union was unnecessary, was for lazy people, and implying that the employee should not vote for it, - in the context of posting the notice of election, also constituted objectionable conduct which warranted setting the election aside. In this regard, the Assistant Secretary noted that it is clearly established policy, as reflected in the preamble and Section 1(a) of the Order, that agency or activity management must maintain a posture of neutrality in any representation election campaign.

Accordingly, the Assistant Secretary ordered that the election herein be set aside and he directed that a second election be conducted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ANTILLES CONSOLIDATED SCHOOLS,
ROOSEVELT ROADS,
CEIBA, PUERTO RICO

Activity

and

Case No. 37-I193(RO)

DIVISION INDUSTRIAL,
TECNICA Y PROFESIONAL
de la NATIONAL MARITIME UNION, AFL-CIO

Petitioner

DECISION ON OBJECTIONS
AND
DIRECTION OF SECOND ELECTION

On November 27, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, concluding that the election in the subject case be set aside and a new election ordered.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed to the Report and Recommendation, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, to the extent consistent herewith.

In agreement with the Administrative Law Judge, I find that the pre-election conduct of William Garcia, a supervisor of non-unit employees, with respect to a unit employee, Andres Serrano Medina, improperly affected the results of the election held on March 28, 1973, and warranted setting the election aside and the direction of a second election. Further, I find, contrary to the Administrative Law Judge, that the statements made by Garcia to another unit employee, Anastasio Velasquez Santos, on the day before the election and in the context of Garcia's posting of the notice of election, were improper and warranted the setting aside of the election. In this regard, the Administrative Law Judge found that Garcia told Velasquez that the Union was unnecessary,

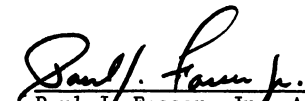
that it was for lazy people, and he implied that Velasquez should not vote for the Union. While the Order does not expressly prohibit an agency or activity from engaging in a "vote no" campaign, it is clearly established policy, as reflected in the preamble of the Order and in Section 1(a), that agency or activity management must maintain a posture of neutrality in any representation election campaign. 1/ Under these circumstances, and noting also the timing of Garcia's conduct and the fact that it occurred in the context of his posting of the notice of election, I find that Garcia's statements to Velasquez also improperly affected the results of the election. 2/

Accordingly, the election conducted on March 28, 1973, is hereby set aside and a second election will be conducted as directed below.

DIRECTION OF SECOND ELECTION

IT IS HEREBY DIRECTED that a second election be conducted, as early as possible, but not later than sixty (60) days from the date below, in the unit set forth in the Agreement for Consent or Directed Election approved on March 16, 1973. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceeding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Dated, Washington, D.C.
February 5, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ See, in this regard, Charleston Naval Shipyard, A/SLMR No. 1, at footnote 17; and also Robert E. Hampton, Chairman, Federal Labor Relations Council, "Federal Labor-Management Relations: A Program in Evolution," 21 Catholic University Law Review 493, at 502.

2/ The fact that Velasquez subsequently voted for the Petitioner was not considered to require a contrary result.



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In the Matter of :
 :
ANTILLES CONSOLIDATED SCHOOLS, :
ROOSEVELT ROADS, CEIBA, PUERTO RICO :
Activity :
 :
and :Case No. 37-1193(RO)
 :
DIVISION INDUSTRIAL, TECNICA Y PROFESIONAL :
de la NATIONAL MARITIME UNION, AFL-CIO :
Petitioner :
.....

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Esquina Ave. de Diego
Puerto Neuvo, Puerto Rico
For the Petitioner

Carl J. Engebretson
Superintendent of Schools
Antilles Consolidated Schools
Fort Buchanan
Ceiba, Puerto Rico
For the Activity

Before: MILTON KRAMER
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to an agreement for a consent election, an election by secret ballot was conducted on the premises of the Activity on March 28, 1973. The unit for which the election was held was the non-supervisory employees of the cafeterias in the elementary and high schools at the Naval Base at Roosevelt Roads, Ceiba, Puerto Rico. There was no incumbent representative, and no intervenor. The vote was five for the Petitioner and six against exclusive recognition.

Timely objections to the election were filed by Petitioner. The first Objection was that William Garcia, a supervisor,

campaigning prior to the election and put pressure on the employees to vote against representation. The second Objection was a contention that a supervisor had been permitted to vote although not included in the unit. The Assistant Regional Director concluded that the second Objection was a challenge of a vote which challenge was not timely made, and dismissed that Objection. No appeal was taken from that dismissal. He found that the first Objection raised a relevant issue of fact and law which may have affected the results of the election and issued a Notice of Hearing on that Objection. The Notice was issued July 20, 1973 for a hearing to be held September 5, 1973.

The hearing was held September 5, 1973. The Petitioner was represented by Counsel and the Activity was represented by its Superintendent of Schools. Both sides were afforded opportunity to examine and cross-examine witnesses, introduce other evidence, make closing arguments, and file briefs. The Petitioner filed a brief on October 10, 1973. The Activity did not file a brief.

Positions of the Parties

The Petitioner contends that William Garcia was a supervisor (although not a supervisor of the employees involved), and made threats and other statements in an effort to induce the employees in the unit to vote against exclusive representation, and in fact did induce at least one employee to vote against exclusive recognition because of fear of retaliation if recognition were achieved.

The Activity takes the position that the election was valid, that it made every effort to provide an environment that would afford a free election, but is unconcerned with whether the election is held to have been valid or invalid.

Facts

The cafeterias in the two schools of the Activity operate with unappropriated funds, deriving their funds from the revenues from the operation of the cafeterias. It is the only operation of the Activity that operates with unappropriated funds. The two schools are in different buildings.

When the election was ordered, the Area Administrator sent notices of the election to be posted where the employees involved worked. These notices were in English. When the principal of the elementary school, Gerard J. Hooley, received the notices for the elementary school the day before the election, he gave William Garcia copies to be posted at three places in the elementary school where they were likely to be seen (including the cafeteria and the front door of the school).

He also told Garcia to read a copy of the notice to the employees of the elementary school cafeteria and to ask them to initial a copy of the notice to signify that they had seen it or had it read to them. There is no probative or significant evidence in the record concerning the posting or other use of the notices in the high school.

Garcia had no supervisory or any other authority over the cafeteria employees. He was the supervisor of the janitors in the elementary school. His job classification was "Janitor Leader."

Three of the cafeteria employees were not conversant in English. Garcia translated the notice to them, and engaged in some conversation with them. There were five employees in the elementary school cafeteria. He received the initials of all the employees. This was shortly before 11:00 a.m. at which time the employees started work. All this, including the reading, translating, engaging in conversation, and obtaining the initials, lasted about three minutes, and took place in the kitchen the day before the election. The nature of the conversations between Garcia and those employees is one of the two critical issues in the case.

Garcia testified that his conversation with the employees was only casual conversation.

Only one of the employees in the elementary school cafeteria testified, Anastasio Velasquez Santos. He testified that Garcia engaged in a private conversation with him in a conversational, non-belligerent way, exchanging ideas about having a union. He testified, and I find, that Garcia stated that the union was unnecessary and was for lazy people, and implied that Velasquez should vote against the union. Velasquez nevertheless voted for the union. 1/ Velasquez did not testify that Garcia made or implied threats of any kind.

1/ The transcript at this point in the testimony (page 41) is quite unclear on whether Velasquez testified that he voted for the union. But I have a distinct recollection that he so testified. Velasquez testified through an interpreter who, while bilingual, was not an experienced simultaneous interpreter. At page 74 of the transcript, in a discussion with union counsel (incorrectly reported as counsel talking) I stated that Velasquez had testified he had voted for the union, and nobody suggested otherwise. The transcript is corrected to change the words "will live" on the fourth line on page 41 to "voted", and on page 73 the words "Mr. Gaud" on the sixth from the bottom line are changed to "Judge Kramer".

The only other witness who testified about the conduct of Garcia was Andres Serrano Medina. Serrano was an employee in the high school cafeteria. Garcia had had nothing to do with posting the notice of election or otherwise apprising the employees of the high school cafeteria of the election. Although Garcia was a supervisor of the Activity's janitors in the elementary school, he had no supervisory or other authority over Serrano or his coworkers in the high school or any other employee in the high school. Garcia and Serrano were cousins. Serrano testified that Garcia came by the day before the election and spoke against having a union. Serrano felt intimidated by what Garcia said; he was afraid that if the union won the election, complaints against the employees might be made and they would lose their jobs. He did not know what kind of complaints might be made or to whom they might be made. He had been employed at the cafeteria for twelve years, and his father a year longer. He therefore voted against representation, although he knew there was no interrelation between the authority over his work and Garcia's work.

Discussion and Conclusions

This case turns on two issues, whether the election was rendered invalid either because of Garcia's conduct when he went to the elementary school cafeteria to post the notice of election and read it to those who could not read English, or because of his conversation the same day with his cousin, Serrano, who was an employee in the unit at the high school cafeteria.

Garcia went to the elementary school cafeteria and posted the notice, read a copy in translation to the three employees who could not read English, and obtained the initials of all five employees in that part of the unit indicating they had read the notice or had had it read to them, and engaged in some conversation with them. All this consumed about three minutes. The five employees knew that he was a janitor in the building; he was the lead janitor with supervisory authority over the other three janitors.

The record shows only his conversation with Velasquez at that place. What he said to Velasquez, out of the hearing of the other employees in that cafeteria, was, as it appears in translation:

"...he spoke against the union. What he spoke, and how he expressed, he said the following words: that the union was not necessary, that that was to maintain or to have lazy people.

"And then, his way of expressing himself, he wanted to, he insinuated that we, that we should vote against the Union."

Garcia was not told by Hooley, the elementary school principal, to engage in any discussion. Although he was a supervisor, he was not a supervisor of the employees involved. He was acting as an emissary of the principal to post and read the notice of election, and so conceivably may have been considered a representative of the principal for some purposes. But what he said was merely an expression of his views, and did not purport to be an official position of anybody. The language was not intimidating language, nor did it intimidate; Velasquez voted for the union. It contained no threats or promises, and I conclude it was no impediment to the free and untrammelled expression of the employees' choice. Although the goal in conducting elections is that the employees' choice of a representative be determined under the antiseptic conditions of a meticulously conducted laboratory experiment, 2/ a single, ineffectual deviation from perfection is insufficient to warrant setting aside an election. 3/

The incident involving Serrano was of a different nature, and requires setting aside the election. I make no presumption that Garcia's conversation with Velasquez at the elementary school became known at the high school or its effect if it did become known. My conclusion is based on what he did at the high school although he had no function to perform there concerning the election.

The same day as the incident with Velasquez at the elementary school, Garcia went to the high school and discussed the next day's election there. There is no evidence of what he said to others than Serrano, but there is direct evidence of what he said to Serrano and its effect.

Garcia's conversation with his cousin Serrano was in a soft, conversational tone. But what he said frightened Serrano. He spoke against the union or, as Serrano described it, "doing politics" against the union. Serrano knew that Garcia had no jurisdiction over him and that his jurisdiction was limited to the janitors at the elementary school. But he knew that Garcia was a supervisor, and became afraid that if he voted for the union his cousin would make complaints of an unspecified nature, to unspecified people, perhaps to Serrano's supervisor, and that as a result Serrano might lose his job. Serrano had been working in the high school cafeteria about twelve years, and had a wife and children to support. Because of his fear of what Garcia might say to Serrano's supervisor

2/ Cf. Norfolk Naval Shipyard, A/SLMR No. 31 (1971) and General Shoe Corporation, 77 NLRB 124 (1948).

3/ Portsmouth Naval Shipyard, A/SLMR No. 241 (1973).

if the union won the election, Serrano voted "with fear" and voted against representation.

While we do not know the exact words of Garcia's statements to Serrano, we do know their effect and that that effect was based in part on Garcia having the status of a supervisor working for the same employer. The fact that Garcia had no official function to perform at the high school does not nullify the fact that he was a supervisor of the Activity and intimidated Serrano. What Garcia said was not merely a personal expression of his views, as was the instance of his conversation with Velasquez, which might be privileged. It was intimidating, and especially in an election like this one, where a swing of one vote would have produced the opposite result, must be held fatal to sustaining the validity of the election.

This case does not involve the question whether the importance of the purity of the conduct of elections transcends the importance of ascertaining the untrammelled choice of the majority of the members of the unit, and the concomitant question whether if the former is sullied the election should be set aside even if the latter is free of taint. Here it was the latter that was impeded by the statements of one who bore at least some of the indicia of management, enough to frighten Serrano. That those responsible for the formulation of managerial policy and its fulfillment were not to be blamed does not detract from the harm that was done.

I recommend that the election be set aside and a new election ordered.



MILTON KRAMER
Administrative Law Judge

Dated: November 27, 1973
Washington, D.C.

February 5, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
4392 AEROSPACE SUPPORT GROUP,
VANDENBERG AIR FORCE BASE, CALIFORNIA
A/SLMR No. 350

This case involves an unfair labor practice complaint filed against the Department of the Air Force, 4392 Aerospace Support Group, Vandenberg Air Force Base (Respondent), by the National Federation of Federal Employees, Local 1001, Professional Division (NFFE), alleging essentially that the Respondent violated Section 19(a)(1), (2), (5), and (6) of Executive Order 11491, as amended, by its conduct in connection with two meetings. At these meetings, the Respondent explained personnel policies and practices which would govern a forthcoming reduction-in-force (RIF), and it announced the number of positions which would be affected. Although officials of the Complainant attended the meetings, they were not publicly recognized in that capacity.

The Administrative Law Judge noted that the gravamen of the complaint was that the Respondent had refused to consult and confer concerning the manner in which the RIF would be effectuated, that it did not recognize officials of the Complainant at the meetings, and that it did not mention the availability of the Complainant for assistance to the employees in derogation of the Complainant's representative status.

It was stipulated by the parties that the only improper conduct complained of occurred at the two meetings involved. In this regard, however, the Administrative Law Judge was of the view that it was necessary to consider the events which preceded the meetings in order to make a determination. He found, among other things, that the proposed procedures for implementing the RIF had been the subject of prior discussions with the Complainant and that, at the time of the two meetings, the Respondent had not formulated its final plans for carrying out the RIF, and the precise positions to be affected had not been completely identified. The Administrative Law Judge found that the Respondent's dealings with the Complainant prior to the meetings belied any contention that the failure of the Respondent to acknowledge publicly the representatives of the Complainant at the meetings constituted a failure to accord appropriate recognition to the Complainant. In this respect, the Administrative Law Judge noted that there was no request by the Complainant's representatives for any type of consultation during the two meetings.

Based on the above circumstances, the Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(5) and (6) of the Order nor had it engaged in conduct which tended to discourage membership in the Complainant in violation of Section 19(a)(2). Further,

he concluded that the Respondent had not engaged in conduct which interfered with, restrained, or coerced any employee in the exercise of rights assured by the Order in violation of Section 19(a)(1). Accordingly, he recommended that the complaint be dismissed in its entirety.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and ordered that the complaint be dismissed in its entirety.

- 2 -

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
4392 AEROSPACE SUPPORT GROUP,
VANDENBERG AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-3689

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1001,
PROFESSIONAL DIVISION, VANDENBERG
AIR FORCE BASE, CALIFORNIA

Complainant

DECISION AND ORDER

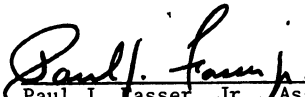
On October 16, 1973, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, and noting particularly that no exceptions were filed, I/ I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-3689 be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 5, 1974


Paul J. asser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ Although the Complainant requested and was granted an extension of time in which to file exceptions to the Administrative Law Judge's Report and Recommendations, it failed to do so.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
OFFICE OF ADMINISTRATIVE LAW JUDGES

DEPARTMENT OF THE AIR FORCE)
4392 AEROSPACE SUPPORT GROUP)
VANDENBERG AIR FORCE BASE, CALIFORNIA)
Respondent)

and)

CASE NO. 72-3689)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES)
LOCAL 1001, PROFESSIONAL DIVISION)
VANDENBERG AIR FORCE BASE, CALIFORNIA)
Complainant)

Appearances:

Mr. Homer R. Hoisington, Regional Business Agent
Rialto, California.

and

Ms. Marie Brogan, President of Local 1001,
Lompoc, California

For the Complainant

Nolan D. Sklute, Capt., United States Air Force
Office of the Judge Advocate General
Washington, D. C.

and

Frank Sprague, Office of the Staff Judge Advocate
Vandenberg Air Force Base, California

For the Respondent

REPORT AND RECOMMENDATIONS

Statement of the Case

GORDON J. MYATT, Administrative Law Judge: Pursuant to a complaint and an amended complaint filed on June 5, 1972, 1/ under Executive Order 11491, as amended, by National Federation of Federal Employees, Local 1001, Professional Division (hereinafter called the Union or Complainant), against Department of the Air Force, 4392 Aerospace Support Group, Vandenberg Air Force Base (hereinafter called the Respondent Activity) a Notice of Hearing on Complaint was issued by the Regional Administrator for the San Francisco Region on February 26, 1973. The Complaint alleged, among other things, that the

1/ Unless otherwise indicated, all dates herein refer to the year 1972.

Respondent Activity engaged in violations of Sections 19(a)(1), (2), (5) and (6) of the Executive Order.

A hearing was held in this matter on May 1, 1973 in Santa Maria, California. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved. Briefs were filed by the parties and they were duly considered by me in arriving at my determination in this matter.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendations:

Findings of Fact

A. Background Facts

The Complainant, Local 1001 of the National Federation of Federal Employees, became the exclusive representative of the professional employees at Vandenberg Air Force Base following an election held on December 9, 1971. The unit for which the Union held exclusive recognition was "all professional employees of Vandenberg Air Force Base, California, the Department of the Air Force, serviced by the Air Force Base Civilian Personnel Office; excluding non-professional employees, managers, supervisors, guards, and persons performing Federal personnel work and other than a purely clerical capacity." 2/

Sometime in early January, 1972, it became known that a reduction-in-force (RIF) was contemplated among the civilian personnel at the Air Force Base. This anticipated reduction-in-force resulted in a number of meetings between representatives of the Union and management officials over a period of several months leading up to the events which are the subject of the Complaint herein.

B. The Events Prior to the Meeting of March 24, 1972

On January 27, a meeting was arranged by Gottfredson of the Civilian Personnel Office with Union officials. Public announcement of the pending reduction-in-force had been made to the general work force and, in addition, a proposed reorganization of a major component employing professionals at the installation had been announced. The meeting was called by management in order to discuss the matter in which the proposed reduction would be conducted.

2/ The Union also represented the non-professional employees on the base. A Vice-President of the Union, Frank O'Neill, had the specific responsibility for representing the professional bargaining unit. Another Vice-President, Leroy Grantski, was in charge of the non-professional unit, and Ms. Marie Brogan was the President of the Local.

O'Neill 3/ and three other members of the professional unit attended on behalf of the Union. The parties generally discussed the manner in which the reduction-in-force was to be conducted. They also attempted to define the terms "competitive area", "competitive levels", and what the "bumping rights" of employees would be in the RIF situation. The Union representatives were given copies of Air Force Regulations which set out the procedures to be followed in conducting a RIF. The Union also had copies of the Federal Personnel Manual which dealt with the procedures to be followed in RIF situations.

There is evidence of subsequent meetings between the Base officials and the Union regarding the pending reduction in the work force at the Space and Missile Test Center (SAMTEC). Colonel Keefer, Executive Officer and Chief of Staff to General Lowe, the SAMTEC Commander, met with O'Neill and Brogan on February 17. The Union representatives asked for the specific number of positions to be affected by the proposed reduction and were told that the Activity did not have that kind of information at the present time. Keefer reiterated the desire of General Lowe to get as much information regarding the RIF to the employees as quickly as it became available. 4/ Keefer also told the union representatives that because of the General's intent to inform the employees about the numbers affected as quickly as possible, there might be a "short lead time" between providing the information to the Union and informing the general work force. He indicated that it might occur the day before or the actual morning of the release of the information generally.

There is indication that there were subsequent meetings between representatives of the Respondent Activity and the

3/ At the time of the hearing O'Neill was on a tour of duty in Canton Island in the South Pacific. When the Civilian Personnel Office learned of his assignment, they immediately got in touch with him and offered to arrange to have him flown in for the hearing. He deemed this unnecessary as the Union's interest would be adequately represented by Brogan. Accordingly, I do not draw any adverse inferences from the absence of this witness; either against the Complainant or the Respondent Activity.

4/ Consistent with his intentions to inform the employees as quickly as possible about the RIF, the Base Commander circulated a letter to the employees prior to the meeting on February 17, stating that it would be his policy to release the information to all employees as quickly as possible. The representatives of the Union had been shown a copy of the letter for comments prior to its circulation. Although the General had signed the letter and was out of town at the time, his deputy was authorized to incorporate any changes that the Union suggested.

Union officials regarding this same matter. The record does not, however, indicate the exact date of these meetings, but it does reflect that the officials of the Activity still did not have the knowledge of the specific number of positions that would be affected by the RIF. This information was classified by the Air Force Headquarters in Washington, D. C., and had not been cleared for release.

On March 23, the Department of Defense announced to Congress the proposed number of positions that would be affected by the reduction in personnel at SAMTEC. The number given was 92. Nathan Wolkimer, National President of the Union, wired Brogan relaying the information to her. The information was also picked up by the local Press media and announced in the Lompoc area where the Air Force Base was located. At the time that DOD made its announcement to Congress, Air Force Headquarters issued orders to the Commander of SAMTEC authorizing him to declassify the information regarding the RIF at 6:00 a.m. on March 24.

C. The Events of March 24, 1972

On March 24, shortly after she arrived at work, Brogan received a call from Keefer at approximately 9:00 a.m. asking her to attend a meeting for Union officials regarding the RIF. This meeting was to take place before a meeting between the Base officials and the general work force at 10:00 a.m. 5/ Brogan told Keefer she didn't see much sense in attending a meeting prior to the general meeting at 10:00 a.m. because it would take her 15 minutes to get to his office and there would not be sufficient time to go into details about the subject matter. She also indicated she had prior knowledge about the number of positions affected because of the Wolkimer wire and announcements in the local media.

Keefer also contacted Grantski requesting that he attend the earlier meeting. Grantski likewise refused because of the lack of time to get to the building where Keefer was located and return for the 10:00 a.m. meeting. As a consequence, there was never a meeting between the Union representatives and the officials of the Respondent Activity after the declassification of the RIF information and prior to the general meetings on March 24.

5/ The Respondent's officials had scheduled two meetings to be conducted with the employees; one at 10:00 a.m. and the other at 11:00 a.m. This was apparently done to insure that all of the employees would be able to attend.

The presentation was given at the 10:00 a.m. meeting by General Lowe, the SAMTEC Commander, and Allan Coleman, the Civilian Personnel Officer. 6/ Brogan, O'Neill, and Grantski attended the meeting along with the rest of the employees. They were not introduced by the officials of the Activity as representatives of the Union nor was there any acknowledgement of their presence at the meeting. General Lowe informed the employees of the number of positions and the divisions and directorates which would be affected by the reduction-in-force. 7/ Coleman explained the RIF procedures Respondent Activity intended to follow. There were discussions about the rights of various classifications of employees and how the RIF would be implemented. None of the Union officials asked any questions in their representative capacity, although employees in general asked a number of questions. At the conclusion of the meeting, Coleman told the employees that if they had any questions regarding the proposed reduction that they should seek answers from the Civilian Personnel Office. There was never any mention of the Union during the entire meeting.

The meeting at 11:00 a.m. followed the same format as the prior meeting. As in the case of the 10:00 a.m. meeting, the Union officials were never publicly acknowledged nor were the employees instructed to go to the Union representatives regarding any questions they had concerning the proposed RIF.

Concluding Findings

There is no serious factual dispute involved in this case. It is evident from the testimony of all the witnesses that in January 1972, a proposed reduction-in-force was contemplated at the Respondent Activity. It is also evident that the Commander of SAMTEC intended to inform the employees about the positions involved and the manner in which the RIF would be implemented as quickly as he was authorized to do so by higher officials in order to allay any fears of the employees. There is evidence of at least two meetings (and possibly more) regarding the pending reduction between the Union representatives and the management officials prior to the time that the information became available regarding the specific positions to be affected. It is most unfortunate that the Department of Defense released the number of positions thought to be affected to the Congress and hence to the general public on March 23,

6/ Coleman testified that the General's staff did not complete their preparation for the meeting until approximately 9:00 a.m. that morning. He also stated that his staff remained until midnight preparing for the general meetings.

7/ These were raw numbers which had not been fully developed at the time of the meeting. The record indicates that the actual number of positions affected was not finalized until sometime the following month.

while Air Force Headquarters issued instructions to the Respondent Activity to declassify the same information at 6:00 a.m. the following day. It is highly improbable that the case would have proceeded to this stage had not this "Catch-22" type of situation developed.

The gravamen of the complaint, however, is that the Respondent Activity refused to consult and confer with the Union concerning the manner in which the RIF would be effectuated prior to the meetings of March 24, and did not recognize the Union officials at the meetings on that date. Nor did management officials mention the availability of the Union for assistance to the employees in derogation of the Union's representative status. Presumably, by this conduct management failed to accord "appropriate recognition" to the Union required by the Executive Order and thereby discouraged membership in the Union. This conduct is alleged to have interfered with the rights of employees assured by the Order.

In my judgement this case does not give rise to the broad-gauged issues asserted by the Complainant. But more importantly, I find that the facts here simply do not support the allegations of the Complaint. It was stipulated at the hearing by the parties that the only conduct complained of occurred at the two meetings on March 24. But it is necessary to consider the events that preceded the meetings in order to make a determination in this case.

As noted above, the officials of the Respondent Activity had several meetings with the Union representatives regarding the pending RIF and provided them with all of the information available at that time. The Union representatives were given copies of the Air Force Regulations dealing with RIF situations and they also had copies of the Federal Personnel Manual dealing with the same subject. In addition, Brogan testified that she made visits to the personnel office regarding information on positions and retention registers and the like. Although Brogan implied that she was unable to get certain information at the exact times she wanted it, it is clear that she had access to all of the information she requested as the Union representative. The key to the discussions of course concerned the number of positions to be affected by the proposed RIF. While this information was not available prior to March 24, it is clear that the officials of the Respondent Activity assured the Union representatives the information would be made known to them as soon as it was declassified. Thus it is apparent that management willingly engaged in consultation with the Complainant on the basis of information available at that time regarding the pending reduction.

The lack of coordination between the public announcement by DOD on March 23, and the declassification of what was already

common knowledge on March 24, does not convert the circumstances into a violation of the Executive Order. There was simply no time for management to consult with the Union prior to the general meeting with the employees on March 24. The efforts of Keefer to arrange a meeting with the Union representatives shortly after 9:00 a.m. on that date demonstrates that it was not feasible or possible to have a meaningful meeting prior to the scheduled general meetings.

The Union complains of the manner in which the general meetings were conducted and the failure of the Respondent's officials to introduce the Union representatives. These complaints, however, do not warrant a finding of a violation of any section of the Executive Order. That management did not publicly acknowledge the presence of the Union representatives in no way constitutes a failure to accord appropriate recognition to the Union in its representative capacity. Indeed, all of management's prior dealings with the Complainant regarding the proposed RIF belie this contention. Nor was there a refusal on the part of management to consult, confer, or negotiate concerning the subject matter of the meetings. The Respondent's officials were merely explaining to the employees the positions to be affected by the pending RIF and stating the procedures which the Respondent proposed to follow in implementing the reduction. The procedures had been the subject of prior discussions with the Union representatives and it was only a matter of identifying specific positions which were to be affected. As noted above, there was no time to inform the Union in a meaningful way of the specific numbers prior to the declassification of that information earlier that day. Moreover, the information regarding the positions to be affected consisted merely of raw data and was not refined or finalized until sometime the following month. Hence, at the time of the meetings on March 24, management had not formulated the final plans for carrying out the reduction and the precise positions to be affected had not been completely identified. 8/

It should also be noted at this point that there was never a request on the part of the Union representatives for any type of consultation during the course of the two meetings. Since the Complaint is limited to the conduct of the two meetings on March 24, it is patently clear that no violation of the Executive Order was committed by the Respondent Activity. It follows from the above that the Respondent did not violate Section 19(a)(5) and (6) of the Executive Order and therefore did not engage in conduct which tended to discourage membership in the Union in violation of Section 19(a)(2). In addition, the Respondent did not engage in any type of conduct which interfered


8/ Cf. United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289.

with, restrained or coerced any employee in the exercise of rights assured by the Executive Order in Section 19(a)(1).

Accordingly, on the basis of the foregoing, I find that the Respondent Activity did not engage in any conduct which violated the Executive Order. I shall, therefore, recommend that the Complaint in this case be dismissed in its entirety.

Recommended Order

On the basis of the foregoing findings of fact and conclusions of law I find that the Respondent Activity, United States Department of Air Force, 4392 Aerospace Support Group, Vandenberg Air Force Base, California, did not engage in any conduct in violation of Sections 19(a)(1), (2), (5) and (6) of the Executive Order and I recommend that the Complaint herein be dismissed in its entirety.


GORDON J. MYATT
Administrative Law Judge

October 16, 1973

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,
STRATEGIC COMMUNICATIONS COMMAND,
FORT HUACHUCA, ARIZONA
A/SLMR No.351

This case involves a petition for clarification of unit filed by the Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona (STRATCOM) in which it seeks to exclude the employees of the newly formed Communications Security Logistics Agency (CSLA), previously a component of the United States Army Communications Electronics Engineering Installation Agency (CEEIA) from an existing bargaining unit because, in STRATCOM's view, the establishment of CSLA as a separate, independent activity at Fort Huachuca, as a result of a reorganization, had effectively destroyed the community of interest which previously existed between the employees of the CEEIA and the employees of the other components included in the certified unit.

The incumbent exclusive representative, American Federation of Government Employees, AFL-CIO, Local 1662, Fort Huachuca, Arizona (AFGE) contended that the reorganization amounted merely to a "paper transfer" of the employees involved to another command. It maintained that, despite the reorganization, the job functions of the employees involved have not changed, and furthermore, the day-to-day operations continue to be the same as they were before the reorganization.

The Assistant Secretary found that the employees of the CSLA continue, after the reorganization, to share a community of interest with the other employees of the existing unit at Fort Huachuca. He noted that the employees of CSLA have remained at the same physical location, performing the same work, under the same immediate supervision and working conditions, and continue to have the same day-to-day contact with other unit employees as existed prior to the reorganization. Also, CSLA continues to receive the same administrative services from STRATCOM, including the services of the Fort Huachuca Civilian Personnel Office such as personnel, labor relations and grievance handling. Accordingly, the Assistant Secretary ordered that the instant petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
STRATEGIC COMMUNICATIONS COMMAND,
FORT HUACHUCA, ARIZONA

Activity-Petitioner

and

Case No. 72-3823(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1662,
FORT HUACHUCA, ARIZONA

Labor Organization

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Thomas R. Wilson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs of the parties, the Assistant Secretary finds:

The Petitioner, Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona, herein called STRATCOM, seeks clarification of an existing bargaining unit in order to have it conform to changes resulting from a recent reorganization. More specifically, STRATCOM contends that employees of the newly formed Communications Security Logistics Agency, herein called CSLA, formerly a component of the United States Army Communications Electronics Engineering Installation Agency, herein called CEEIA, should be excluded from the existing bargaining unit because their removal from CEEIA and the establishment of CSLA as a separate, independent tenant activity at Fort Huachuca effectively destroyed the community of interest which previously existed between employees of CEEIA and employees of the other components included in the certified unit. STRATCOM argues that the continued inclusion of employees of CSLA -- now a component of the United States Army Electronics Command, Fort Monmouth, New Jersey, herein called ECOM -- in the existing unit would not promote effective dealings and efficiency of agency operations and would make a viable labor-management relationship impractical. The incumbent exclusive representative, American Federation of

Government Employees, AFL-CIO, Local 1662, Fort Huachuca, Arizona, herein called AFGE, contends that the reorganization amounted merely to a "paper transfer" of the employees involved to another Command. The AFGE maintains that, despite the reorganization, the job functions of the employees involved have not changed and, furthermore, the day-to-day operations continue to be the same as they were before the reorganization. It urges the Assistant Secretary to permit the ongoing and beneficial relationship to continue by holding that the CSLA employees should remain in the existing bargaining unit. 1/

The evidence establishes that in 1967, the Communications Security Directorate, herein called COMSEC, an entity within STRATCOM, was moved from Washington, D.C. to Fort Huachuca, Arizona. Subsequently, in September of 1970, COMSEC became a part of CEEIA, and on December 28, 1971, the AFGE was certified as the exclusive representative in a unit consisting of "All Wage Grade and General Schedule nonprofessional employees of the Headquarters United States Army Strategic Communications Command, United States Army Communications-Electronics Engineering Installation Agency, Communications Electronics Engineering Installation Agency -- Western Hemisphere, and Headquarters Fort Huachuca, located at Fort Huachuca, and Procurement Annexes serviced by Headquarters, Fort Huachuca Civilian Personnel Office, excluding supervisors, managers, professional employees, guards and persons performing Federal personnel work in other than a purely clerical capacity, and casual employees." 2/

Subsequently, on October 1, 1972, a reorganization was effectuated whereby COMSEC was removed as a component of CEEIA, was redesignated as CSLA and the latter became a component of ECOM. Further, CSLA became a tenant of Fort Huachuca and entered into a Host-Tenant agreement with Headquarters, Fort Huachuca. The record reveals that the Host-Tenant agreement specified that the Host would provide the same administrative and logistics support services to CSLA which it had provided previously to COMSEC when the latter was a component organization of STRATCOM. These services, which are identical to those provided in similar agreements with other tenants of the Fort, include the furnishing of all buildings,

1/ In view of the disposition herein, I find it unnecessary to rule on the AFGE's Motion to Dismiss the subject petition for clarification of unit.

2/ On August 11, 1972, a two-year negotiated agreement was entered into between the parties covering the employees in the exclusively recognized unit. The agreement covered also a separate unit of employees of the U.S. Army Safeguard Communications Agency, herein called SAFCA -- a tenant command at Fort Huachuca -- for which the AFGE was the exclusive representative. The negotiated agreement was signed by both the Commander of STRATCOM and the Commander of SAFCA.

maintenance, office supplies, civilian personnel services, health services, transportation, computer facilities, disposal services, telephone services, machine repair and servicing, snack bar, cafeteria and commissary facilities, mail services, janitorial services, maintenance engineering, finance and accounting, and the services of Civilian Welfare Council.

The record reveals that the Fort Huachuca Civilian Personnel Office, (CPO) handles personnel functions and labor-management relations for the Fort and its tenant activities, and that virtually all personnel policies and regulations administered by the CPO apply to employees of Fort Huachuca and its tenants. The CPO handles labor relations on a component-by-component basis in order to take into account specific problem areas that individual components may have. The processing of all promotions and reductions-in-force (RIF's) are handled through the CPO even though different competitive areas are involved. ^{5/} Similarly, all grievances are processed by the CPO and it works closely with the AFGE and STRATCOM management in an attempt to settle all grievances at the first and second steps of the grievance procedure. The record reveals that the third step of the grievance procedure requires that the matter be handled by individual component commanders, all of whom are located at Fort Huachuca, except the CSLA Commander. ^{4/}

The evidence establishes that the chief function and mission of CSLA -- that of providing communications security equipment to the Army -- did not change as a result of the reorganization, although CSLA did lose two minor functions previously performed by CEELA which were given to other components established to handle them. Further, the reorganization was accomplished with no change in the type of appointment, position title, series, grade or salary of the employees involved and CSLA employees continue to be housed at the same location as before the reorganization along with employees of several other components. The record reveals that the type of work performed by CSLA requires that its employees work closely with the employees within the various STRATCOM components. In this regard, CSLA employees give advice and assistance concerning the installation of security equipment on the communications equipment handled by STRATCOM. Also, they are responsible for servicing the security equipment which necessitates their close cooperation with employees of other STRATCOM components. The evidence establishes that the employees of CSLA continue to perform the same jobs and are utilizing the same equipment as before

^{3/} There is a Fort-wide competitive area for all jobs GS-11 and below; however, all jobs above GS-11 may be component-wide or command-wide. All components at the Fort have the same competitive area for RIF's except SAFCA and CSLA which have their own separate competitive areas.

^{4/} In this latter regard, the record indicates that the only difference in third-step grievance handling brought about by the change in CSLA's status is that all records regarding the grievance now are sent to ECOM headquarters in New Jersey for action.

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the reorganization. Moreover, inasmuch as many of the same job classifications, such as computer analyst and inventory specialist, are found within the numerous components at the Fort, there is a substantial amount of interchange and transfer between employees of the various components at the Base, including employees of CSLA.

Under all of the circumstances, I find that the employees of the CSLA continue, after the reorganization, to share a community of interest with the other employees of the existing exclusively recognized unit at Fort Huachuca. Thus, the evidence demonstrates that the employees of CSLA have remained at the same physical location, performing the same work, under the same immediate supervision and working conditions, and continue to have the same day-to-day contact with other unit employees, as existed prior to the reorganization. In addition, CSLA continues to receive the same administrative services from STRATCOM, including the services of the Fort Huachuca CPO which continues to provide assistance on personnel, labor relations and grievance matters. Although CSLA has been transferred administratively to another command, which is separated geographically from STRATCOM, and whose Commander participates at the third step of the grievance procedure, I find these factors are not sufficient to establish that CSLA employees, as a result of the reorganization, enjoy a community of interest separate and distinct from the other employees in the existing unit and that their continued inclusion in the existing unit would fail to promote effective dealings and efficiency of agency operations. ^{5/} Accordingly, I shall order that the instant petition be dismissed. ^{6/}

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 72-3823(CU) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 5, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

^{5/} Cf. Department of Army, Headquarters, U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 328 and AMC Ammunition Center, Savanna, Illinois, A/SLMR No. 291.

^{6/} It was noted that under the circumstances of this case, the filing of a petition for amendment of certification may be appropriate to reflect the change in the designation of the Activity precipitated by the reorganization of October 1972.

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UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

LONG BEACH NAVAL SHIPYARD
A/SLMR No. 352

This unfair labor practice proceeding involved a complaint filed by the Federal Employees Metal Trades Council - Long Beach (Complainant) alleging that the Long Beach Naval Shipyard (Respondent) violated Section 19(a)(1) and (6) of the Order based on a foreman's alleged threat to take action against an employee if the latter went to see a union steward while working on any of the foreman's jobs, and the alleged refusal of the foreman to discuss settlement of the matter.

At the time of the occurrence of the alleged unfair labor practice, the Complainant and the Respondent were parties to a collective bargaining agreement which set forth a procedure under which a unit employee who had a grievance or complaint could contact a representative of the Complainant to discuss the matter. Basically, the procedure provided that in the event an employee had a grievance, he had the option of either contacting his representative privately during non-duty hours to arrange for a meeting with management to discuss the matter, or, during working time, requesting his supervisor to make arrangements for the employee to meet with his representative.

The foreman involved herein assigned employees Smith, Randolph and Landry to clean a crane at the Shipyard. In order to clean the upper portion of the crane, the three had to be raised in the basket of another crane. On the following day, during his lunch break and apparently unbeknown to the foreman, Smith discussed with a union steward the prospect of receiving "high pay" for cleaning the crane as well as the need for a rigger to direct the operator of the other crane. During that afternoon, the foreman approached the job site and, upon inquiring why the three men were not working, was told by Smith that he had spoken to a union steward concerning "high pay" and the need for a rigger. The foreman advised Smith that if he ever left his job without the foreman's consent or permission to seek or see a union steward, the foreman would "put him out of the gate." The foreman further stated that, if Smith wanted to see a union steward, he should contact the foreman, who would make the appropriate arrangements.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent's conduct herein did not violate Section 19(a)(1). In this regard, the Assistant Secretary adopted the Administrative Law Judge's conclusion that the foreman's admonishment to Smith referred to Smith's leaving the job during working hours and did not refer to Smith's seeking a union steward on the latter's own time. Consequently, the Assistant Secretary concluded that the foreman's statement

was not a threat that constituted an infringement of Smith's rights under either the Order or the agreement between the parties, but, rather was a legitimate restriction of an employee to his work station during working hours.

With respect to the alleged 19(a)(6) violation, the Assistant Secretary adopted the Administrative Law Judge's conclusion that the foreman's alleged refusal to discuss settlement of the unfair labor practice complaint was not, as contended by the Complainant, violative of the Order. The Administrative Law Judge noted that the Assistant Secretary, in U.S. Department of Defense, Department of the Army, et al, A/SLMR No. 211, had concluded that the obligation to consult, confer, or negotiate relates to the collective bargaining relationship between an incumbent labor organization and an agency or activity and that a question relating to compliance with Regulations is an administrative matter to be handled in the processing of unfair labor practice cases.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LONG BEACH NAVAL SHIPYARD

Respondent

and

Case No. 72-3860

FEDERAL EMPLOYEES METAL TRADES
COUNCIL - LONG BEACH

Complainant

DECISION AND ORDER

On October 24, 1973, Administrative Law Judge William Naimark issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the ruling of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in the subject case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-3860 be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 5, 1974

Paul J. Façser, Jr.
Paul J. Façser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ On page 2 of his Report and Recommendation, the Administrative Law Judge inadvertently stated that it was contended that the alleged improper statement herein was made on August 25, 1973, rather than on August 25, 1972; and that the parties met on August 26, 1973, to discuss settlement of the complaint, rather than on August 26, 1972. These inadvertent errors are hereby corrected.



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In the Matter of :
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LONG BEACH NAVAL SHIPYARD :
Respondent :
:
and :
:
FEDERAL EMPLOYEES METAL TRADES :
COUNCIL - LONG BEACH :
Complainant :
.....

Case No. 72-3860

Robert Owens
Business Agent, Local 831
United Association of Journeymen
and Apprentices of the Plumbing
and Pipe Fitting Industry

and

Paul Ennis
Vice President of Federal Employees
Metal Trade Council, Long Beach,
California

For the Complainant

Geoffrey D. Spinks
Labor Relations Advisor
Labor Disputes & Appeals Section,
Office of Civilian Manpower Management,
Department of the Navy

For the Respondent

Before: WILLIAM NAIMARK
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

The proceeding herein arose under Executive Order 11491 (herein called the Order), pursuant to a Notice of Hearing on complaint issued on June 5, 1973 by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, San Francisco Region.

On October 16, 1972, Federal Employees Metal Trades Council, Long Beach, California (herein called the Complainant) filed a complaint against Long Beach Naval Shipyard (herein called the Respondent). The complaint alleged violations by Respondent of Sections 19(a)(1), (2) and (6) of the Order based on alleged threats by a foreman to take action against an employee if the latter went to see a union steward while working on any of the foreman's jobs. Based on the same facts Complainant filed an amended complaint on April 30, 1973 deleting the alleged violations of Section 19(a)(2) of the Order.

A hearing was held before the undersigned on August 22, 1973 at Los Angeles, California. Both parties were represented thereat, and were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered by the undersigned.

Complainant contends that the statement made by Foreman Harold to employee John Smith on August 25, 1973 regarding leaving work to find a union steward was a denial of union representation. It insists the remark by the supervisor was coercive in nature, and constituted a violation of Section 19(a)(1) of the Order. Further, Complainant maintains that when the parties met to discuss settlement of the complaint on August 26, 1973, the foreman did not want to discuss the matter or settle in good faith. This action was allegedly a refusal to recognize the union agent, as well as a refusal to entertain the grievance, and constituted a violation of Section 19(a)(6) of the Order. 1/

It is urged by Respondent that the foreman merely advised the employee not to leave his job to find a steward without following the contractual procedure of making arrangements through his supervisor. Further, the failure to settle the matter cannot be deemed a violation of the obligation to consult, confer, or negotiate as required by the Order. Violations of Sections 19(a)(1) and (6) of the Order are denied.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

1/ In its brief Complainant objects to Respondent's calling two union witnesses and paying them for attending the hearing, maintaining that all representatives of both parties should be on time allowed. As this issue is not before me for consideration, nor within the allegations of the complaint, I make no recommendations with regard thereto.

Findings of Fact

1. At all times material herein, and during 1972, Complainant was the exclusive bargaining representative of all ungraded employees in the Shipyard of Respondent.

2. Complainant and Respondent executed a written collective bargaining agreement on November 1, 1971 which, by its terms, was effective for two years from its date of approval (November 10, 1971).

3. Section 6 of the aforementioned agreement provides, in pertinent part, as follows:

Section 6. Any employee in the Unit, who has a complaint or an alleged grievance has the right, and shall be protected in the exercise of that right, to discuss the matter with a Council representative of his choice.

A Unit employee may request the services of a specific Council representative, either through his supervisor or privately during non-duty hours, such as lunch periods, before and after work.

In those cases where an employee, through his supervisor, requests the services of a Council representative, that supervisor will arrange the date, time and place at which the employee can expect to meet with the requested Council representative.

In those cases where an employee, privately during non-duty hours, requests the services of a Council representative, that Council representative will so notify his supervisor who will arrange the date, time and place at which the Council representative can expect to meet with the employee who requested his services.

In either case the responsible supervisor will advise the employee or the Council representative of the arrangements made.

4. John Smith, Jr., Herbert Landry, and Richard Randolph were employed by Respondent as tank cleaners in Department 72, and were supervised by foreman James Harold, during all times material herein.

5. On August 24, 1972 foreman Harold assigned employees John Smith, Jr., (hereinafter called Smith), Herbert Landry,

(hereinafter called Landry), and Richard Randolph (hereinafter called Randolph) to clean a crane on the west side of a dry-dock. In order to steam clean the upper part of the crane, the employees had to be raised in a "basket" of another crane to reach the section or part of the crane to be cleaned.

6. On the same date that the aforementioned employees were assigned to clean the crane, August 24, 1972, they discussed among themselves the prospect or idea of receiving "high pay" for this work, as well as a rigger being needed to signal the crane operator when the tank cleaners are stationed in the basket and cleaning the crane. Smith stated to the others that he would talk to foreman Harold about both matters.

7. Smith testified and I find that on August 25 at noon, and during his lunch time, he spoke to Wallace, union steward for Laborer's 110, Labor Council Representative, about the fact that no rigger was present to guide the crane basket and that the men did not receive "high pay" for going up in the basket; that Wallace said he did not know if the men should receive such "high pay," and he would check into it, but the men should have a rigger with them.

8. Smith testified, further, that on August 25 between 2:00 p.m. and 2:30 p.m., he went over to the east side of the drydock to get a soda; that as he left the "coke machine" he met Harold who asked him where he was going and Smith said he was returning to work; that they walked back to the job together and the foreman inquired why the basket was down and Smith mentioned he had talked to Wallace who said they should have a rigger; that Smith told Harold he was not going back up in the basket until the men had a rigger, and the foreman replied Smith will do so if he is told; that he told the foreman he had talked to Wallace, and Harold replied "any-time you go and see a steward from any of my jobs without permission, without my permission I am going to put you out of Gate 5;" and the foreman, while making this statement to Smith, was shaking his finger in front of the latter's face; that Smith stated the foreman was letting his hat go to his head, whereupon Harold threw the hat to the ground and said he would ground Smith's big ass; that Harold told him to return to work, and he thereupon went back to his job.

Landry testified that on August 25 at about 3:30 p.m. Harold came up alone to where the three tank cleaners were standing and awaiting the other crane to assist them in their job. According to Landry, the foreman asked them why they were not in the basket, and the men replied they were waiting for a rigger to direct the crane. Smith raised the question of "high pay" for the job, and told Harold the men can't go up in the basket without assistance. The foreman allegedly replied that "if I tell you to go up there you will go up there."

Further, Landry testified a discussion ensued about a union steward and Harold told Smith "...if you ever go through a Union steward without my consent I will put you out of Gate 5."

Testimony by Randolph reflects that at approximately 1:30 p.m. or 2:00 p.m. Harold approached the job and engaged in a conversation with Smith regarding high pay for their cleaning the crane. This witness testified that the foreman said, "if you ever go and leave my job and see a shop steward without my consent that (sic) I will put you out of Gate 5." Smith allegedly replied he didn't go off the job but had seen Wallace on his lunch hour. Randolph confirms earlier testimony that Smith told Harold to get his fingers out of the employee's face; that Smith told the foreman he was letting his hat go to his head, and Harold threw off his hat and said he would ground Smith's big ass.

Foreman Harold testified that on August 25 at about 1:00 p.m. or 1:30 p.m. he came across the dry dock to the crane where Landry and Randolph were on the job. Smith was, according to the foreman, approaching the area and he told Harold the men were not supposed to go on the crane without a rigger. Harold maintains he asked Smith where he had been and the latter replied he went to find a steward. The foreman then said, "John, you know better than to leave the job and go find a steward." After Smith retorted that he goes where he wants, Harold said "...not during working hours...furthermore you can be put out the gate for going to find a steward without authorization." The foreman further testified that he told Smith if he wanted a steward he should go through channels and Harold would get him one. Harold confirms the testimony by the other witnesses that Smith admonished Harold to get his hand out of the employee's face, but denies the alleged threat by him to "ground Smith's big ass." Moreover, the foreman avers Smith threatened to "knock" him on his ass if Harold did not get his hand out of Smith's face. Harold testified he called his general foreman to report the matter, but the latter was not there and the foreman dropped the matter.

While there are discrepancies among the versions given by the four witnesses regarding the incident on August 25, I do not feel compelled to resolve those variances dealing with the time sequence, the location where Smith and Harold met on that date, the minor details concerning comments regarding the work, or remarks of physical violence unrelated to Smith's seeking a union steward. Since the three employees testified corroboratively, for the most part, to the substantive portion of the discussion between Harold and Smith, I find that foreman Harold stated to Smith on August 25 that if he ever left his job without the foreman's consent or permission to seek or see

a union steward, Harold would put him out of the gate. 2/ I further find that the foreman stated to Smith on that date that if he wants to see a union steward, he should contact Harold and the latter would make arrangements therefor.

9. Smith did not ask foreman Harold for permission to speak with a union steward on August 25, nor did Harold grant permission to Smith to leave the job on August 25 in order to find, or speak with, a union steward.

10. On several occasions prior to August 25 Smith had spoken to Harold regarding his desire to see a union official. On said occasion Harold made arrangements for Smith to contact a union representative, and the said employee did, in fact, confer with the union agent as a result of said arrangements made by the foreman.

Conclusions

A. Foreman Harold's Statement As Violative of 19(a)(1)

Both the spirit and the letter of the Order, as well as decisional law issued by the Assistant Secretary, demonstrate clearly that employees are entitled to select, and confer with, union representatives in respect to complaints or grievances concerning working conditions. This doctrine is not, as I understand the case at bar, disputed by Respondent herein. The sole issue is whether Respondent, by virtue of foreman Harold's remarks to employee Smith on August 25, 1972, infringed upon these rights. Stated otherwise, it must be determined if the foreman threatened to affect Smith's employment should the latter exercise his rights guaranteed under Section 1 of the Order.

Orderly and efficient conduct of any employer's operations would necessarily dictate that employees remain at their posts or areas during working hours unless permission is granted to do otherwise. Such restriction would, it seems, logically apply to any departure from the job, including meetings or discussions between employees and their union representatives.

2/ While Landry did not testify that Harold referred to Smith's leaving the job to find a union steward, the thrust of the interdiction, as confirmed by all other witnesses, was limited to leaving the job site. Moreover, the tenor of the witnesses' testimony reflects, and I find, that the foreman's admonishment was referable to Smith's leaving the job during working hours and not on his own time.

The maxim "working time is for work" has been accepted in the private sector and management has been exculpated from any wrongdoing when it resisted unauthorized work breaks even to transact union business. Associated Retailers' Suburban Delivery Co. 181 NLRB 456.

The circumstances herein do not sustain Complainant's contention that the foreman's remarks constituted an infringement under the Order. Even accepting the version as stated by Smith, the warning issued to him lies within permissible bounds. Thus, Harold's caveat not to leave his jobs to see a union steward, under penalty of being "put out the gate," unless Smith received the foreman's permission, is no more than a proper confinement of an employee to his work. I do not construe the admonition to Smith to include not visiting the union steward on non-working time. Continual reference is made to Smith's not leaving the foreman's job without permission or consent - an approval not required or expected during non-working hours - and I am persuaded that Harold's prohibition extended only to working time. Moreover, I do not deem Harold's statement as an attempt to deny union representation to Smith. Record testimony reflects that Smith had, on prior occasions, sought to confer with union stewards or representatives and that he had made this request through the foreman. In accordance with these requests, Harold had arranged meetings between Smith and the particular union representatives. No evidence was presented to establish attempts by the supervisor to thwart the employee's rights in this respect, and I do not conclude that Harold was attempting to frustrate Smith's rights to union consultation provided he did so at the proper time.

The parties themselves have made provision for an employee to seek services of a union representative whenever he has a complaint or grievance regarding his employment. Thus, Section 6 of the contract specifically provides that an employee may request the assistance of a Council representative, "either through his supervisor or privately during non-duty hours, such as lunch period, before and after work." (underscoring supplied) Further provision is made in this section for the supervisor, when the request is through him, to arrange the date, time and place of the meeting between the employee and the union representative. While the agreement makes no specific reference as to the particular time when the meeting shall occur, it does require that any requests made during working hours for the services of a union representative be channeled through the supervisor. Thus, Harold would be entitled to expect that, during duty time, Smith follow this procedure and his comment to the employee on August 25 is in conformity with the aforesaid contractual language.

In sum, I do not conclude that Harold's statement was a threat that constituted an infringement of Smith's rights under either the Order or the contract between the parties. It was not, in my opinion, coercive in nature since it was a legitimate restriction of an employee to his work station during working hours.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

B. Refusal by Respondent to Discuss Settlement of the Complaint As Violative of Section 19(a) (6)

The failure or refusal by foreman Harold to discuss settlement of the complaint herein is not, as contended by Complainant, a refusal to entertain a grievance, or to a refusal to confer or consult, under the Order. As stated by the Assistant Secretary in U. S. Department of Defense, Dept. of the Army, et al A/SLMR No. 211, the obligation to consult, confer or negotiate relates to the collective bargaining relationship between an incumbent labor organization and an agency or activity. The question as to compliance with Regulations is an administrative matter to be handled in the processing of unfair labor practice cases. Accordingly, whether or not Respondent attempted to resolve the dispute herein amicably is not a proper issue before me for determination.

Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends the complaint against Respondent herein be dismissed.


WILLIAM NAIMARK
Administrative Law Judge

Dated: October 24, 1973
Washington, D.C.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
KANSAS CITY AIR ROUTE CONTROL CENTER,
OLATHE, KANSAS
A/SLMR No. 353

This proceeding arose upon the filing of an unfair labor practice complaint by the Professional Air Traffic Controllers Organization, Marine Engineers Beneficial Association, AFL-CIO, Rocky Mountain Region (Complainant) against the Department of Transportation, Federal Aviation Administration, Kansas City Air Route Control Center, Olathe, Kansas (Respondent). The complaint alleged that the Respondent violated Section 19(a)(1), (3), and (5) of the Order by permitting the inclusion of an article by a supervisor about the Air Traffic Control Association (ATCA) in the Respondent's official house organ--the supervisor allegedly indicating in the article his preference for ATCA over the incumbent labor organization.

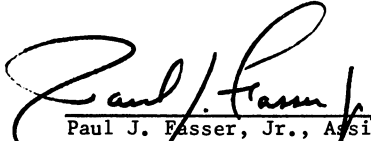
Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge that the complaint be dismissed. The Administrative Law Judge had found that in view of the Assistant Secretary's holding in Federal Aviation Administration, Atlanta ATC Tower, A/SLMR No. 300, that ATCA is a professional association and not a labor organization within the meaning of Section 2(e) of the Order, even if it were assumed that the publication of the ATCA article constituted encouragement of membership in ATCA, there is nothing in the Executive Order that prohibits the Respondent from encouraging membership in a professional organization.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the complaint in Case No. 60-3266(CA) be,
and it hereby is, dismissed.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
KANSAS CITY AIR ROUTE CONTROL CENTER,
OLATHE, KANSAS

Dated, Washington, D.C.
February 5, 1974


Paul J. Esser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

Respondent

and

Case No. 60-3266(CA)

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, MARINE ENGINEERS BENEFICIAL
ASSOCIATION, AFL-CIO,
ROCKY MOUNTAIN REGION

Complainant

AIR TRAFFIC CONTROL ASSOCIATION

Party in Interest 1/

DECISION AND ORDER

On November 30, 1973, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

1/ Because the Air Traffic Control Association was alleged to have been an improperly assisted labor organization, it was served with the notice of hearing in this matter. However, the Air Traffic Control Association did not choose to appear at the hearing.



REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated January 18, 1973 and filed January 22, 1973. The complaint alleges a violation of Sections 19(a)(1), (3), and (5) of the Executive Order by the Respondent. The violation was alleged to consist of the Respondent including in the Vol. I, Issue 1, November 1972 issue of Kansas City ARTCC, Olathe, Kansas (a house organ disseminated among Respondent's employees) an article by a supervisor indicating his preference for another labor organization, the Air Traffic Control Association, Inc., although Complainant was the exclusive representative of Respondent's employees.

The Area Administrator investigated the complaint and reported to the Assistant Regional Director. On March 30, 1973, the Acting Assistant Regional Director issued a Notice of Hearing to be held June 5, 1973, in Kansas City, Missouri.

Hearings were held June 5, 1973. The Complainant was represented by its Regional Vice-President (who had signed the complaint on behalf of Complainant) and the Respondent Activity was represented by the Deputy Director, Labor Relations, of the Federal Aviation Administration. The Party in Interest was not represented. The Complainant and the Respondent each filed a brief.

Procedural Matters

1. During the hearing the Complainant wanted to introduce in evidence as an exhibit a copy of a document it did not have at the hearing and asked that the hearing be held open until he could obtain it and furnish it. I ruled that an exhibit could not be introduced without the opposing party first having seen it and had an opportunity to object to it. I ruled also that the hearing would be closed at the end of the day and stated that thereafter a motion could be made to reopen the record to receive additional evidence and that if that were done the other side would have an opportunity to object before I ruled. The document was described as an interpretation by the Southwest Region of FAA of the National Merit Promotion Program Handbook in which the Southwest Region stated it would give credit for membership in professional societies in determining merit promotions.

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 In the Matter of :

DEPARTMENT OF TRANSPORTATION
 FEDERAL AVIATION ADMINISTRATION
 KANSAS CITY AIR ROUTE CONTROL CENTER
 OLATHE, KANSAS

Respondent

and

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION,
 MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO
 ROCKY MOUNTAIN REGION

Complainant

and

AIR TRAFFIC CONTROL ASSOCIATION

Party in Interest

CASE No.
 60-3266 (CA)

Noel F. Keane
 Regional Vice-President
 Professional Air Traffic Controllers Organization
 9036 West 95th Street
 Overland Park, Kansas 66212

For the Complainant

William W. Heimbach
 Deputy Director, Labor Relations
 Federal Aviation Administration
 800 Independence Avenue, S. W.
 Washington, D. C. 20591

For the Respondent

Before: MILTON KRAMER
 Administrative Law Judge

Three weeks after the hearing the General Counsel of the Complainant filed a Motion for leave to file an additional exhibit which was attached to the Motion. The tendered exhibit is a copy of a supplement to the revised Southwest Regional Merit Promotion Plan. In the supplement it is stated, inter alia, that specified credit would be given for activity in a professional society. The supplement is dated April 3, 1973. The Respondent filed an Objection to the Motion on the grounds that the proffered document was issued by an Activity other than the Respondent and was not controlling on the Respondent, and that it was issued after the complaint in this case was filed and thus was irrelevant to the merits of the complaint.

The proffered exhibit, assuming its authenticity, is a document issued by an Activity of FAA other than the Respondent and there is no showing that it is binding or even persuasive on the Respondent. At the hearing the representative of the Complainant urged that he assumed that if the Southwest Region supplement should prove successful it was only preliminary to other Regions taking the same action. (Tr. 44.) I make no such assumption. The tendered exhibit is irrelevant to the nature of any conduct of the Respondent. More, it is irrelevant and immaterial to the nature of the conduct alleged in the complaint as an unfair labor practice.

The Motion for Leave to File Exhibit is denied. The proffered exhibit is not received in evidence and is not part of but will accompany the record.

2. The transcript of the hearing shows that Exhibits J-2, C-1 and R-1 were identified but not offered or received in evidence, although both Complainant and Respondent assumed they were in evidence and I so believed. The Complainant has requested that the record be corrected to show that those exhibits are part of the record and the Respondent has joined in that request. Since I cannot specify any physical errors in the record to be corrected in this respect, those identified exhibits are received in evidence and are made part of the record.

3. The parties stipulated that the record in Case No. 40-3470 (CA) be made a part of the record in this case. (J. Exh. 2, par. 8; Tr. 16-18, 58.) That case was later decided by the Assistant Secretary on August 15, 1973. Federal Aviation Administration, Atlanta ATC Tower, A/SIMR No. 300. The record in that case is treated in this case as though it is part of the record in this case.

4. At the close of the hearing, July 11, 1973, was fixed as the date for filing briefs. The Respondent filed a brief July 10, 1973. The Complainant mailed a brief from Overland Park, Kansas postmarked July 5, 1973, which was not received until July 17, 1973. It is considered timely filed.

Facts

On October 20, 1972, Professional Air Traffic Controllers Organization (PATCO) obtained exclusive recognition of non-supervisory air traffic controllers and certain other employees of FAA on a national basis (with certain exceptions) in the unit found appropriate in Federal Aviation Administration, Department of Transportation, A/SIMR No. 173, July 20, 1972. Included in the unit are the non-supervisory air traffic controllers employed by the Activity which is the Respondent, the Kansas City Air Route Traffic Control Center, Olathe, Kansas. That recognition is still in effect. There is also in effect a national agreement between FAA and PATCO effective April 4, 1973.

Air Traffic Control Association (ATCA) is also an organization of air traffic controllers, including supervisors. It was of the view that since the decision in Professional Air Traffic Controllers Organization, A/SIMR No. 10, which had held it to be a labor organization within the meaning of the Executive Order, it had so changed its organization and operation that it was no longer such a labor organization. The Respondent apparently shared that view.

In the Fall of 1972 the Respondent started publication of a house news organ not yet named. Volume I, Issue 1 was issued under the caption "Kansas City ARTCC Olathe, Kansas" and was issued in November 1972. It contained items of news, humor, cartoons, articles, and the like. Page 20 was an article under a PATCO masthead by one of Respondent's Air Traffic Controllers who was also an officer of PATCO. Page 22 was an article under an ATCA masthead by an official of ATCA who was also a controller supervisor of the Respondent. It stated, among other observations, that ATCA was a professional organization and had elected to remain such. The Complainant concedes (Tr. 47) that there was no particular language in that article that it found objectionable but contends that the mere publication by Respondent of an article under an ATCA masthead by a supervisor at the Activity created an atmosphere of encouraging membership in ATCA. It contends further that the

publication of that article, written by a supervisor, constituted assistance to a rival labor organization in violation of Section 19(a)(3), a refusal to accord PATCO appropriate recognition as the exclusive representative of the controllers in violation of Section 19(a)(5), and that such violations constituted derivatively a violation of Section 19(a)(1).

Discussion and Conclusions

In Professional Air Traffic Controllers Organization, A/SLMR No. 10, January 20, 1971, the Assistant Secretary held that ATCA was a labor organization within the meaning of Section 2(e) of the Executive Order. Thereafter, ATCA sought to cease being a labor organization and to become a professional organization and to be recognized as such. In Federal Aviation Administration, Atlanta ATC Tower, A/SLMR No. 300, August 15, 1973, the Assistant Secretary found that ATCA had "materially changed its organization and operation" so that "the record does not support the conclusion that ATCA is a labor organization within the meaning of Section 2(e) of the Order" and that "its current relationship with the FAA is consistent with that permitted a professional association under Section 7(d)(3) of the Order, as amended."

There is nothing in the record before me to indicate that ATCA has, since the record in the Atlanta ATC Tower case was made, "changed its organization and operation" to again become a labor organization within the meaning of Section 2(e). Indeed, there is nothing to indicate it has changed at all. In such circumstances I am bound by the decision in the Atlanta ATC Tower case, and find that ATCA is not a labor organization within the meaning of the Executive Order.


In light of the decision in the Atlanta ATC Tower case, the record would not support a conclusion that there was anything in the dealings between Respondent and ATCA that was not "consistent with that permitted a professional association under Section 7(d)(3) of the Order, as amended." Section 7(d)(3) permits limited dealing with a professional association, and the dealings between Respondent and ATCA have not transgressed those limits. Assuming, without deciding, that the publication of the ATCA article constituted encouragement of membership in ATCA, there is nothing in the Executive Order that prohibits the Activity from encouraging membership in a professional organization that is not also a

labor organization. The fact that air traffic controllers are eligible for membership in both organizations does not make encouragement of membership in ATCA a violation of Section 19(a)(3) which proscribes assistance to a labor organization, nor a refusal to accord appropriate recognition to the recognized labor organization in violation of Section 19(a)(5). Such assistance to such an organization would be no more violative of the Executive Order than would be encouragement of membership in the Activity's recreational association (if it has one) in which the controllers are eligible for membership because they are employees of the Activity.

The publication of the questioned article was thus not a violation of the Executive Order.

Recommendation

The complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: November 30, 1973
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
 UNITED STATES CUSTOMS SERVICE
 A/SLMR No. 354

The subject case involved a representation petition filed by the National Treasury Employees Union, Chapter 101 (NTEU) seeking an election in a unit of all professional employees in the United States Department of Treasury, United States Customs Service, Office of Regulations and Rulings. The record revealed that the only nonsupervisory professional employees in the unit claimed are Customs Law Specialists but that there are other professional employees employed in other administrative divisions of the Activity in Washington, D.C. These other nonsupervisory professional employees include 12 accountants, an engineer, and an architect in the Office of Administration, and chemists in the Office of Operations. In addition, the Office of the Chief Counsel, under the overall supervision of the General Counsel of the Department of the Treasury but located in the United States Customs Service offices in Washington, D.C., employs staff attorneys. The parties entered into a stipulation setting forth all material facts and the case was transferred by the Acting Assistant Regional Director for Labor-Management Services to the Assistant Secretary for decision.

The Assistant Secretary found that the skills and basic qualifications standards, as well as the duties, of the Customs Law Specialists differ considerably from those of the chemists, accountants, the engineer and the architect. Moreover, on-the-job-training and the career ladder of the Customs Law Specialists are unlike those of the other above-mentioned professionals, and there is no interchange and relatively little work contact between the Customs Law Specialists and other professionals of the Activity. The Assistant Secretary also found no evidence that the attorneys in the Office of Chief Counsel have extensive contact with Customs Law Specialists or other professionals of the Activity. He noted that although the Chief Counsel has his own budget for his office, unlike the Assistant Commissioners who are in charge of each of the operating Offices of the Activity, he does not have the authority to hire, fire and promote the employees under his jurisdiction; rather, this authority resides in the General Counsel of the Treasury Department.

Based on these circumstances, and noting particularly the agreement of the parties with respect to the appropriateness of the unit sought and the facts that the unit sought would include all nonsupervisory, professional employees employed within a given administrative division of the Activity, that the professional employees sought performed different work and have little or no work contact with other professional employees of the Activity, and that all of the employees in the claimed unit are

under the supervision, direction, and administrative control of the Assistant Commissioner of the Office of Regulations and Rulings, the Assistant Secretary found that the claimed employees share a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operation. Accordingly, he directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
UNITED STATES CUSTOMS SERVICE

Activity

and

Case No. 22-4040(RO)

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 101

Petitioner

DECISION AND DIRECTION OF ELECTION

This matter is before the Assistant Secretary pursuant to Acting Assistant Regional Director for Labor-Management Services Frank P. Willette's Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon the entire record in this case, including the parties' stipulation of facts and accompanying exhibits, 1/ the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. As indicated above, the NTEU seeks an election in a unit consisting of all professional employees in the Office of Regulations and Rulings of the United States Customs Service, Washington, D.C. The

1/ The stipulation of facts and accompanying exhibits failed to set forth the unit sought in the instant petition filed by the National Association of Internal Revenue Employees, and Chapter No. 101, National Association of Internal Revenue Employees, the former designation of the Petitioner, the National Treasury Employees Union, Chapter 101, herein called NTEU. I am advised administratively however, that the unit sought by the subject petition is: All professional employees in the United States Department of Treasury, United States Customs Service, Office of Regulations and Rulings; excluding, all nonprofessional employees and employees engaged in Federal personnel work in other than a purely clerical capacity, managers, supervisors and guards as defined in Executive Order 11491, as amended.

evidence establishes that the only professional nonsupervisory job category in the Office of Regulations and Rulings is, in fact, that of Customs Law Specialist. It appears that the parties are in agreement as to the appropriateness of the unit sought. However, because additional professional employees are employed in other administrative divisions of the Activity in Washington, D.C., the case was transferred to the Assistant Secretary by the Acting Assistant Director for Labor-Management Services for a determination as to whether the unit sought was appropriate.

The stipulation of facts reflects that the Office of Regulations and Rulings is one of five administrative subdivisions of the Activity, each of which is under the direction of an Assistant Commissioner of Customs. These five Assistant Commissioners, and the Chief Counsel, who is in charge of the Office of Chief Counsel, are the principal staff assistants to the Commissioner of the Bureau. The Office of Regulations and Rulings is subdivided into four operating divisions: Carriers, Drawback and Bonds Division; Classification and Value Division; Entry Procedures and Penalties Division; and Regulations Division. Among the duties of the Office of Regulations and Rulings are: providing interpretations and information concerning Customs and other laws, Customs regulations and related procedures, internally, to other government agencies, to the Congress, and to the public; preparing decisions on current regulations and practice, including decisions reflecting Customs Service positions to be defended by the Department of Justice in the courts; monitoring Customs legal decisions and programs; maintaining and revising the Customs regulations and manual; reviewing and recommending methods for the dissemination of regulatory or procedural information; drafting legislation or reviewing proposed legislation; and providing legal advice and assistance to Treasury Department and Customs Service representatives at legislative hearings, Treasury Department conferences, inter-agency conferences and international meetings. These responsibilities cut across the organizational lines of the four operating divisions of the Office of Regulations and Rulings, and Customs Law Specialists are employed in each of these divisions.

Although the Customs Law Specialists are the only nonsupervisory, professional employees in the Office of Regulations and Rulings, 2/ there are other professional employees in two of the remaining four organizational offices of the Activity, and in the Office of the Chief Counsel. Thus, in the Office of Administration there are employed 12 nonsupervisory accountants, an engineer and an architect; the Office of Operations employs five chemists; and the Office of the Chief Counsel employs nine staff attorneys. The evidence establishes that the skills and basic qualification standards, as well as the duties, of the Customs Law Specialists differ considerably from those of the chemists, accountants, the engineer and the architect. Moreover, on-the-job-training and the career ladder of the Customs Law Specialists are unlike those of

2/ I am advised administratively that there are approximately 77 employees in the claimed unit. It was noted that there is no collective bargaining history with respect to any Headquarters staff employees of the Activity.

the other above-mentioned professionals, and there is no interchange and relatively little work contact between the Customs Law Specialists and other professionals of the Activity.

The Assistant Commissioners of the Bureau, including the Assistant Commissioner of the Office of Regulations and Rulings, have authority to hire, fire and promote employees under their jurisdiction. They also have authority for supervising, assigning and transferring employees within their respective offices, reviewing job performance, and approving the expenditure of funds for operational needs. 3/

The Office of the Chief Counsel is under the general supervision of the General Counsel for the Treasury Department, although physically located in the offices of the United States Customs Service. Among the many responsibilities of the Office of Chief Counsel are the providing of legal advice to the Commissioner and the Assistant Commissioners in all areas pertaining to personnel matters; representing management in administrative hearings involving labor-management relations; reviewing and recommending possible disciplinary action against holders of various licenses issued by the Customs Service; representing the Customs Service in any administrative hearings conducted in connection with such disciplinary matters; reviewing and recommending disposition of claims filed under various statutes; and furnishing legal advice to the Department of Justice with regard to such claims. In connection with these various responsibilities, staff attorneys are generalists and are given assignments to all areas of functional responsibility. There is, however, no evidence that these attorneys have extensive contact with Customs Law Specialists or other professionals of the Activity. Moreover, although the Chief Counsel has his own budget for his office, unlike the Assistant Commissioners, he does not have the authority to hire, fire and promote the employees under his jurisdiction; rather, this authority resides in the General Counsel of the Treasury Department.

Based on the foregoing circumstances, and noting particularly the agreement of the parties with respect to the appropriateness of the unit sought, and the facts that the unit sought would include all the nonsupervisory, professional employees employed within a given administrative subdivision of the Activity, that the professional employees sought perform different work and have little or no work contact with other professional employees of the Activity, and that all of the employees in the claimed unit are under the supervision, direction, and administrative control of the Assistant Commissioner of the Office of Regulations and Rulings, I find that the claimed employees share a clear and identifiable community of interest and that such a unit will promote effective dealings

3/ The parties stipulated that if the unit sought were broadened to include the other professionals employed by the Activity, negotiations would have to be elevated to the level of the Commissioner of Customs, which the parties assert would also require the active participation of the three Assistant Commissioners in whose divisions professionals are employed.

and efficiency of agency operations. Accordingly, I shall direct an election in the following unit which I find to be appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional employees in the United States Department of Treasury, United States Customs Service, Office of Regulations and Rulings, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including the employees who did not work during the period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Treasury Employees Union, Chapter 101.

Dated, Washington, D.C.
February 28, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

TENNESSEE AIR NATIONAL GUARD,
NASHVILLE, TENNESSEE
A/SLMR No. 355

TENNESSEE AIR NATIONAL GUARD,
NASHVILLE, TENNESSEE

Respondent

and

Case No. 41-3171(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES

Complainant

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Party

DECISION AND ORDER

This unfair labor practice proceeding involves a complaint filed by the National Federation of Federal Employees (Complainant) alleging that the Tennessee Air National Guard (Respondent) violated Section 19 (a)(1) of the Executive Order by refusing to allow the Complainant's non-employee representatives to distribute literature in the Respondent's parking lots and to otherwise conduct a representation campaign.

The Administrative Law Judge found that at the time of the Complainant's request for access to the Respondent's premises by its non-employee representatives, there had been no diligent or unsuccessful efforts made by the Complainant to contact employees away from the Respondent's premises. He found further that there was no showing that the Complainant's non-employee representatives were treated in a manner different from non-employee representatives of the incumbent labor organization, National Association of Government Employees (NAGE). Under these circumstances, the Administrative Law Judge concluded that by denying non-employee representatives of the Complainant access to its parking lots and premises for the purpose of conducting an organizational campaign among the Respondent's employees, the Respondent did not interfere with, restrain, or coerce employees in the exercise of the rights assured them under Section 1(a) of the Order or otherwise violate Section 19(a)(1) of the Order. Accordingly, he recommended that the complaint be dismissed.

Upon review of the entire record in this proceeding, including the Report and Recommendation of the Administrative Law Judge, and noting the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge.


On November 9, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent has not engaged in the unfair labor practice alleged and recommending that the complaint be dismissed. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-3171(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 28, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



REPORT AND RECOMMENDATION

Statement of the Case

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 In the Matter of :
 TENNESSEE AIR NATIONAL GUARD :
 NASHVILLE, TENNESSEE, :
 Respondent :
 and :
 NATIONAL FEDERATION OF FEDERAL :
 EMPLOYEES, :
 Complainant:
 NATIONAL ASSOCIATION OF GOVERN- :
 MENT EMPLOYEES, :
 Party :

CASE NO. 41-3171(CA)

Joseph Martin, Jr.
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For the Complainant

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For National Association
 of Government Employees

BEFORE: RHEA M. BURROW
 Administrative Law Judge

This proceeding arose upon the filing of an unfair labor practice complaint that was amended on February 26, 1973, by the National Federation of Federal Employees (hereinafter referred to as NFFE and/or Complainant), against the Tennessee Air National Guard (hereinafter referred to as Respondent) alleging that the Respondent engaged in certain conduct violative of Section 19(a)(1) of Executive Order 11491. Essentially the complaint as amended, charges that Respondent committed an unfair labor practice by refusing to allow NFFE representatives to distribute literature in Respondent's parking lots and to otherwise conduct a representation campaign.

The Regional Administrator's Order rescheduling the hearing designated the Respondent, Complainant, and the National Association of Government Employees as parties to the proceeding and a hearing was held in the matter on June 14, 1973, at Nashville, Tennessee. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved. Briefs were filed on behalf of Complainant and Respondent and were duly considered by me in arriving at my determination in this matter.

Upon the entire record herein, including my observation of the witnesses and their demeanor and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

I

The Issue and Position of the Parties

The issue presented in this proceeding is whether the Respondent violated Section 19(a)(1) of the Order by denying access of its premises to Complainant's non-employee organizers in non-work areas on non-duty hours so as to deprive employees of their right to be informed and deny them freedom to make a reasoned and informed choice of representative.

The Respondent and NAGE urge that Complainant did not carry its burden of showing that it made a diligent effort to communicate with employees away from Respondent's premises; also, that Respondent would have been in violation of Section 19(a)(3) of the Order had it granted Complainant's request.

The Complainant postulates that NAGE had exclusive recognition in only two of Respondent's installations, thus the remaining installations were on an equal basis; also, that when NAGE attempted to obtain statewide recognition in one unit it put the two units where they had an exclusive "on the line," and the effect was to waive exclusive recognition at those installations and to put the parties on an equal basis at all installations. Department of the Treasury, Bureau of Customs, Boston, Massachusetts, A/SLMR No. 169 was cited to support its position and the following was quoted at page 5 from that decision:

"...To support a contention that non-employee organizers should be accorded personal access...to employees on activity premises for the purpose of campaigning, it must be shown that the employees at whom the campaigning is directed are inaccessible, thus rendering reasonable attempts to communicate with them on a direct basis outside the activity's premises ineffective."

At the close of Complainant's proof and upon completion of all testimony at the hearing the Respondent agency and NAGE moved to dismiss the proceeding on the basis that the Complainant had not sustained its burden of proof under Section 203.14 of the Rules and Regulations of proving by a preponderance of the evidence that the Respondent had violated Section 19(a)(1) of the Order by interfering with, restraining or coercing any employee in the exercise of their rights assured by the Order. I did not consider it appropriate to rule on the motion from the bench and reserved judgment on it for consideration in my decision.

II

Findings of Fact

Except as to whether Respondent's employees were accessible through attempts to communicate with them by Complainant's agents by means other than direct, personal access on Respondent's premises, the material facts in this proceeding are not essentially in dispute. The Respondent with five activities located in four metropolitan areas^{1/} in Tennessee to wit: Knoxville, Chattanooga, Nashville, and Memphis, is responsible for conducting flight operations in support of various Air Force commands; performing work in connection with maintenance

^{1/} Alcoa and Knoxville are practically adjacent installations located in the Knoxville area. Transcript, hereinafter referred to as Tr., p.9.

repair and operation of aircraft; maintaining and operating a ground to air communications network; and, assuring that all activities are trained to a state of combat readiness.^{2/} The Respondent employs approximately 475 employees at the five locations. At two of the installations, Alcoa and Nashville, the National Association of Government Employees, hereinafter referred to as NAGE and/or party had exclusive representation. It is urged by the Complainant that these exclusive activities were, in accordance with a stipulation entered into by the parties, "put on the line"^{3/} by NAGE's bid or petition filed on October 31, 1972, to seek exclusive statewide recognition. An election on January 24, 1973, resulted in NAGE being successful in its attempt to represent all 475 employees in one statewide exclusive unit.

III

Notice of NAGE's October 31, 1972 petition for exclusive representation was posted at the Chattanooga installation on November 4, 1972; Memphis and Alcoa on November 6, 1972; Nashville on November 7, 1972; and Knoxville on November 9, 1972, pursuant to the Rules and Regulations of the Assistant Secretary of Labor. While posting was being accomplished at the five installations, Laurence Chivers, Regional Coordinator, and organizer for Complainant, contacted Respondent's technician personnel representative at the Nashville installation on November 6, 1972, to arrange for solicitation of employees on the premises. At that time Mr. Chivers was aware there had been no posting at Nashville. About 10:30 a.m., on November 7, he began passing out literature within the headquarters complex and in the parking areas. About 2:30 p.m., he was told he could no longer do so. On November 8, 1972, he met with Respondent's representatives and requested permission of Respondent to conduct an organizing campaign with non-employee organizers among the petitioned for employees by distributing literature at the installations and in parking lots at off and after duty hours in order to secure the

^{2/} Tr. pp 12, 13, 142-146.

^{3/} Tr. p 9.

required showing of interest^{4/} in the forthcoming election as an interested party.^{5/} The Complainant was denied permission to conduct an organizing campaign with non-employee organizers at the agency installations.^{6/} William C. Smith, Respondent's Adjutant General, testified that access to its installations had previously been denied to NAGE non-employee organizers and he had been instructed that if Complainant was afforded access the Respondent would be in violation of Department of Defense policy. Bob Chaffin, Director of Inter-Governmental and Employee Relations for the State of Tennessee, testified that at the meeting on November 8, 1972, he advised the NFFE non-employee representatives present that they were permitted to use employee-representatives to distribute literature during work hours on non-duty time in non-restricted areas, but the non-employee representatives could not enter the parking lots. An inquiry was made if the agency would furnish a list of employees with names, addresses and telephone numbers and they were informed that the names and bases where the employees worked could be furnished but to include addresses and telephone numbers would be in violation of Department of Defense directives^{7/} and possibly the Federal Personnel Manual. He stated that Mr. Chivers remarked that the permissible list would not do any good at that late date, that they might want it later.

^{4/} Section 202.5(a) of the Assistant Secretary Regulations provide that "no labor organization will be permitted to intervene in any proceeding pursuant to this part unless it has submitted a showing of interest of 10 percent (10%) or more of the employees in the unit involved in the petition together with a alphabetical list of names constituting such showing or has submitted a current or recently expired agreement with the Activity, covering any of the employees involved, or has submitted evidence that it is the currently recognized or certified exclusive representative of any of the employees involved."

^{5/} Complainant's Exhibit A.

^{6/} Respondent's Exhibit No. 2, which states in part: "We would welcome any efforts made on behalf of your Union which are provided for in DOD 1426.1, Section VII, entitled: Dealing with Labor Organizations, parts A 1 (a) and (b) (a copy is attached for your information). However, it is our policy that non-employee representatives not be granted permission to engage in on-station organizing or campaigning activities. Section C of the above referenced Directive states: 'If permission is granted to one labor organization for non-employee representatives to engage in on-station organizing or campaigning activities, the same privilege must be extended to any other requesting labor organization. Our policy is based on this statement and the possible disruptive effects in the work situation, especially if several Unions become involved.'"

^{7/} Tr., p. 191, and Respondent's Exhibit No. 2.

IV

At Nashville, the Complainants effort to communicate with employees occurred on November 7, the afternoon of November 8, and November 9, 1972. The communications on November 8 and 9 with employees consisted of representatives passing out handbills outside the gate of the Respondent's premises and contacting employees during lunch at restaurants off the premises. Complainant in its brief state that by handbilling, its agents were able to distribute literature to up to thirty percent (30%) of the automobiles that entered and left the gate in the morning and afternoon but they were unable to tell non-unit employees from other persons on the installation. About ten percent (10%) of the vehicles that entered in the morning left the installation for lunch but again unit and non-unit personnel could not be distinguished and in a two-day period they were only able to contact one person at restaurants. The effort to establish contact at Nashville was called off at the end of the second day after two of Complainant's representatives were reported to have been almost run over by an irate employee. Other than at Memphis all activity by the Complainant ceased after November 9, 1972.

V

At the Memphis installation, Complainant's representative, Charles Stephens, testified that he was told on November 8, 1972 that non-employee organizers would not be allowed on the installation.^{8/} He then came to Nashville but returned to Memphis the following day in time to pass out handbills to sixty or sixty-five people. On Friday, November 10, an individual he contacted furnished him a list of 20 names and on Saturday, November 11, he made some effort to contact them, apparently by long distance phone calls from Little Rock, Arkansas. He returned to Memphis Sunday night and on Monday, November 13, he passed out literature announcing a meeting that night. Seven or eight persons showed up at the meeting.^{9/} He announced he would be in his motel room on Tuesday. He handed out his remaining literature on Tuesday morning, November 14, 1972, and then returned to his motel. No one showed up to see him or appeared for the 4:30 scheduled meeting when they got off work and he withdrew about 5:30 p.m. ^{10/}

^{8/} Tr. p 126.

^{9/} Tr. p 120.

^{10/} Tr. pp 121, 130, 131.

Complainant had an employee at Knoxville, but no proof was introduced as to his activities other than Mr. Chivers stated he was told by him he had been denied a list of names at the Knoxville installation.^{11/} There was no proof introduced as to the Complainant's activities to organize the installations at Alcoa and Chattanooga.

VI

Summary of Concluding Findings and Discussion

The guideline decisions material to this proceeding include Department of Treasury, Bureau of Customs, A/SLMR Case No. 169, cited by NFFE in support of its position. In that case, there were more than 800 employees eligible to vote in some 50 locations scattered in seven states and all of them were not located in the cities in which the districts were headquartered. In the circumstances the Assistant Secretary

"adopted the Hearing Examiner's recommendation and sustained the AFGE's objection relating to the Activity's refusal to permit the Union use of its intra-office mail facilities, inasmuch as the unit, composed of over 800 employees, is dispersed over a wide geographical area with some employees located in remote areas, and the Activity refused both the AFGE and the NCSA permission to use any of its facilities to enable them to communicate with employees in the Unit. In these circumstances, and noting the desirability of attaining an informed electorate in elections held under the provisions of the Executive Order, the Assistant Secretary concluded that the Activity's refusal to make its internal mail services available improperly interfered with the conduct of the election. The Assistant Secretary also noted that existing agency policy to the contrary was not controlling."

It was also held that

"...to support a contention that non-employee organizers should be accorded personal access (as distinguished from access through the mail) to employees on activity premises for the purpose of campaigning, it must be shown that the employees at whom the campaigning is directed are inaccessible, thus rendering reasonable attempts to communicate with them on a direct basis outside the activity's premises ineffective."

^{11/} Tr. p 70.

The Respondent Activity has cited Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, A/SLMR No. 263, as being dispositive of the issue in this proceeding. In that case the following was stated:

"In my view the principles enunciate in the Menlo Park [^{12/}] and the Defense Supply Agency, Burlingame [^{13/}] decisions are, except in the special circumstances noted below, applicable in the subject case. Thus, I find that in the absence of special circumstances, a labor organization, such as AFGE in the instant case, which has not raised a question concerning representation and which clearly does not have equivalent status with an incumbent exclusively recognized representative, such as the Complainant herein, may not be furnished, at the discretion of an agency or activity, with the use of the latter's services and facilities. To hold otherwise would, in my opinion, be inconsistent with the purposes and policies of the Order as expressed in Section 19(a) (3). Thus, a contrary result, in effect could grant to an agency or activity the power to pick and choose the particular rival labor organization it desires to unseat an incumbent, rather than leaving such a choice where it belongs - in the hands of the unit employees.***Moreover, the labor-management relations stability sought to be achieved through a meaningful bargaining relationship constantly could be placed in jeopardy by an agency or activity using as leverage in the bargaining relationship the power to permit representatives of a rival labor organization on its premises at any time for campaigning purposes.

"With regard to possible special circumstances which may warrant a departure from the foregoing principle, I find that where no question concerning representation exists, such as in the instant case, non-employee representatives of a labor organization which does not have equivalent status nevertheless may be furnished with agency or activity services and facilities for the purpose of an organizational campaign only in circumstances where it can be established that the employees involved are inaccessible to reasonable attempts by the labor organization to communicate with them outside the agency's or activity's premises.***It is my view that in such limited circumstances the policies of the Order as set forth in Section 19(a) (3) must be balanced with the overall policy of affording employees the right to obtain relevant information which will assist them in exercising their rights assured under Section 1(a) of the Order. It should be noted, however, that

^{12/} A/SLMR No. 143.
^{13/} A/SLMR No. 247.

before an agency of activity grants access to its facility by non-employee representatives of a labor organization in these circumstances, it must ascertain that the labor organization involved has made a diligent, but unsuccessful, effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility...."14/

In view of the above in connection with Section 19(a) (1) of the Order which provides that "Agency management shall not - (1) Interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order," I find that:

(1) At the time NAGE filed its petition for statewide recognition on October 31, 1972, it was the exclusive representative of Respondent's employees at Nashville and Alcoa, Tennessee installations. Even assuming arguendo, without deciding that NAGE waived its exclusive jurisdiction at Nashville and Alcoa and that the parties were on an equal basis in all areas as Complainant contends,15/ there is no showing that Complainant's non-employee representatives were treated in any different manner from those of NAGE.

14/ Also see NLRB v. Babcock & Wilcox Company, 351 U.S. 105 (1956), illustrating the law in the private sector where the Supreme Court held that an employer need not permit non-employee organizers the use of its property where other available and effective channels of communication exist.

15/ In Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, A/SLMR No. 247, the Assistant Secretary held that when a petition was filed a question concerning representation was raised, and that a labor organization which did not intervene in the proceeding did not have equivalent status with the petitioner for purposes of campaigning on the Activity's premises, notwithstanding the fact that a question as to the appropriateness of the claimed unit had not been resolved at the time the non-intervening labor organization was granted access to the Activity's premises. Accordingly, it was found that the Activity violated Section 19(a) (3) of the Order by granting a non-intervening labor organization equivalent status with respect to use of its facilities for the purposes of conducting a solicitation campaign.

(2) The evidence of record does not establish that there was a showing of sufficient interest in favor of NFFE among Respondents' employees to permit it to intervene and in the subsequent election NAGE was certified in January 1973 as the exclusive statewide union representative.

(3) Notice of posting ensued after NAGE filed its petition for statewide recognition beginning at Chattanooga on November 4 and ending at Knoxville on November 9, 1972.

(4) There was no evidence introduced as to any activity having been taken by Complainant to organize employees of the Respondent at Chattanooga and Alcoa installations.

(5) One Complainant member employee at Knoxville is reported to have told NFFE organizer, Laurence Chivers, that NFFE was denied a list of names of employees at that station but no other significant activity was suggested and the hearsay testimony was not otherwise substantiated.

(6) At Nashville, the Complainant, NFFE Activities by its non-employee representatives was confined to handbilling on November 7, 8, and 9, 1972, outside the gate at the installation, and attempts to contact employees at various restaurants during lunch hour in the vicinity of the installation.

(7) At Memphis the Complainant had one non-employee organizer who on November 9, 1972 distributed literature to 60 or 65 people driving automobiles through the gate; literature was again distributed on November 13, 1972, and seven persons showed up for a meeting that was announced for that evening. Literature was again distributed on November 14, 1972, but no employees showed up for the scheduled meeting on that date and all activity ceased on that date.

(8) Employees in all areas resided away from but within a radius of 25 to 30 miles of Respondent's installations and came to work in vehicles parked on the premises. All installations were in metropolitan areas.

(9) At the time Complainant's non-employee organizers sought permission on November 8, 1972, to distribute literature in Respondent's parking lots and to otherwise conduct a representation campaign it had made no significant or diligent effort to contact the employees away from the agency or activity premises or show that its failure to communicate with them was based on their inaccessibility. Inaccessibility as distinguished from unresponsiveness is not demonstrated by the brief handbilling efforts subsequently shown to have been made at the Nashville and Memphis installations with sub-

stantially no effort having been demonstrated at Knoxville, Chattanooga and Alcoa. Further, there was no proof by Complainant of any attempts to utilize its member employee at the various installations to help in its organization campaign or that Respondent in any way restricted it from doing so.

Based on the foregoing, I find that the evidence does not establish that the employees involved herein were beyond the reach of reasonable efforts of NFFE to communicate with them other than by access to parking lots and premises of the Respondent by non-employee organizers.^{16/}

(10) Denial of access to Activity work areas to non-employees for electioneering; impartially applied to all unions, is not an unfair labor practice, since there is no obligation for the Activity to grant such access.^{17/} This policy was later clarified in Department of the Army, U.S. Army Natick Laboratories case to apply except in those circumstances where it can be established that the employees are inaccessible to reasonable attempts by the labor organization to communicate with them outside the agency or activity premises.^{18/} In Defense Supply Agency, Defense Contract Administration Services, Region SF, Burlingame, California, the Assistant Secretary held that when a petition was filed a question concerning representation was raised, and that a labor organization which did not intervene in the proceedings did not have equivalent status with the petitioner for purposes of campaigning on the Activity's premises, notwithstanding the fact that a question as to the appropriateness of the claimed unit had not been resolved at the time the non-intervening labor organization was granted access to the Activity's premises.^{19/} In the same case it was noted that "...before an agency or activity grants access to its facility by non-employee representatives of a labor organization in these circumstances, it must ascertain that the labor organization involved has made diligent, but unsuccessful, effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility.

^{16/} This finding was made without reference or reliance to the Respondent Agency's contention that in denying access to NFFE, it was following Department of Defense or Agency directives. Such is not considered a proper defense of allegedly violative conduct, (A/SLMR Decisions Nos. 1 and 263).

^{17/} Report No. 23 of Assistant Secretary Ruling pursuant to Section 6 of Executive Order 11491.

^{18/} A/SLMR No. 263.

^{19/} See footnote 15, supra.

In this case access to its premises was not granted by the Respondent and I find that at the time of Complainant's requested access to Respondent's premises by its non-employee representatives there had been no diligent or unsuccessful efforts made by Complainant to contact employees away from Respondent's premises.

In view of the foregoing, I find that the motion to dismiss the complaint because of failure to prove a violation of Section 19(a)(1) of the Order made at the close of Complainant's proof and renewed upon completion of all testimony is warranted and I will so recommend.

VI

Conclusion

By denying non-employee representatives of Complainant (NFFE) access to its parking lots and premises for the purpose of conducting an organizational campaign among its employees, after it had previously denied permission and access to non-employee representatives of NAGE, the Respondent did not interfere with, restrain, or coerce employees in the exercise of the rights assured them under Section 1(a) of the Order or otherwise violate Section 19(a)(1) of the Order.

VII

Recommendation

In view of the foregoing findings and recommendation made above, I recommend that the Assistant Secretary dismiss the complaint.



Rhea M. Burrow
Administrative Law Judge

Dated: November 9, 1973

Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTION
 OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
 McCLELLAN AIR FORCE BASE,
 SACRAMENTO, CALIFORNIA
 A/SLMR No. 356

This case involved a petition filed by Western Council of Engineers (Petitioner) seeking an election in a unit of all professional engineers, physical scientists, mathematicians and statisticians serviced by the Consolidated Civilian Personnel Office and located at the Activity. The latter contended that the petitioned for unit is not appropriate because it includes employees who do not share a community of interest separate and distinct from that of other employees of the Activity and, further, that the unit sought would not promote effective dealings and efficiency of agency operations.

Under all of the circumstances, the Assistant Secretary concluded that the employees in the petitioned for unit constitute a unique, functional and homogeneous grouping of employees who enjoy a clear and identifiable community of interest separate and distinct from all other employees of the Activity. In reaching this conclusion, the Assistant Secretary noted that the employees in the unit sought are engaged in a complex, highly integrated function, under common overall supervision, and are charged with a common mission. Further, he noted that they are subject to uniform personnel policies, enjoy common working conditions and job benefits, have direct job-related contacts with each other and, have a basic similarity of job classifications and skills. In finding that the petitioned for unit would promote effective dealings and efficiency of agency operations, the Assistant Secretary noted that the Activity currently recognizes Activity-wide units of nonprofessionals, as well as a number of less-comprehensive units, and that there was no evidence that such units had failed to promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary ordered an election to be conducted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
 McCLELLAN AIR FORCE BASE,
 SACRAMENTO, CALIFORNIA

Activity

and

Case No. 70-2480

WESTERN COUNCIL OF ENGINEERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert M. Sichon. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, Western Council of Engineers, seeks an election in a unit consisting of "all engineers and scientists working in the primary professional series employed or serviced by the Consolidated Civilian Personnel Office at McClellan Air Force Base, Sacramento, California," excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors and guards as defined under Executive Order 11491, as amended. ¹/ The Activity takes the position that the unit sought is inappropriate because the employees covered by the petition do not share a community of interest separate and distinct from other employees of the Activity and because the petitioned for unit will not promote effective dealings and efficiency of agency operations.

¹/ In its petition, the Petitioner enumerated some 27 specific classifications of engineers, physical scientists, mathematicians and statisticians which are included in the unit sought.

The evidence establishes that the Activity includes the Sacramento Air Materiel Area and the McClellan Air Force Base and that it is primarily engaged in materiel procurement and the production and distribution of assigned equipment, commodities and services to Air Force units located world-wide. It is under the authority of a Commander and Vice-Commander and organizationally is composed of four directorates which report directly to the Commander -- the Directorate of Materiel Management, the Directorate of Procurement and Production, the Directorate of Distribution, and the Directorate of Maintenance. Each directorate is subdivided into seven or more divisions and, in turn, each division is subdivided into two or more branches or detachments. Also reporting directly to the Commander are eight staff offices and four support offices 2/ as well as the Commanding Officer of McClellan Air Force Base who is in charge of some fifteen staff and support organizations. 3/ In addition, there are thirty tenant organizations located at the Activity which, although not subject to the authority of the Commander in their operations, are serviced by the Consolidated Civilian Personnel Office of the Activity. The record discloses that the Activity employs approximately 15,000 civilian employees in addition to approximately 5,000 military personnel. Of the civilian complement, approximately 346 are alleged to be nonsupervisory professional employees. The petitioned for unit would include approximately 306 professional employees 4/ who are located organizationally throughout the Activity as well as in two of the tenant organizations.

The record reveals that the Activity is a large, complex, highly integrated organization composed of a number of smaller organizations having diverse responsibilities and missions, but each dependent upon the others in achieving its own mission and/or achieving the common mission of the Activity. The evidence establishes that the Activity's mission requires the coordinated efforts of each of its directorates and support organizations and the success of its mission is dependent upon their interrelationship, cooperation and teamwork. Although each directorate performs its own function, testimony discloses that, through the integrated

2/ The staff offices include the Inspector General, the Staff Judge Advocate, the Small Business and Contractor Relations Office, the Historical Office, the Safety Office, the Local Actions Office, the Management Engineering Team, and the Directorate of Plans and Programs. The four support offices include the Advanced Systems Program Office (Detachment 51), the Project Support Office (Detachment 42), the 2951st Combat Logistics Support Squadron, and the United States Air Force Medical Clinic.

3/ These include, but are not limited to, the Personnel Division, Comptroller, Special Services Division, Civil Engineering Division and Security Police Division.

4/ At the hearing, the parties stipulated that the employees in the petitioned for unit are professional employees within the meaning of the definition set forth in Department of the Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

work process, each is dependent upon the other for the successful completion of the particular service to be rendered. The record reflects that in accomplishing their particular functions, the petitioned for employees generally have direct, job-related contacts with each other, regardless of their location at the Activity. Moreover, there is evidence of some interchange and transfer among employees of the petitioned for unit throughout the directorates, divisions and support offices.

Although the petitioned for unit embraces some 27 separate job classifications, all of these classifications are similar in terms of requiring a basic education in physical science and mathematics and the utilization of a common methodology in problem solving. Any distinctions between the various classifications reflect specialization in the application of the basic education and skills of the individual employee. The record also discloses that all employees in the petitioned for unit are subject to common overall supervision and, generally, enjoy common personnel policies, working conditions, and job benefits. Further, the area for consideration for promotion and reduction-in-force for the petitioned for employees is Activity-wide.

Based on all of the foregoing circumstances, I find that the employees in the petitioned for unit constitute a unique, functional and homogeneous grouping of employees who enjoy a clear and identifiable community of interest separate and distinct from all other employees of the Activity. Thus, they are engaged in a complex, highly integrated function, under common overall supervision and are charged with a common mission. Further, they are subject to uniform personnel policies, enjoy common working conditions and job benefits, have direct job-related contacts with each other and have a basic similarity of job classifications and skills. Moreover, I find that the petitioned for unit will promote effective dealings and efficiency of agency operations. In this latter regard, it was noted that the Activity currently recognizes Activity-wide units of nonprofessional employees as well as numerous less-comprehensive units and no evidence was presented that such units had failed to promote effective dealings and efficiency of agency operations. 5/ Accordingly, I find that

5/ The AFGE currently represents the following three bargaining units of nonsupervisory, nonprofessional employees under one negotiated agreement: a unit of employees in the Reproduction Branch; a unit of all Wage Grade employees, Activity-wide, including tenant organizations; and a unit of all General Schedule employees, Activity-wide, including tenant organizations. Additionally, the International Association of Fire Fighters represents a unit of firefighters; the National Association of Government Employees represents a unit of guards; the Technical Skills Association represents a unit of technicians in the Petroleum Branch; the American Federation of Technical Engineers represents a unit of technicians in the Production and Quality Branches of the Accessories Division; and the California Nurses Association represents a unit of nurses in the Civilian Employee Health Services Branch of the Clinic.


the unit sought is appropriate for the purpose of exclusive recognition under the Order and, therefore, shall direct an election among the employees in the following described unit:

All professional engineers, physical scientists, mathematicians and statisticians serviced by the Consolidated Civilian Personnel Office and located at McClellan Air Force Base, Sacramento, California, excluding all other professional employees, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the Western Council of Engineers.

Dated, Washington, D.C.
February 28, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

February 28, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
VETERANS BENEFIT OFFICE
A/SLMR No. 357

The Petitioner, National Alliance of Postal and Federal Employees, Local 211, (NAPFE) sought an election in a unit of all nonsupervisory, nonprofessional employees of the Administrative Division of the Veterans Benefit Office, Veterans Administration, Washington, D.C. The Activity contended that the requested unit was inappropriate because the other five divisions at the Veterans Benefit Office are highly integrated with the Administrative Division; the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and distinct from other employees of the Veterans Benefit Office; and such a fragmented unit would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition. In this connection, he noted that all of the Activity's employees, including those in the unit sought, are engaged in a common mission which requires a close working relationship between Administrative Division employees and those of the other five divisions of the Activity. Moreover, he noted that the evidence established that much of the work of the Administrative Division affects, and is affected by, the pace and scheduling of work performed in the other divisions, that employees of the Administrative Division have extensive work contacts with employees of the Activity's other divisions, and that there have been numerous transfers of employees between the Administrative Division and the other Activity divisions which contain several of the same job classifications as are found in the Administrative Division.

As the Assistant Secretary found that the employees in the petitioned for unit did not share a clear and identifiable community of interest separate and distinct from other employees of the Activity, and as such a fragmented unit, in his view, will not promote effective dealings and efficiency of agency operations, he ordered that the NAPFE's petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS BENEFIT OFFICE

Activity

and

Case No. 22-3618(RO)

NATIONAL ALLIANCE OF POSTAL
AND FEDERAL EMPLOYEES, LOCAL 211

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Donald K. Clark. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, National Alliance of Postal and Federal Employees, Local 211, herein called NAPFE, seeks an election in a unit of all nonsupervisory, nonprofessional employees of the Veterans Administration, Veterans Benefit Office, Administrative Division, Washington, D.C. The Activity contends that the proposed unit is inappropriate. In this regard, it asserts that because the Administrative Division and the other five divisions of the Veterans Benefit Office in Washington, D.C., are highly integrated, the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and distinct from other employees of the Veterans Benefit Office. Such a fragmented unit, in the Activity's view, will not promote effective dealings and efficiency of agency operations.

The Activity, which employs approximately 409 employees, is headed by a Director and is analogous to the Veterans Administration's 59 regional offices. 1/ It processes various claims for veterans benefits

1/ The different title results from the Activity's location in Washington, D.C., and the fact that it is assigned certain responsibilities, not relevant to the instant case, in addition to those assigned regional offices.

and, in general, handles all veterans benefits aside from those involving health care. In addition to the Administrative Division, whose employees the NAPFE seeks to represent, the Activity has (1) a Finance and Data Processing Division with an authorized strength of 58 employees; (2) a Personnel Division with five employees; (3) a Veterans Assistance Division with 78 employees; (4) an Adjudication Division with 122 employees; and (5) a Loan Guarantee Division with 34 employees. The Office of the Director of the Activity contains eight employees.

The Administrative Division of the Activity has an authorized strength of 110 employees and, at present, there are actually 124 employees in the Division of whom approximately 85 are in clerical positions. Throughout all of the divisions of the Veterans Benefit Office there are approximately 110 employees in clerical positions, including the 85 employed in the Administrative Division. The Administrative Division contains a Records Section, a Centralized Transcribing Unit, and an Offices Services Section. Its employees perform, among other things, graphic arts and other general services for the Veterans Benefit Office, including the operation of a messenger service. The Records Section of the Division processes mail, dispatches folders to the appropriate operating divisions, and prepares, maintains and services various records. Employees from this Section are located on the 3rd, 4th, 8th and 9th floors of the Activity's building. The Centralized Transcribing Unit serves as a typing pool for the Activity. In this regard, the record reveals that although there are clerk-typists assigned to several other divisions, the Centralized Transcribing Unit performs typing for the Activity's five other divisions. The Offices Services Section of the Division contains correspondence units, a teletype unit, a mailroom, and a publication unit. Employees of this Section are located in areas on three different floors of the Activity's building. In sum, therefore, employees in the Administrative Division are located on six of the nine floors in the building which houses the Activity and they provide various services for the other divisions of the Activity.

Nearly all of the employees in the unit sought are at the GS-2 to GS-5 levels and are classified as clerk-typists, file clerks and mail clerks. Also, within the claimed unit are two office machine operators and four teletypists. The evidence establishes that there is considerable daily contact between employees of the Administrative Division and the other employees of the Activity. Thus, as noted above, Administrative Division employees are located in various areas throughout the building housing the Activity and, in addition, "searchers" from the Administrative Division circulate throughout the building when a particular file must be located. Moreover, Administrative Division employees receive a degree of guidance from supervisors of other divisions. 2/

2/ In fact, supervisors from other divisions have recommended awards for Administrative Division employees based on their observation of and contacts with such employees.

The record reveals that although there is little interchange of employees between the Administrative Division and other divisions of the Activity, there has been a considerable number of employee transfers involving Administrative Division employees. In this connection, of the 51 transfers within the Activity since January 1970, 31 have involved Administrative Division employees. ^{3/}


Based on the foregoing circumstances, I find that the unit sought by the NAPFE is not appropriate for the purpose of exclusive recognition under the Order. Thus, the record reflects that all employees of the Activity, including those in the Administrative Division, are engaged in a common mission which requires a close working relationship. In this regard, it was noted particularly that employees of the Administrative Division have extensive work contacts with employees of the other five divisions of the Activity, and that these contacts occur because of the nature of many of the jobs in the Administrative Division which involve dealing with employees of the other divisions and because of the fact that employees of the Administrative Division are scattered among other Activity employees located throughout the building. Moreover, the evidence establishes that much of the work of the Administrative Division affects and is affected by the pace and scheduling of work performed in the other divisions of the Activity. Finally, there is evidence of numerous transfers of employees between the Administrative Division and the other divisions of the Activity, which divisions contain several of the same job classifications as are found in the Administrative Division.

Under all of these circumstances, I find that the employees of the Administrative Division do not share a clear and identifiable community of interest separate and distinct from other employees of the Activity and that such a fragmented unit will not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the NAPFE's petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-3618(RO) be, and hereby is, dismissed.

Dated, Washington, D.C.
February 28, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

^{3/} Twenty-seven of these transfers involved employees leaving the Administrative Division for other components of the Activity.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTIONS
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGION 2, NEW YORK, NEW YORK
A/SLMR No. 358

This case arose as a result of a representation petition filed by the American Federation of Government Employees, AFL-CIO, District 2, Council of General Services Administration Locals (AFGE) seeking an election among professional and nonprofessional employees in the Regionwide unit encompassing Region 2 of the General Services Administration. The National Association of Government Employees, Local R2-7 (NAGE) intervened and contended that the unit of all Wage Grade employees employed in the Building Management Division, Public Buildings Service, New York City, New York, for which it is currently the exclusively recognized representative, is an appropriate unit.

The Assistant Secretary found that the petitioned for Regionwide unit was appropriate in that there was a clear and identifiable community of interest among all of the employees in the Region and that such a unit would promote effective dealings and efficiency of agency operations. He further found that the employees employed in motor pools geographically located in Region 2 but who were, in fact, Region 1 employees should be excluded from the unit because they did not share a clear and identifiable community of interest with Region 2 employees. Conversely, he found that the employees employed in the National Archives and Records Service (NARS) who were located geographically within the confines of Region 1, but were under the jurisdiction of the Regional Commissioner for NARS, Region 2, shared a clear and identifiable community of interest with Region 2 employees and that, therefore, their inclusion in the claimed unit was warranted.

With respect to the unit currently represented by the NAGE, the Assistant Secretary found, in accordance with the principle established in Federal Aviation Administration, Department of Transportation, A/SLMR No. 122, that such employees would be entitled to a self-determination election in that unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION
REGION 2, NEW YORK, NEW YORK

Activity

and

Case No. 30-5109(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, DISTRICT 2,
COUNCIL OF GENERAL SERVICES
ADMINISTRATION LOCALS

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R2-7

Intervenor

DECISION AND DIRECTION OF ELECTIONS

Upon petitions 1/ duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Office Louis A. Schneider. 2/ The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

1/ The petition in the subject case previously was consolidated for hearing with a petition filed by Local 71-71A, International Union of Operating Engineers, AFL-CIO, (IUOE). During the hearing, the IUOE requested that its petition be withdrawn. Its withdrawal request subsequently was approved by the Assistant Regional Director.

2/ Although the National Federation of Federal Employees, herein called NFFE, did not intervene in the subject proceeding pursuant to Section 202.5(c) of the Assistant Secretary's Regulations, the Assistant Regional Director allowed the NFFE to participate in the hearing as a "party-in-interest" on the basis of negotiated agreements existing between the Activity and NFFE Locals 1557 and 907 which allegedly encompassed certain employees in the petitioned for unit.

Upon the entire record in the subject case, including the Activity's brief, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, AFL-CIO, District 2, Council of General Services Administration Locals, herein called AFGE, seeks an election in a unit of all professional and nonprofessional General Schedule and Wage Grade employees of General Services Administration (GSA), Region 2, excluding managers, confidential employees, Public Buildings Service Wage Grade employees located in the U.S. Post Office and Court House in Trenton, New Jersey, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Order. 3/

The Activity is essentially in agreement that the unit petitioned for by the AFGE is appropriate. The Intervenor, National Association of Government Employees, Local R2-7, herein called NAGE, contends that the claimed unit is inappropriate inasmuch as it encompasses a unit of Wage Grade employees employed in the Building Management Division, Public Buildings Service (PBS) in New York City, New York, for which it is the incumbent exclusive representative. 4/

Alleged Bars to the AFGE Petition

At the time the instant petition was filed, there existed 15 separate exclusive bargaining units of GSA employees located throughout Region 2. Of these 15 units, the AFGE (which is comprised of 6 locals) represented 9 units; the NFFE represented 2 units; the American Postal Workers Union, AFL-CIO, APWU Maintenance Craft, herein called APWU, represented 2 units; the NAGE represented one unit; and the International Federation of Federal Police, herein called IFFP, represented a Regionwide unit of all guards employed by the Activity. 5/

3/ The unit description appears essentially as amended at the hearing.

4/ The NAGE indicated that if the Assistant Secretary determined that the petitioned for Regionwide unit was appropriate, including the existing unit represented by the NAGE within Region 2, it would be willing to participate in an election in such unit.

5/ As noted above, guard employees in this latter unit, which was certified on March 8, 1973, are specifically excluded from the unit sought by the petition herein.

The evidence establishes that, currently, negotiated agreements exist covering employees in four of the nine units represented by the AFGE, in one of the two units represented by the APWU, in both units represented by the NFFE, and in the single unit represented by the NAGE.

During the hearing, the AFGE and the Activity agreed to waive their existing agreements insofar as they may constitute bars to the petition herein. 6/ Under these circumstances, I find that such agreements do not constitute procedural bars to the inclusion of the covered employees in the claimed unit. 7/

The parties, including the Activity, stipulated that the negotiated agreement between the Activity and the NFFE Local 1557, covering all PBS Wage Grade employees at the U.S. Post Office and Court House in Trenton, New Jersey, which expires on November 13, 1975, constituted a bar to a representation election at that facility. Inasmuch as there is no evidence which indicates that the parties' stipulation in this regard was improper, I find that the negotiated agreement between the Activity and NFFE Local 1557 constitutes a bar to an election with respect to those employees covered by such agreement.

The Activity and the AFGE maintained that the negotiated agreement between NFFE Local 907 and the Activity, covering firefighters employed by the Activity at its facility in Scotia, New York, had a termination date of July 24, 1973, and does not constitute a bar to the instant petition. 8/ The NFFE, on the other hand, asserted that this agreement had automatically renewed itself, was still in effect because NFFE Local 907 had not sought to terminate it, and therefore, it constituted a bar to an election with respect to the employees covered by such

6/ These agreements cover employees in units represented by AFGE Local 2041 (Belle Mead, New Jersey); Local 2658 (Bayonne, New Jersey); Local 2431 (PBS professional employees, New York, New York); and Local 2431 (Printing Plant employees, New York City, New York).

7/ Cf. U.S. Department of Defense, DoD Overseas Dependent Schools, A/SLMR No. 110.

8/ The Activity also argued that this negotiated agreement was defective because "it is a nonsubstantive recognition agreement and, as such, does not foster the purposes of the Order". Additionally, the Activity contended that the agreement "comes in conflict" with the requirements of Section 13 of the Order. In view of my conclusion with respect to the timeliness of the instant petition, I deem it unnecessary to make any findings with regard to the Activity's foregoing contentions.

agreement. The evidence establishes that the negotiated agreement in question contained a termination date of July 24, 1973, and that the AFGE filed its petition timely on April 26, 1973, during the prescribed "open period." Under these circumstances, I find that the agreement does not constitute a bar to an election at the Activity's Scotia, New York facility. 9/

With regard to the existing unit of all Wage Grade employees of the PBS, GSA, Region 2, New York City, which the NAGE currently represents, the record reveals that the NAGE was granted exclusive recognition on April 28, 1967, and that its most recent negotiated agreement with the Activity expired on June 27, 1973. None of the parties contend that such agreement constituted a bar to an election and, in this regard, the evidence establishes that the AFGE's petition herein was timely filed with respect to unit involved. Accordingly, as modified below, I find that no procedural bar exists to the inclusion of the eligible PBS employees in the unit sought by the AFGE. Under similar circumstances, it previously has been held that, where, as here, a petition has been timely filed encompassing an exclusively recognized unit in which a collective bargaining history exists, employees in such unit have been afforded the opportunity to vote in a self-determination election. 10/ Under the circumstances outlined above, I shall provide the employees in the PBS unit currently represented by the NAGE an opportunity to vote in a self-determination election.

Defunctness

The record indicates that APWU Local 123 was granted exclusive recognition on July 19, 1968, for a unit of all nonsupervisory PBS employees in Albany, New York. Subsequently, APWU Local 123 and the Activity negotiated an agreement effective October 25, 1968, which subsequently continued in effect by virtue of an automatic renewal clause. On December 12, 1972, the Executive Vice-President of APWU

9/ As noted above at footnote 2, the NFFE did not intervene in the subject proceeding pursuant to Section 202.5(c) of the Assistant Secretary's Regulations. Accordingly, a self-determination election in the unit at the Activity's Scotia, New York facility with the NFFE on the ballot would be inappropriate.

10/ See Federal Aviation Administration, Department of Transportation, A/SLMR No. 122 in which it was stated that "the employees in such existing units would vote whether or not they desire to continue to be represented in their unit by their current exclusive bargaining representative. If a majority indicate such a desire, their existing unit would remain intact. However, if a majority of these employees do not vote for the labor organization which represents them currently, their ballots would then be pooled with those of the employees voting in any unit found appropriate..."

advised the Activity that, in effect, he was disclaiming interest in the unit employees stating that Local 123 did not represent any employees and was "defunct." Under these circumstances, I find that at the time the subject petition was filed, APWU Local 123 was "defunct" and therefore, the negotiated agreement covering the PBS employees in Albany, New York, does not constitute a bar to the inclusion of these employees in the claimed unit. 11/

Appropriate Unit

The evidence establishes that the mission of GSA is to provide the various services required by agencies of the Federal Government. To accomplish this mission, GSA, which is headquartered in Washington, D.C. and is headed by an Administrator, has ten regional offices, each headed by a Regional Administrator. Under each Regional Administrator are Regional Commissioners who, with certain limited exceptions, head the various program services for their respective regions. The program services involve generally the procurement and supply of personal property and nonpersonal services, the acquisition of real property, the management of Federally owned and leased space and property, the utilization of available real and personal property, the disposal of surplus real and personal property, and records management.

There are four program services: (1) PBS, which is concerned primarily with providing care and maintenance for Federal buildings and with providing non-government office space where government space is unavailable; (2) Automated Data Processing and Telecommunications (ADTS), which provides telecommunications and computer services to all Federal agencies; (3) Federal Supply Service (FSS), which purchases supplies, provides storage space for such supplies until needed, and operates all interagency motor pools; and (4) National Archives and Records Service (NARS), which acts as a repository for historical documents, manages several Federal record centers which store records not immediately in use by the various Federal agencies, and provides a records management advisory function to other agencies.

The record reveals that Region 2 of GSA is headquartered in New York City, New York, and encompasses the States of New York and New Jersey, the Commonwealth of Puerto Rico, and the Virgin Islands. It employs some 2,300 employees of whom approximately 1,400 are Wage Grade with approximately 1,000 of these employed in the PBS. Located in the Regional Office in New York City are, among others, the Regional Administrator for Region 2 and the Regional Commissioners for the various program services.

The record indicates that the various services of Region 2 have field locations. Thus, there are approximately 14 ADTS facilities consisting of

11/ Cf. Federal Aviation Administration, Department of Transportation, A/SLMR No. 173.

telephone operators and some computer operators under the supervision of the chief operators; approximately 3 FSS warehouses and depots supervised by Facility Managers; and approximately 15 field offices performing the day-to-day functions of the PBS and supervised by Field Office Managers. 12/ At several of these PBS field offices, Field Office Managers have the responsibility for one or more Federal buildings. There are 3 Area Managers within the PBS in Region 2 who supervise the Field Office Managers.

The evidence establishes that employees in the petitioned for unit are subject to uniform, basic personnel policies, administered by the Regional Personnel Office. In this regard, the Regional Personnel Division establishes promotion registers, and referral lists of qualified employees and, in accordance with the Activity's promotion policy, vacancies are posted Regionwide. While production standards and staffing formulas are developed by the GSA's Central Office in Washington, D.C., they are applied by the Regional Office to determine regional staffing requirements. The chief spokesman for the management negotiating committees is the Regional Personnel Officer or his designee. The Regional Administrator has final authority with respect to approving negotiated agreements and other matters pertaining to labor relations. Further, the Regional Office must approve all requests made by its managers for overtime and the detailing of personnel for thirty or more days. Similarly, changes in hours of work are authorized only at the regional level. Although Field Office Managers of PBS can detail employees from one building to another for less than thirty days, and, in emergency situations, hire individuals as temporary employees up to 700 hours without advance approval, these actions are subject to post-audit by the Regional Personnel Office to insure compliance with Civil Service Regulations. With respect to the movement of employees within Region 2, the record reveals that from June of 1972 to May 1973 there were twenty-two reassignments from one service to another within Region 2 resulting from promotions, transfers or temporary details.

Based on the foregoing, and noting the discussion above with respect to procedural bars, I find that the employees in the petitioned for unit share a clear and identifiable community of interest and that such a comprehensive unit will promote effective dealings and efficiency of agency operations. Thus, in sum, the record reveals that the employees in the claimed unit share a common mission, are subject to uniform basic personnel, leave, and labor relations policies, and that movement of employees among the various services of Region 2 is not uncommon. Ac-

12/ The field office concept exists only within the PBS.

cordingly, I find that the petitioned for employees constitute a unit appropriate for the purpose of exclusive recognition under the Order. 13/

The record discloses that there are certain employees physically located within the geographic boundaries of Region 2 who are under the jurisdiction of the Regional Administrator of Region 1. Also, there are some employees under the jurisdiction of the Regional Administrator of Region 2 who are physically located within the geographic boundaries of Region 1. The Activity contends that the employees of Region 1, regardless of their geographic locations, are, in fact, considered by the GSA to be Region 1 employees and, therefore, should be excluded from the claimed unit. Conversely, the Activity maintains that employees located within the geographic confines of Region 1, but under the jurisdiction of the Regional Administrator of Region 2, should be included in the petitioned for unit. The AFGE took no position in this regard.

The evidence establishes that one of the groups involved is comprised of forty-two employees employed in motor pools located in Albany, New York City and Syracuse, New York; Newark and Trenton, New Jersey; and San Juan, Puerto Rico. These employees and their supervisors are on the payroll of Region 1. Further, they are on Region 1 retention registers for reduction-in-force purposes; their personnel files are maintained in Region 1; any vacancies occurring in this group are filled through the Personnel Division in Region 1; and the hiring and discharge of any of these employees must be approved by Region 1's Regional Administrator. The record also reveals that these employees do not interchange with other employees located within Region 2. Under all of these circumstances, I find that the employees employed in these motor pools do not share a clear and identifiable community of interest with Region 2 employees and that their inclusion in the claimed unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall exclude these Region 1 employees from the claimed unit.

The record reveals also that there is a group of thirty employees employed in the NARS, located in Boston and Waltham, Massachusetts, (within the geographic jurisdiction of Region 1) who are under the administrative control of the NARS Commissioner in Region 2. 14/ These

13/ In accordance with the holding in Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83, by petitioning for exclusive recognition and proceeding to an election in a Regionwide unit encompassing units for which the AFGE is the exclusive representative, the AFGE will, in effect, have waived its exclusive recognition status with respect to the employees in those less-comprehensive units, and therefore, may continue to represent those employees on an exclusive basis only in the event that it is certified in the unit petitioned for in the subject case.

14/ The jurisdiction of the NARS Commissioner in Region 2 includes Region 1 NARS functions, as there is no NARS Commissioner in Region 1.

employees are not subject to supervision by Region 1 supervisors, and the NARS Commissioner in Region 2 issues instructions to them with respect to their duties, job functions and work schedules. While, at present, they appear on the Region 1 payroll and retention register for reduction-in-force purposes, the evidence establishes that a directive has been issued by the GSA Central Office in Washington, D.C. with instructions that these employees be transferred to the jurisdiction of Region 2. 15/ Under all of these circumstances, I find these NARS employees to have a clear and identifiable community of interest with Region 2 employees and that their inclusion in the claimed unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall include them in the petitioned for unit.

Having found that the Wage Grade employees employed in the Building Management Division, Public Buildings Service, in New York City, for whom the NAGE is the exclusively recognized representative, are entitled to a self-determination election, I shall not make any final unit determination at this time, but shall first ascertain the desires of the employees by directing an election in the following group:

Voting Group (a): All Wage Grade employees of the General Services Administration, Region 2, employed in the Building Management Division, Public Buildings Service, New York City, New York, excluding all confidential and temporary employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

As noted above, the Activity-wide unit of professional and nonprofessional employees sought by the AFGE may constitute a unit appropriate for the purpose of exclusive recognition under the Order. 16/ However,

15/ This directive presently is awaiting implementation by Region 1.

16/ The parties stipulated that employees classified as architect, electrical engineer, mechanical engineer, accountant, structural engineer, attorney, librarian, chemist, archivist, industrial engineer and urban planner are professional employees within the meaning of the Executive Order. As there is no evidence in the record which indicates that the parties' stipulation was improper, I find that employees in these classifications are professional employees within the meaning of the Order. The parties also stipulated as to the exclusion of temporary employees and confidential employees. Inasmuch as there is no evidence in the record which indicates that the parties' stipulations in this regard were improper, I find that employees in these classifications also should be excluded from the unit found appropriate.

the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I, therefore, shall direct that separate elections be conducted in the following groups:

Voting Group (b): All professional employees of the General Services Administration, Region 2, excluding all employees voting in Voting Group (a), nonprofessional employees, Public Buildings Service Wage Grade employees located in the U.S. Post Office and Court House, Trenton, New Jersey, confidential and temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (c): All General Schedule and Wage Grade employees of the General Services Administration, Region 2, excluding all professional employees, employees voting in Voting Group (a), temporary and confidential employees, Public Buildings Service Wage Grade employees located in the U.S. Post Office and Court House, Trenton, New Jersey, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in voting group (a) shall vote whether they desire to be represented by the AFGE, the NAGE, or neither. If a majority of the employees selects the NAGE, the labor organization seeking to represent them in a separate unit, they will be taken to have indicated their desire to be represented separately in such unit. However, if a majority of employees voting in group (a) does not vote for the NAGE, the ballots of the employees in such voting group will be pooled with those of the employees in voting group (c). 17/

17/ If the ballots of voting group (a) are pooled with those of voting group (c) they are to be tallied in the following manner: In voting group (a) the votes for the NAGE, the labor organization seeking a separate unit, shall be counted as part of the total number of valid votes cast but neither for nor against the AFGE, the labor organization seeking to represent the Regionwide unit. All other votes are to be accorded their face value. I find that any unit resulting from a pooling of votes as described above constitutes an appropriate unit for the purpose of exclusive recognition under the Order.

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The employees in professional voting group (b) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the AFGE. In the event that a majority of the valid votes of voting group (b) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (b) shall be combined with those of voting group (c).

Unless a majority of the valid votes of voting group (b) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Administrator indicating whether or not the AFGE was selected by the employees in the professional unit.

The employees in voting group (c) shall vote whether or not they desire to be represented by the AFGE. 18/

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in the voting groups described above, as early as possible, but not later than sixty (60) days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote in voting group (a) shall vote whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, District 2, Council of General Services Administration Locals; by the National Association of Government Employees, Local R2-7; or by neither. Those eligible to vote in voting group (b) shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation

18/ I am advised administratively that the NAGE does not have the prescribed showing of interest to support an intervention in the unit found appropriate, as described above in voting group (c).

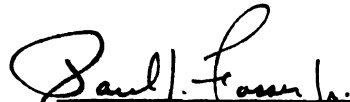
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of Government Employees, AFL-CIO, District 2, Council of General Services Administration Locals. Those eligible to vote in voting group (c) shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, District 2, Council of General Services Administration Locals.

February 28, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Dated, Washington, D.C.
February 28, 1974


Paul J.asser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

GRAPHIC ARTS INTERNATIONAL
UNION, LOCAL 4B
A/SLMR No. 359

This unfair labor practice proceeding involves a complaint filed by John M. DeNiro (Complainant), alleging that the Respondent labor organization violated Section 19(b)(1) of the Executive Order, as amended, by refusing to allow him to resign from such labor organization. The Respondent acknowledged during the hearing and in a post-hearing brief that its actions in this matter constituted a violation of the Executive Order but contended that a remedial order was not necessary as such actions were not discriminatorily motivated but, rather, were caused by the absence of a provision in its Constitution and By-Laws prescribing a specific procedure for resignation.

The Administrative Law Judge found that the Complainant sought, and was refused, the opportunity to exercise his rights set forth in Section 1(a) of the Executive Order, namely, to resign from the Respondent labor organization. He found that inasmuch as there was no contention that the Complainant's conduct in seeking to resign conflicted with any provisions of the Respondent's Constitution or By-Laws, the Respondent's action in subsequently listing and publishing the Complainant's name in its monthly "Bulletin" as a suspended member interfered with the Complainant's rights in violation of Section 19(a)(b)(1) of the Executive Order, as amended.

Upon review of the entire record in this proceeding, including the Report and Recommendations of the Administrative Law Judge, and noting the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GRAPHIC ARTS INTERNATIONAL
UNION, LOCAL 4B

Respondent

and

Case No. 22-4028(CO)

John M. DeNiro

Complainant

DECISION AND ORDER

On November 26, 1973, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and entire record in the subject case, and noting that no exceptions were filed to the Report and Recommendations, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Graphic Arts International Union, Local 4B, shall:

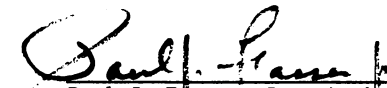
1. Cease and desist from:

- (a) Refusing and failing to accept or honor the resignation from membership of John M. DeNiro submitted on or about July 21, 1972.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

- (a) Accept and honor the resignation from membership of John M. DeNiro effective as of July 21, 1972.
- (b) Publish in its monthly "Bulletin" a statement indicating that John M. DeNiro was erroneously listed in previous "Bulletins" as a suspended member when, in fact, he had effectively resigned from Graphic Arts International Union, Local 4B on July 21, 1972, being at that time a fully paid-up member of Local 4B.
- (c) Post at its Local business office and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations which shall be signed by the President of Graphic Arts International Union, Local 4B. The notices shall remain posted for a period of 60 days, and Local 4B shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.
- (d) Submit signed copies of said notice to the Bureau of Engraving and Printing in Washington, D.C. for posting in conspicuous places, where unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.
- (e) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
February 28, 1974



 Paul J. Fasser, Jr., Assistant Secretary of
 Labor for Labor-Management Relations

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT refuse to accept or honor the resignation of John M. DeNiro from membership in Graphic Arts International Union, Local 4B.

Graphic Arts International Union, Local 4B

Dated: _____ By _____ President

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

If members have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pa. 19104.



In the Matter of GRAPHIC ARTS INTERNATIONAL UNION, LOCAL 4B Respondent and JOHN M. DeNIRO Complainant

Case No. 22-4028 (CO)

Anthony F. Cafferky, Esquire 1828 L Street, N.W. Suite 703 Washington, D.C. 20036

William A. Kilcoyne President of Local 4B 2818 Kingswell Drive Wheaton, Maryland 20902

Michael J. Smith Vice President of Local 4B Mullsworth Drive & Rte. 1 Mount Airy, Maryland 21771 For the Respondent

John M. DeNiro 4201 Eastern Avenue Mt. Rainier, Maryland 20822 For the Complainant

Before: BURTON S. STERNBURG Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint filed on June 28, 1973, under Executive Order 11491, as amended, by John M. DeNiro, an individual, against Graphic Arts International Union, Local 4B (hereinafter called the Union or Respondent) a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the Philadelphia, Pennsylvania, Region on September 6, 1973.

The complaint alleges, in substance, that the Respondent has refused to allow the Complainant, John M. DeNiro, to freely resign from its Union in violation of Section 19(b)(1) of the Executive Order.

A hearing was held in the captioned matter on October 15, 1973, in Washington, D.C. All parties 1/ were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Subsequently, Respondent, through its attorney, filed a brief which has been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence adduced at the hearing, I make the following, conclusions and recommendations:

Findings of Fact

The facts are not in dispute and no credibility issues are involved.

The Respondent, Graphic Arts International Union, Local 4B, is the duly authorized and recognized representative of certain employees of the Bureau of Engraving and Printing, Washington, D.C. The Complainant, John M. DeNiro, has worked for the Bureau of Engraving and Printing for some twenty years. About August 1953, DeNiro became a member of the Respondent when he transferred his "membership from a New York Local into the Graphic Arts Local". Thereafter, he remained a paid-up member in good standing until on or about July 21, 1972, when the events underlying the instant proceeding took place.

Thus, on or about July 21, 1972, DeNiro, who at the time had paid his union dues through the end of July 1973, approached James Arnold, Union Representative in the Postal Stamp Division of the Bureau, surrendered his paid-to-date union dues payment book and informed Arnold that he, DeNiro, was resigning from the

1/ Respondent was represented by counsel.

Union. Arnold accepted the book without challenge or argument and DeNiro then departed under the impression that he was no longer a member of the Union.

Nothing further of note occurred with regard to DeNiro's resignation until March 20, 1973, when he received a telephone call at his home from William A. Kilcoyne, President of the Union. During the course of the telephone conversation, Kilcoyne attempted to dissuade DeNiro from relinquishing his union membership by pointing out to him the various death and retirement benefits he would lose if he adhered to his July decision to resign from the Union. Additionally, Kilcoyne informed DeNiro of the union rules requiring the publication of any suspended member's name in the Union's "Bulletin", a monthly newspaper. 2/ Thereafter, DeNiro, who did in fact adhere to his initial decision with respect to his resignation, was listed in various union Bulletins published during the period March 1973 through August 1973 as being a "suspended" union member. 3/ As noted supra, it is this latter action of the Respondent in incorrectly publishing DeNiro's name in its "Bulletin" as a suspended rather than as a resigned member which is the basis of the complaint.

2/ According to the uncontroverted testimony of Kilcoyne, the Union's Constitution and By-laws set forth only the requirements and procedure for suspension and expulsion. No provision, whatsoever, is made for resignation. In view of the foregoing, and since a resignation has never to his knowledge occurred, DeNiro was treated as a suspended member.

3/ The date when the March "Bulletin" was actually published does not appear in the record. However, in view of certain dates appearing therein which predate the March 20th conversation between Kilcoyne and DeNiro, it is possible that the publication had gone to press prior to such conversation. In any event, I see no particular significance to the actual date the March "Bulletin" was published since there is no allegation that the appearance of DeNiro's name therein as being a suspended member was predicated solely on, or in retaliation for, anything in particular occurring during the March 20th telephone conversation.

DISCUSSION AND CONCLUSIONS

Section 1(a) of the Executive Order provides, in pertinent part, that an employee subject thereto has a right to refrain from joining or assisting a labor organization. Union abridgement of such rights, which include resignation from a union, constitutes a violation of Section 19(b)(1) of the Order. Local 1858, American Federation of Government Employees (Redstone Arsenal, Alabama) A/SLMR No. 275

In the instant case, the essential facts of which are not in dispute, DeNiro sought, and was refused, the opportunity to exercise his rights set forth in Section 1(a) of the Executive Order, namely, to resign from the Union. Inasmuch as there is no contention that such action on his part conflicted with any provisions of the Respondent's Constitution or By-Laws, the Union's action in subsequently listing and publishing his name in its monthly "Bulletin" as a suspended member interfered with DeNiro's rights in violation of Section 19(b)(1) of the Executive Order. In my view the Union's action was tantamount to a refusal to allow DeNiro's resignation since the only choice given to him was to remain a member in good standing of the Union or suffer the humiliation of having his name continually published as being a "suspended member", a category generally associated with the non-payment of dues.

Respondent, during the hearing and in post hearing brief, acknowledged that its action constituted a violation of the Executive Order but contended that a remedial order was not necessary. In support of its position the Respondent points out that its actions were not discriminatorily motivated but rather were caused solely by the absence of a provision in its Constitution and By-Laws prescribing a specific procedure for resignation. Additionally, Respondent takes the position that the instant case is distinguishable from Local 1858, American Federation of Government Employees, supra, in that there is no evidence, whatsoever, that the posting of DeNiro's name as being a suspended member was in retaliation for his resignation. As to the first contention, sufficeth to say, ignorance of the law is no excuse. With respect to the second contention, I do not view the Assistant Secretary's decision in the cited case as holding that evidence of "retaliation" is a prerequisite to a 19(b)(1) finding predicated on a union's interference with an employee's Section 1(a) right to resign from membership in a union.

However, while I do not view the Respondent's contentions set forth above as a defense, I do feel that they are mitigating circumstances which should be taken into consideration when fashioning a remedy. Accordingly, since it appears that the

Union is prepared to voluntarily rectify its actions with respect to any future resignations, I will recommend a narrow order tailored specifically to the situation here involved.

RECOMMENDATIONS

Having found that Respondent has engaged in certain conduct prohibited by Section 19(b)(1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Graphic Arts International Union, Local 4B, shall:

- 1. Cease and desist from:

Refusing and failing to accept or honor the resignation from membership of John M. DeNiro submitted on or about July 21, 1972.

- 2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

- (a) Accept and honor the resignation from membership of John M. DeNiro effective as of July 21, 1972.
- (b) Publish in its monthly "Bulletin" a statement indicating that John M. DeNiro was erroneously listed in previous "Bulletins" as a suspended member, when in fact, he had effectively resigned from Local 4B on July 21, 1972, being at that time a fully paid-up member of Local 4B.
- (c) Post at its Local business office and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations which shall be signed by the President of Graphic Arts International Union, Local 4B. The notices shall remain posted for a period of 60 days, and Local 4B shall take reasonable steps to insure that said notices are not altered, defaced, or covered by other material.

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE


ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

- (d) Submit signed copies of said notice to the Bureau of Engraving and Printing for posting in conspicuous places where the unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of posting.
- (e) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply herewith.


 BURTON S. STERNBURG
 Administrative Law Judge

We will not refuse to accept or honor the resignation from membership in Graphic Arts International Union, Local 4B of any member, submitted in accordance with our constitution or by-laws.

Dated at Washington, D.C.
 November 26, 1973 -

Graphic Arts
 International
 Union, Local 4B

Dated _____ By _____
 President

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 Administrator of the Labor-Management Services Administration, U.S. Department of Labor whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pa. 19104.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE SUPPLY AGENCY,
 DEFENSE PROPERTY DISPOSAL OFFICE,
 ABERDEEN PROVING GROUND,
 ABERDEEN, MARYLAND
 A/SLMR No. 360

This proceeding arose upon the filing of an unfair labor practice complaint by Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO (Complainant). The Complainant alleged that the Respondent violated Section 19(a)(1), (2), (5), and (6) of the Order by refusing to recognize the Complainant or to apply the terms of an existing negotiated agreement which included in its coverage certain employees of the property disposal operations at the Aberdeen Proving Ground, who were transferred from the Department of the Army to the Defense Property Disposal Service (DPDS) of the Defense Supply Agency (DSA), pursuant to a Department of Defense reorganization. The complaint further alleged that the Respondent improperly threatened to revoke dues withholding authorizations for the transferred employees. The case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties had submitted a stipulation of facts and exhibits to the Assistant Regional Director for Labor-Management Services.

The Respondent took the position that the Complainant should not be permitted to gain certification and recognition as the exclusive bargaining representative of any bargaining unit without filing a representation petition and winning an election. Further, it contended that hopeless fragmentation of DPDS units would result from the finding of a violation in the instant case.

Relying on the Decision on Appeal of the Federal Labor Relations Council (Council) in Headquarters, United States Army Aviation Systems Command, FLRC No. 72A-30, the Respondent urged that it should not be placed in the dilemma of assuming the risk of violating Section 19(a)(3) or (6) during the period in which an underlying representation issue is pending before the Assistant Secretary. The Assistant Secretary, noting that neither the DSA nor any labor organization sought to raise a question concerning representation by filing an appropriate representation petition prior to the withdrawal of recognition and the threat to terminate dues withholding, found that the rationale in the Council's decision did not afford a defense in the instant matter. Thus, the Assistant Secretary concluded that Respondent did not "avail itself of the representation proceedings offered in order to resolve legitimate questions as to the

correct bargaining unit" (as stated by the Council) but, rather, unilaterally terminated recognition and set its own rules for how a new recognition could be obtained.

Noting that following the reorganization and "transfer-in-place" the 15 Wage Grade employees involved worked under the same supervision, retained their same job descriptions and classifications, and continued to work in the same geographical areas, performing the same functions and job duties that they had performed while under the command of the Department of the Army, prior to the reorganization, the Assistant Secretary found that the DPDO Wage Grade employees at Aberdeen continued to share a community of interest with the employees in the Activity-wide Wage Grade unit at Aberdeen represented by Complainant and, in effect, remained in the exclusively recognized bargaining unit subsequent to their transfer to DPDS.

In view of the fact that both the Department of the Army and the DSA are components of the Department of Defense, which was the moving force in transferring the responsibility for property disposal from one of its components to another, the Assistant Secretary found that DSA and the Department of the Army were co-employers vis-a-vis the existing unit at Aberdeen represented by the Complainant and, as co-employers the DSA and the Department of the Army were responsible for maintaining the present terms and conditions of employment of all employees in the unit, including those contained in the existing negotiated agreement.

By withdrawing recognition with regard to the DPDO employees at Aberdeen, where as a co-employer it had the obligation to continue such recognition, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (5) of the Order. Moreover, he found that the Respondent's admitted threat to terminate dues withholding six months after the date of the unit employees' transfer to the DPDO, if no representation petition was filed, constituted an additional violation of Section 19(a)(1) of the Order.

Under the circumstances, the Assistant Secretary found no 19(a)(6) violation based on the withdrawal of recognition. He also found that, in the absence of any evidence of discriminatory motivation, further proceedings under Section 19(a)(2) were unwarranted.

The Assistant Secretary, considering the broad scope of the reorganization herein affecting the major components of the Department of Defense and its implementation on a nationwide basis by the DSA, found that a broad cease and desist order was necessary in order to effectuate the purposes and policies of the Order. Accordingly, he ordered, among other things, that the DSA cease and desist from refusing to accord appropriate recognition to the Complainant or other similarly situated labor organizations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE PROPERTY DISPOSAL OFFICE,
ABERDEEN PROVING GROUND,
ABERDEEN, MARYLAND

Respondent

and

Case No. 22-4027(CA)

LOCAL LODGE 2424, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Acting Assistant Regional Director for Labor-Management Services Eugene M. Levine's Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19(a)(1), (2), (5), and (6) of the Executive Order by refusing to recognize the Complainant or to apply the terms of an existing negotiated agreement with the Aberdeen Proving Ground, which included in its coverage certain employees of the property disposal operations at the Aberdeen Proving Ground, who were transferred to the Respondent pursuant to a Department of Defense reorganization. The complaint further alleges that the Respondent improperly threatened to revoke dues withholding authorizations for the transferred employees.

The Respondent takes the position that the Complainant should not be permitted to gain certification and recognition as the exclusive bargaining representative of any bargaining unit without filing a representation petition and winning an election. Further, it contends that hopeless fragmentation of Defense Property Disposal Service, herein called DPDS, units would result from a finding by the Assistant Secretary that a violation occurred in the instant case. 1/

Background and Facts

The Aberdeen Proving Ground is a field activity of the Department of the Army engaged primarily in the testing and evaluation of Army ordnance (i.e., weapons and ammunition). The Department of the Army, like the Department of the Navy, Department of the Air Force, and the Defense Supply Agency, herein called DSA, is a separate, co-equal component of the Department of Defense. On July 29, 1970, the Complainant was certified as the exclusive bargaining representative in a unit of all Wage Grade employees assigned to the Aberdeen Proving Ground Command, Aberdeen Proving Ground, Maryland. The certified unit covered approximately 1,620 employees. Thereafter, on August 9, 1972, a two-year agreement between Complainant and Aberdeen Proving Ground Command covering the above-described unit was executed.

On August 16, 1972, the Assistant Secretary of Defense (Installation and Logistics), as a result of a study which had been conducted, adopted recommendations concerning the creation of a new specialized service within the Department of Defense having the sole responsibility for all surplus personal property disposal functions for the entire Department of Defense. In this regard, the Director of the DSA was authorized to establish such a service. Accordingly, on September 11, 1972, the DSA established the DPDS to perform the functions involved and directed that the Commander of the DPDS report and be responsible to the Director of the DSA.

Under the reorganization, the headquarters of the DPDS was established at Battle Creek, Michigan. Subordinate to the DPDS headquarters five Defense Property Disposal Regions (DPDR's) were established, three of which are in the Continental United States (CONUS) 2/ and two overseas, with approximately 7,000 DPDS employees employed world-wide.

1/ In its brief, the Respondent points out that approximately 87 petitions have been filed by interested labor organizations seeking to represent DPDS employees throughout the country.

2/ The three DPDR's in CONUS are headquartered at Columbus, Ohio; Memphis, Tennessee; and Ogden, Utah.

Within each DPDR a number of Defense Property Disposal Offices (DPDO's) were established. Specifically, there are 168 such offices in CONUS, one of which, located at Aberdeen, consists of 27 employees. ^{3/}

On or about February 6, 1973, ^{4/} the DSA wrote to the National officials of all labor organizations, including the Complainant, representing employees of the Army, Navy, Air Force, and DSA (five DPDO's are located at previously existing DSA activities) who were to be transferred from those employing agencies and activities to the DPDS and provided them with all of the pertinent information concerning the DPDS which was available at that time. According to the communication of February 6, the transfer was to take place by moving the employees currently performing property disposal functions from their present commands to the DSA. Under this "transfer-in-place," employees were to continue their existing job assignments at their present duty stations and were to perform essentially the same duties, with no substantive changes in job descriptions, classifications, or grade.

On March 21, the Complainant wrote to the DSA stating its position with respect to whether the existing negotiated agreement between it and Aberdeen continued in effect insofar as it covered DPDS employees. The letter stated, in part,

The IAMAW was certified for a bargaining unit of production and maintenance employees under the command of the Army. A portion of this unit - Supply Function - was then transferred to Defense Supply. An added factor should be taken into consideration and that is that the IAMAW has a contract with the Army covering all of the employees in the unit. . . . The fact that a portion of the unit was transferred is insignificant for if this were not true, the Department of Defense could circumvent each and every certification held by each and every union by merely transferring command from the Army to the Navy, the Navy to Defense Supply, etc., the important factor being that the work remains intact with the same identical supervision and same locations.

Thereafter, on or about April 18, DSA advised all labor organizations, including the Complainant, which had represented the newly assigned DPDS employees that "the dues withholding privileges of those employees would be extended for a six-month period . . . to allow for the resolution of

^{3/} Two of these employees are supervisors, ten are nonsupervisory Classification Act (graded) employees, and the 15 employees at issue in this case are nonsupervisory Wage Grade (ungraded) employees.

^{4/} All dates herein, unless otherwise specified, occurred in 1973.

such representation and successorship issues as may arise incident to this reorganization." The 15 Wage Grade employees in the certified unit who were performing the property disposal functions at the Aberdeen Proving Ground Command were administratively transferred to the DSA Command on April 22. The transferred employees continued to work in the same geographical areas, under the same supervision, and performed the same job functions and duties that they had performed while under the command of the Army.

On April 24 the Complainant local's president requested that the DSA continue the withholding of dues for those employees who had valid dues withholding authorizations in effect at the time of their transfer. The DSA replied on May 8 stating that, "The continuation of dues withholding is for a temporary period. It will terminate six months after the date of the employees transfer to DPDS if no representation petition covering the employees is filed within the six-month period."

On May 14 the Complainant filed an unfair labor practice charge with the Commander, Defense Communication Supply Center, Defense Supply Agency, Columbus, Ohio, alleging violations of Section 19(a)(1), (2), (5), and (6) of the Order based on a "refus[al] to apply the terms and conditions of the collective bargaining agreement that was in effect [at Aberdeen] covering these employees." The DSA issued its "final decision" on the matter on June 8, stating that the Aberdeen agreement was between Complainant and the Department of the Army and that:

When these 28 [sic] employees transferred to DPDS they ceased to be employees of either the Aberdeen Proving Ground Command or the Department of the Army. They thereby also ceased, in the judgment of this Agency, to be members of the bargaining unit. . . . The Agency stands ready, at any time, of course, to recognize any bargaining agent certified to us by the Department of Labor as the duly elected representative of the employees of DPDS or of any appropriate bargaining unit made up of DPDS employees.

Upon receipt of the "final decision," the Complainant, on June 15, filed the instant unfair labor practice complaint which subsequently was amended. Following the filing of the instant complaint, representation petitions were filed by two other labor organizations for units encompassing these 15 employees. One of these petitions later was withdrawn and refiled; both petitions are presently pending.

All of the facts and positions set forth above are derived from the parties' stipulation and accompanying exhibits.

Allegations and Findings

The Respondent contends that it has "strived to resolve the issues which have inevitably arisen with respect to the DPDS reorganization," and that the instant complaint should be dismissed and a remedy pursued through representation procedures. Relying on the Decision on Appeal of the Federal Labor Relations Council (Council) in Headquarters, United States Army Aviation Systems Command, FLRC No. 72A-30, the Respondent urges that it should not be placed in the dilemma of assuming the risk of violating Section 19(a)(3) or (6) during the period in which an underlying representation issue is pending before the Assistant Secretary. It should be noted, however, that neither the Respondent nor any labor organization sought to raise a question concerning representation by the filing of an appropriate representation petition covering the Aberdeen DPDO employees prior to the Respondent's statement to the Complainant, on May 8, that it intended to terminate dues withholding if no representation petition were forthcoming ^{5/} and its statement to the Complainant on June 8 that based on the administrative transfer to DPDS the Aberdeen DPDO employees "ceased . . . to be members of the bargaining unit. . . ." Under these circumstances, I find that the rationale set forth in the Council's decision in Headquarters, United States Army Aviation Systems Command, cited above, does not afford the Respondent a defense in this matter. In that decision the Council stated, in relevant part, that "where an agency has acted in apparent good faith and availed itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit, [emphasis added] and where no other evidence of misconduct is involved, an agency should not be forced to assume the risk of violating either Section 19(a)(3) or Section 19(a)(6) during the period in which the underlying representation issue is still pending before the Assistant Secretary." In the instant case, it is clear that the Respondent did not "avail itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit" but, rather, it unilaterally terminated recognition and set its own rules for how a new recognition would be obtained.

^{5/} As noted above, the instant unfair labor practice complaint was filed on June 15. Thereafter, on August 29, the National Federation of Federal Employees filed a representation petition covering the DPDO employees at Aberdeen. This petition subsequently was withdrawn on October 30 and refiled on November 6. On October 24, the American Federation of Government Employees, AFL-CIO, filed a petition covering the DPDR, Columbus, Ohio, which encompasses the DPDO employees at Aberdeen.

As to the actual effect of the reorganization on the unit employees at Aberdeen, the parties stipulated that prior to the transfer on April 22, the 15 Wage Grade employees who performed property disposal functions at the Aberdeen Proving Ground were part of an Activity-wide unit at the Aberdeen Proving Ground Command, Aberdeen Proving Ground, Maryland. Following the reorganization and administrative "transfer-in-place" of these employees into the DPDO at Aberdeen, Maryland, under the command of DSA, these transferred employees retained their same job descriptions and classifications, continued to work in the same geographical areas, and performed the same functions and job duties that they had performed while under the command of the Army prior to the reorganization. Moreover, the immediate supervision of these employees remained the same as before the reorganization, although the chief of the office now reported upward through the DSA Command, rather than through the Army Command. Under these circumstances, I find that the DPDO Wage Grade employees at Aberdeen continue to share a community of interest with the employees in the Activity-wide Wage Grade unit at the Aberdeen Proving Ground Command represented by the Complainant and have, in effect, remained in the exclusively recognized bargaining unit subsequent to their administrative transfer to the DPDS. ^{6/}

In its brief, the Respondent contends that questions relating to whether Department of Defense components are separate employing agencies are irrelevant to a decision in this case. Nevertheless, it asserts that the Respondent has no obligation to recognize the Complainant because the negotiated agreement currently in existence herein is between the Complainant and the Department of the Army. The parties stipulated that both the DSA and the Department of the Army are components of the Department of Defense, that the Department of Defense made the decision to reorganize giving a separate responsibility to the DSA from that which existed when property disposal functions were controlled by the various services, and that the reasons for such reorganization were intimately connected with and determined by the Department of Defense as part of an effort to achieve an effective method of operating the personal property disposal functions of the military services.

I do not view as determinative in this matter the fact that the Department of the Army and the DSA are separate employing agencies, particularly in view of the fact that both are components of the Department of Defense which was the moving force in transferring the responsibility for property disposal from one of its components to another. In my judgment, where, as here, it is found that the exclusively recognized unit has remained intact following a reorganization and

^{6/} See Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona, A/SLMR No. 351; Department of Army, Headquarters, U. S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 328; and AMC Ammunition Center, Savanna, Illinois, A/SLMR No. 291.

administrative transfer by a parent organization - i.e., the Department of Defense - any additional component organizations which have been added as employing entities vis-a-vis the existing exclusively recognized unit, would be viewed to be co-employers with common responsibilities for maintaining the present terms and conditions of employment for all employees in the unit including any negotiated agreement that is in existence. While it is recognized that there are differences in the specific missions and functions of the two components of the Department of Defense involved in this matter, such differences, in my view, do not outweigh the factors outlined above concerning the continued appropriateness of the existing bargaining unit at Aberdeen represented by the Complainant.

A balance struck in accordance with the Respondent's position would, in my view, create the type of chaotic labor-management relations situation currently encountered in the instant case, as well as in other locations throughout the country. ^{7/} Thus, the record reveals that as a result of an administrative reorganization in which, for the most part, the employees involved have historically been included in bargaining units and, after the reorganization continue to perform the same job functions, under the same supervision, at the same locations, a substantial number of representation petitions appear to have been filed, based on the conditions set forth by the Respondent to continue dues withholding, seeking to separate such employees from their existing bargaining units. To upset these existing units based solely on such an administrative reorganization clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations.

Under all of these circumstances, I find that the Respondent and the Department of the Army are co-employers vis-a-vis the existing unit at Aberdeen represented by the Complainant and, as such, the Respondent and the Department of the Army are responsible for maintaining the present terms and conditions of employment of all employees in the unit including those contained in the existing negotiated agreement. ^{8/}

Section 19(a)(5) of the Order provides that "Agency management shall not refuse to accord appropriate recognition to a labor organization qualified for such recognition." An integral part of the obligation to

^{7/} I have been advised administratively that the subject case is typical of many of those currently pending throughout the country.

^{8/} It is, of course, the responsibility of management to decide how it will fulfill its management role with respect to dealing with any exclusive bargaining representative. Thus, in this instance, it will be incumbent upon the co-employers to take the necessary steps to designate an appropriate management representative or representatives to deal with the Complainant concerning appropriate matters related to the bargaining unit.

accord appropriate recognition to a labor organization qualified for such recognition is the obligation to continue to accord such recognition as long as the labor organization involved remains qualified under the provisions of the Order. In view of the above finding that the DPDO employees at Aberdeen continue to remain in the exclusively recognized unit, the Respondent, as a co-employer of these employees, was obligated to continue to accord recognition to the Complainant including the obligation to continue to honor the existing negotiated agreement between the Complainant and the Department of the Army, as it pertained to the DPDO employees. Under these circumstances, I find that the Respondent's conduct herein constituted an improper withdrawal of recognition from the Complainant in derogation of its obligation "to accord appropriate recognition to a labor organization qualified for such recognition" and thereby constituted a violation of Section 19(a)(5) of the Order.

Also, I find that Respondent's conduct herein constituted an independent violation of Section 19(a)(1) of the Order. Thus, it has been held previously that the right to form, join and assist a labor organization as provided for in the Executive Order would be rendered meaningless where, as here, agency management fails to accord appropriate recognition to a labor organization and, with that action, negates the benefits which flow from the selection of an exclusive representative, e.g., a negotiated agreement. ^{9/} Accordingly, under the circumstances of this case, I find that the Respondent's conduct also violated Section 19(a)(1) of the Order. Moreover, I find that the Respondent's admitted threat to terminate dues withholding six months after the date of the unit employees' administrative transfer to DPDS if no representation petition was filed constituted an additional violation of Section 19(a)(1) of the Order.

The Complainant contends further that the Respondent violated Section 19(a)(2) and (6) of the Order by "refus[ing] to recognize the IAM or to apply the agreement" and "by threatening to discontinue dues deductions." It has been determined previously under similar circumstances that matters related to an improper refusal to accord appropriate recognition such as the termination of a negotiated agreement and the revocation of dues withholding are inseparable from the theory of violation discussed above with respect to the 19(a)(5) allegation and that Section 19(a)(6) is not applicable in such a situation. ^{10/} Moreover, here, as in A/SLMR No. 106, the appropriate remedy, discussed below, for the Respondent's improper conduct herein under Section 19(a)(1) and (5) of the Order requires a return to the status quo ante, which necessarily would include the reinstatement of the negotiated agreement and its terms applicable to dues withholding. Accordingly,

^{9/} See United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tennessee, A/SLMR No. 106.

^{10/} Ibid.

while I find that under the circumstances of this case and for the reasons outlined above, the Respondent's conduct herein was violative of Section 19(a)(1) and (5) of the Order, its conduct was not considered to be violative of Section 19(a)(6) of the Order. Moreover, in the absence of any evidence of discriminatory motivation, I find that further proceedings under Section 19(a)(2) were unwarranted. Under the circumstances, I shall order that the Section 19(a)(2) and (6) allegations be dismissed.

CONCLUSION

By failing to continue to accord appropriate recognition to a labor organization qualified for such recognition and also failing to continue to honor an existing negotiated agreement, the Respondent violated Section 19(a)(5) of Executive Order 11491, as amended. By such conduct, and additionally by threatening to revoke dues withholding authorizations, the Respondent interfered with, restrained, or coerced employees in the exercise of rights assured by the Order in violation of Section 19(a)(1).

THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (5) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the purposes and policies of the Order. Further, in view of the broad scope of the reorganization herein affecting the major components of the Department of Defense and its implementation on a nationwide basis by the DSA, as described above, I find that a broad cease and desist order is warranted to effectuate the purposes and policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Defense Supply Agency and its Defense Property Disposal Office, Aberdeen Proving Ground Command, Aberdeen, Maryland, shall:

1. Cease and desist from:

(a) Refusing to accord appropriate recognition to Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, and similarly situated labor organizations, and refusing to honor the existing negotiated agreement with Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, as it pertains

to the Defense Property Disposal Office employees at the Aberdeen Proving Ground, and existing negotiated agreements of similarly situated labor organizations as they pertain to other Defense Property Disposal Office employees.

(b) Interfering with, restraining, or coercing unit employees of the Defense Property Disposal Office at the Aberdeen Proving Ground by refusing to accord appropriate recognition to their exclusive bargaining representative, Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO; by refusing to honor the existing negotiated agreement with that labor organization; and by threatening to cancel dues withholding authorizations executed in that labor organization's behalf.

(c) In any like or related manner interfering with, restraining, or coercing its employees represented by Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, and similarly situated labor organizations in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Upon request, accord appropriate recognition to Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO, for its employees, including eligible employees of the Defense Property Disposal Office, in the following certified unit:

All Wage Grade employees assigned to the Aberdeen Proving Ground Command, Aberdeen Proving Ground, Maryland, exclusive of supervisors, managerial officials, guards, employees engaged in Federal personnel work other than in a purely clerical capacity, employees of the Boiler Plants Branch, Facilities Management Directorate, and any other employees to whom exclusive recognition has been granted.

(b) Honor all terms of the existing negotiated agreement with Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO.

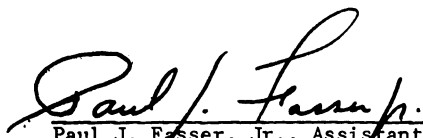
(c) Post at its facility at Aberdeen Proving Ground Command, Aberdeen Proving Ground, Maryland, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, and shall be posted and maintained by him for sixty (60) consecutive days

thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other materials.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations of Section 19(a)(2) and (6) of Executive Order 11491, as amended, be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 28, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to accord appropriate recognition to Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO.

WE WILL NOT refuse to honor all of the terms of the existing negotiated agreement with Local Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO.

WE WILL NOT interfere with, restrain, or coerce our employees by refusing to accord appropriate recognition to their exclusive bargaining representative, by refusing to honor the existing negotiated agreement covering our employees and by threatening to cancel dues withholding authorizations executed by our 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 Executive Order 11491, as amended.

Commanding Officer

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120 Gateway Building, 3535 Market St., Philadelphia, Pa. 19104.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
 AND WELFARE, FOOD AND DRUG
 ADMINISTRATION, NEWARK DISTRICT,
 NEWARK, NEW JERSEY
 A/SLMR No. 361

This case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3445 (AFGE) seeking a unit of all professional and nonprofessional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health, Education and Welfare. The parties were in agreement on the appropriateness of the claimed unit. However, contrary to the AFGE, the Activity would exclude certain job classifications on the basis that the employees in such classifications were either management officials or supervisors.

The Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition. In this connection, he noted particularly the agreement of the parties with respect to the appropriateness of the claimed unit, as well as the facts that the unit includes all of the employees within the District Office, that the employees in the claimed unit share a common mission and facilities, that they are all under the same supervision and direction of the same Deputy Regional Food and Drug Director, and they are subject to the same personnel and labor relations policies. Under these circumstances, he found that there is a clear and identifiable community of interest among the employees in the claimed unit and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary directed an election in the unit found appropriate.

Determinations also were made by the Assistant Secretary as to the supervisory and/or managerial status of employees in certain disputed job classifications. Further, in the absence of contrary evidence, the Assistant Secretary found that the parties' agreements concerning professional and certain excluded employees were proper.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH,
 EDUCATION AND WELFARE,
 FOOD AND DRUG ADMINISTRATION,
 NEWARK DISTRICT, NEWARK, NEW JERSEY 1/

Activity

and

Case No. 32-3269

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, AFL-CIO,
 LOCAL 3445

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer William A. Ware. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs submitted by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3445, herein called AFGE, seeks an election in a unit of all professional and nonprofessional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health, Education and Welfare, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The record indicates that the Activity and the AFGE are in agreement as to the appropriateness of the claimed unit. The Activity maintains, however, and the AFGE disagrees, that employees in two classifications, Consumer Safety Officers, GS-12 and GS-13, in the Compliance Branch and

1/ The name of the Activity appears as corrected at the hearing.

Consumer Affairs Officers, GS-11, - are ineligible for inclusion in the unit sought, because the employees in such classifications are either management officials or supervisors within the meaning of the Order.

The Unit

The Food and Drug Administration (FDA), which is a component of the Department of Health, Education and Welfare (HEW), enforces the Federal Food, Drug and Cosmetic Act, and related statutes and regulations. It operates under the direction of the Commissioner of Foods and Drugs. The management of FDA field offices is under the authority of the Executive Director of Regional Operations who is on the Commissioner's staff. There are ten FDA Regional offices with each having a Regional Food and Drug Director who reports directly to the Executive Director of Regional Operations. The FDA Regional offices are subdivided into 19 districts with each district office managed by a Deputy Regional Food and Drug Director who reports to the Regional Food and Drug Director of his respective region. Although not uniform in size, jurisdictional area, or functional responsibility, each district office contains compliance, investigative, and administrative units, which have essentially the same duties and responsibilities, regardless of the district in which they are located. The Deputy Regional Food and Drug Director in each district office is charged with the responsibility of obtaining compliance with the laws and regulations enforced by the FDA, initiating and conducting investigations and inspections, conducting administrative hearings on alleged violations, initiating appropriate enforcement actions and recommending legal action to various bureau officials at the headquarters level, to the Office of General Counsel of the HEW, or to the responsible U.S. Attorney. These functions are accomplished through the activities of the Inspection and Compliance Branches of the district.

The Activity in the instant case, the Newark District Office, is one of four district offices which comprise FDA Regional Field Office II headquartered in Brooklyn, New York. Although the record indicates that the Newark District Office is organized along the same basic lines as the other FDA districts throughout the nation, it is dissimilar in that it does not have a laboratory branch as do the other districts.

The record indicates that all of the employees in the petitioned for unit work in the same building, with the exception of employees of the Investigative Branch, who temporarily are located less than one mile away because of the lack of available space.

Based on the foregoing, and noting particularly the agreement of the parties with respect to the appropriateness of the claimed unit, I find that there is a clear and identifiable community of interest among the employees in the claimed unit and that such a unit will promote effective dealings and efficiency of agency operations. Also noted in reaching the foregoing conclusion were the facts that the unit includes all of the employees within the District Office and that the employees in the claimed unit share a common mission and facilities, are all under

the supervision and direction of the same Deputy Regional Food and Drug Director, and are subject to the same personnel and labor relations policies. Under all of these circumstances, I find that the claimed unit is appropriate for the purpose of exclusive recognition under the Order.

Eligibility Issues

As stated above, the Activity contends, contrary to the AFGE, that two employee classifications should be excluded from the unit sought by the AFGE because employees in these classifications are either management officials or supervisors. The classifications at issue involve four Consumer Safety Officers, GS-12 and GS-13, in the Compliance Branch, and two Consumer Affairs Officers, GS-11, also in the Compliance Branch.

Consumer Safety Officers, GS-12 and GS-13, in the Compliance Branch 2/

The Activity contends that the Consumer Safety Officers, GS-12 and GS-13, in the Compliance Branch should be excluded from any unit found appropriate on the basis that duties of the employees in these positions are supervisory and/or managerial in nature. The record indicates that these Consumer Safety Officers perform job functions concerned with enforcing the laws and regulations which protect consumers from foods, drugs, cosmetics, fabrics, toys, and household products and equipment that are impure, unwholesome, ineffective, improperly labelled, or dangerous. They apply scientific knowledge to perform a variety of functions including: inspecting food and drug manufacturing establishments; investigating complaints of violations and injuries and illnesses caused by regulated products; planning and directing regulatory programs; initiating actions against violators and coordinating activities associated with their prosecution; developing inspectional and laboratory analytical methods, procedures, and techniques; and advising industry, state and local officials, and consumers on enforcement policies, methods, and interpretation of regulations. These duties are undertaken pursuant to the direction and supervision of the Compliance Branch Chief and his superiors. The record indicates that although the Consumer Safety Officers attend supervisory staff meetings for the purpose of reporting on activities of the previous week and discussing future activities, the Consumer Safety Officers' opinions at these meetings are not solicited with respect to shaping policy or to formulating rules and regulations.

The record indicates that after necessary information is obtained by the inspection and laboratory facilities of the FDA and referred to the Consumer Safety Officer, he makes a determination as to whether a violation has occurred and a decision as to what further action is required. If

2/ The parties stipulated that incumbents in these classifications are professional employees within the meaning of the Order, and there is no evidence in the record to indicate to the contrary.

he feels that a violation has occurred, he may schedule a hearing in which all parties are present. The parties present their positions and the Consumer Safety Officer, in their presence, dictates a summary of the proceedings. Based upon this hearing, and whether he feels that a violation of the food and drug laws has occurred, he meets with his supervisors 3/ to decide whether any action should be taken against the alleged violator, including prosecution by the U.S. Attorney, review by the HEW General Counsel, or other review by agency headquarters. Other action may involve further inspection, warning letters, the institution of civil proceedings to remove the product, or administrative sanctions. All of these actions are taken in accordance with the FDA guidelines which detail the responsibility of Consumer Safety Officers.

The Activity alleges that because of the delegation of authority and responsibility for the establishment of district regulatory policy from the Deputy Regional Food and Drug Director to the Consumer Safety Officers, such Officers are managerial employees. The record reflects, however, that the Consumer Safety Officers do not have direct access to the Deputy Regional Food and Drug Director but, rather, they report directly to their Compliance Branch Chief who is a GS-14 employee. The record reveals also that the Consumer Safety Officers basically review work submitted by inspection and laboratory branches for soundness and technical content in accordance with requirements established by FDA headquarters and in accordance with established administrative guidelines. These guidelines are specific pronouncements of agency policy based upon precedent cases and interpretations of law to determine the extent of the regulatory action permissible. Where no guidelines exist, the Consumer Safety Officer must submit his relevant findings to headquarters for review and evaluation. Thus, all actions of a regulatory nature which are engaged in by the Consumer Safety Officers are merely recommendations, made in accordance with established policy, to the appropriate headquarters branch which may accept or reject such recommendations. Further, any actions which may be initiated by the Consumer Safety Officers are only by way of recommendation and must be cleared with and concurred in by his Compliance Branch Chief and the Deputy Regional Food and Drug Director.

It has been held previously that a management official is an employee "having authority to make, or to influence effectively the making of, policy necessary to the agency---with respect to personnel, procedures, or programs," and that in determining whether an individual meets this requirement consideration should be given to "whether his role is that of an expert or professional rendering resource information or recommendations---or whether his role extends beyond this to the point of active participation in the ultimate determination as to what

3/ The Consumer Safety Officers are required to meet with the Compliance Branch Chief and the Deputy Regional Food and Drug Director to decide on an appropriate course of action after a hearing is held.

that policy, in fact, will be." 4/ In my view, the record in the instant case does not establish that the role of the Consumer Safety Officers extends beyond that of a resource person. Thus, the record reflects that the Consumer Safety Officers are engaged essentially in enforcing established policy within controlled agency guidelines, rather than participating in the determination of what that policy, in fact, should be. Accordingly, I find that such employees should not be excluded from the unit on the basis that they are management officials.

The Activity contends also that these employees are supervisors within the meaning of the Order and should, for this reason, be excluded from any unit found appropriate. In this connection, the record establishes that certain clerk-stenographers, GS-4 and GS-5, are assigned to work for the Consumer Safety Officers. Although the Consumer Safety Officers do not have authority to hire, discharge, reward or discipline these clerk-stenographers, the evidence establishes that they have the authority to approve sick and annual leave for such employees. Further, the evidence indicates that they are responsible for preparing the official performance rating forms for the clerk-stenographers. In this latter regard, the record reveals that these forms consist of twenty categories of information sought with respect to the particular employee involved, and that each category has five sub-ratings. The rating form also provides for written comments on the performance of the employees involved, and requires that the employees discuss the rating forms with the rating officer,--i.e., the particular Consumer Safety Officer, -- before the appraisal is forwarded to the Compliance Branch Chief for approval. The evidence indicates that these detailed evaluations have never been countermanded by higher authority, nor disagreed with.

Based on the foregoing, I find that the evidence is sufficient to establish that the Consumer Safety Officers effectively evaluate the performance of the clerk-stenographers and that the exercise of this authority is not of a merely routine or clerical nature but, rather, requires the use of independent judgement. Accordingly, consistent with the decisions of the Federal Labor Relations Council in United States Naval Weapons Center, China Lake, California, FLRC No. 72A-11 and Mare Island Naval Shipyard, Vallejo, California, FLRC No. 72A-12, I conclude that the Consumer Safety Officers, GS-13 and GS-12, in the Compliance Branch are supervisors within the meaning of the Order and, therefore, this classification should be excluded from the unit found appropriate.

Consumer Affairs Officers, GS-11

The Activity contends that the two incumbents in the above classification should be excluded from any unit found appropriate on the basis that they are management officials. Consumer Affairs Officers are responsible for consumer information and education programs for the Activity. Their job functions include participation in various types of consumer education programs and working with various media, including

4/ Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

radio, television, and newspapers, in order to get the FDA informational messages to the public.

The Activity contends that the nature of the Consumer Affairs Officers' job is such that they influence and help to develop policy of the FDA with respect to various programs. It maintains that because the Officers are directly in contact with the public and they represent the Director of the FDA in the district involved, their views are, in effect, the FDA's views and, as such, they are promulgating policy. Under these circumstances, the Activity contends that the Consumer Affairs Officer's job is managerial in nature, and, therefore, this classification should be excluded from any unit found appropriate. The AFGE contends, on the other hand, that such Officers in no way influence or make policy because they merely carry out policy set at a higher level. In this connection, it asserts that the Consumer Affairs Officers are required to submit their program plans for approval by higher supervision one month in advance.

The evidence establishes that the Consumer Affairs Officers work within strictly prescribed guidelines. Thus, in program matters higher headquarters generally provides the Officers with the objectives and the materials which they require and specifies the roles that they may take in fulfilling the objectives. In addition, they work under the direct authority of, and are actively supervised by, their Compliance Branch Chief who approves their work plans. Headquarters also provides general guidelines on the types of audiences to whom they may speak and, although these Officers attend staff meetings held by the Deputy Regional Food and Drug Director, their views are solicited only with respect to aspects of consumer affairs within their areas of responsibility. There is no evidence that they, in any way, make district policy; rather, the evidence establishes that their work is dictated strictly by guidelines provided them.

Based on the foregoing, I find that the job functions of the Consumer Affairs Officers, GS-11, reflect that they essentially apply, implement and make recommendations with respect to established policy, as distinguished from employees who actively participate in the ultimate determination as to what a policy would be. ^{5/} Accordingly, I find that these employees are not management officials within the meaning of the Order and, therefore, this classification should be included in the unit found appropriate.

Based on all the foregoing circumstances, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Executive Order 11491, as amended:

^{5/} See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, cited above.

All professional and nonprofessional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health, Education and Welfare, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. ^{6/}

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in the unit with employees who are not professionals, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following voting groups:

Voting group (a): All professional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health, Education and Welfare, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting group (b): All nonprofessional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health, Education and Welfare, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the American Federation of Government Employees, AFL-CIO, Local 3445.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees,

^{6/} The parties stipulated that the following classifications should be excluded from any unit found appropriate because the employees in these classifications were management officials, supervisors, or confidential employees — Deputy Regional Food and Drug Director, Job Classification GS-696; Administrative Officer and Administrative Assistant, Job Classification GS-341; EAM Project Planner, Job Classification GS-362; Supervisor Consumer Safety Officer, Job Classification GS-696; Secretary to the Chief of Investigations, Job Classification GS-316; Clerk, Dictating Machine Transcriber, Secretary to the Administrative Officer, Job Classification GS-316; Secretary to the Deputy Regional Food and Drug Director, Job Classification GS-318. As indicated above, the parties also stipulated that the incumbents in the job classification of Consumer Safety Officer, Job Classification GS-696, are professional employees as defined by the Order. In the absence of contrary evidence, I find that the parties' agreement concerning the above classifications was proper.

AFL-CIO, Local 3445. In the event that the majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the American Federation of Government Employees, AFL-CIO, Local 3445, was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health, Education and Welfare, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

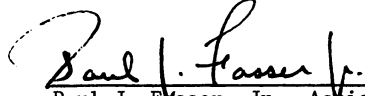
(a) All nonprofessional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health Education and Welfare, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All professional employees of the Newark, New Jersey District, Food and Drug Administration, Department of Health, Education and Welfare, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 3445.

Dated, Washington, D.C.
February 28, 1974


Paul J. Fisser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NEW MEXICO AIR NATIONAL GUARD,
 DEPARTMENT OF MILITARY AFFAIRS,
 OFFICE OF THE ADJUTANT GENERAL,
 SANTA FE, NEW MEXICO
 A/SLMR No. 362

This case involves an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1636, Albuquerque, New Mexico (Complainant), against the New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico (Respondent). The complaint alleged that the Respondent violated Section 19(a)(6) of Executive Order 11491 by refusing to consult, confer, or negotiate with Complainant prior to the issuance, on June 20, 1972, of a letter which called for strict enforcement of the standards for personal grooming.

The Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent had violated Section 19(a)(6) of the Order.

On June 20, 1972, the Respondent's Base Detachment Commander sent a memorandum to all of the Civilian Air technician employees stating that an inspection would be made on June 23, 1972, of all working areas, that the inspection would include the personal appearance of technicians, and that violations in the areas specified would be reflected in a technician's performance report, which could lead to a denial of a step increase, suspension, or affect future military promotion. Following the inspection, several technicians were "written-up" for wearing their hair longer than regulation length, although, as found by the Administrative Law Judge, the Respondent had, in the past, tolerated some deviation from the hair grooming standards often enough to give the impression to the technicians that conformity was largely a matter of personal choice, and that failure to conform would not affect their employment status. Throughout, the Respondent maintained that it was privileged to issue the memorandum without prior consultation because it contained merely a reiteration of existing policy or regulation; however, it conceded that such memorandum did represent a change in the manner of enforcement with respect to uniform requirements, including hair length.

The Administrative Law Judge found that the June 20, 1972, memorandum, in effect, announced a sharp and significant shift in the matter of enforcement of existing grooming standards and that, but for the terms of the parties' negotiated agreement, such conduct would constitute a violation of Section 19(a)(6) of the Order. He noted, however, that the parties' negotiated agreement provided for negotiation of a supplemental agreement with respect to "wearing of the uniform" if that subject were declared a negotiable item. In this connection, the Administrative

Law Judge concluded from a reading of the Air Force Manual (AFM) that personal grooming was an integral part of the phrase "wearing of the uniform," that the parties had, in effect, agreed in their negotiated agreement to defer negotiation on the subject of grooming pending the resolution of its negotiability, and that Complainant had not requested such resolution under the procedures set forth in Section 11(c) of the Order, but rather, had chosen the inappropriate unfair labor practice forum. The Administrative Law Judge thus concluded the Assistant Secretary was without authority to resolve the issue of negotiability and, accordingly, he recommended dismissal of the complaint in its entirety.

Contrary to the holding of the Administrative Law Judge, the Assistant Secretary concluded that the parties had not clearly and unequivocally excluded from bargaining the subject of personal grooming. In this connection, he noted that no provision of the negotiated agreement specifically alludes to personal grooming standards, nor was there any indication in the agreement that the phrase "wearing of the uniform" was intended to encompass grooming standards or to incorporate the AFM regulation which deals with such standards. Further, there was no evidence of bargaining history to show that the parties had intended to waive bargaining on this subject pending the resolution of its negotiability.

While finding that the parties by contract did not expressly waive as a negotiable item personal grooming standards, the Assistant Secretary found that such subject was, nevertheless, nonnegotiable under the circumstances of this case. In this connection, the Assistant Secretary noted that in a case involving the same parties, NFFE Local 1636 and New Mexico National Guard, FLRC No. 73A-13, the Federal Labor Relations Council (Council) held proper the determination of the agency head that a proposal concerning the wearing of the uniform was nonnegotiable under agency regulations. As personal grooming standards are also established by agency regulations and as such standards are an integral part of the standards of wearing of the uniform, the Assistant Secretary found, in accordance with the Council's rationale, that the Respondent was not obligated to meet and confer on the decision to institute a new policy with respect to the enforcement of personal grooming standards.

However, the Assistant Secretary noted that in prior decisions it had been found that notwithstanding that a particular subject matter is nonnegotiable, agency or activity management is required under the Order to meet and confer on the procedures management intends to use in implementing the decision involved, and on the impact of such decision on adversely affected employees. In this regard, the Assistant Secretary found that under the circumstances herein the Respondent's conduct was violative of Section 19(a)(6) of the Order, because it is clear that by its actions it did not afford the Complainant a reasonable opportunity to meet and confer to the extent consonant with law and regulations on the procedures to be utilized in effectuating the Respondent's new policy with respect to the enforcement of grooming standards, and on the impact of such policy on adversely affected employees.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NEW MEXICO AIR NATIONAL GUARD,
DEPARTMENT OF MILITARY AFFAIRS,
OFFICE OF THE ADJUTANT GENERAL,
SANTA FE, NEW MEXICO

Respondent

and

Case No. 63-4027(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1636,
ALBUQUERQUE, NEW MEXICO

Complainant

DECISION AND ORDER

On October 12, 1973, Administrative Law Judge John H. Fenton issued his Report and Recommendations in the above-entitled proceeding, finding that the New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, herein called Respondent, had not engaged in the unfair labor practice alleged, and recommending that the complaint be dismissed in its entirety. Thereafter, the National Federation of Federal Employees, Local 1636, Albuquerque, New Mexico, herein called Complainant, filed exceptions to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The complaint in the instant case alleged that Respondent violated 19(a)(6) of Executive Order 11491 by refusing to consult, confer, or negotiate with Complainant prior to the issuance, on June 20, 1972, of a letter which called for strict enforcement of the standards for personal grooming.

The essential facts in the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

At all times material the Complainant has represented exclusively the Civilian Air technician employees of the Respondent, such employees being covered by a negotiated agreement between the Respondent and the Complainant. Although technicians are Civil Service employees who work a regular workweek in such status, they are required as a condition of their employment to belong to the National Guard. Article 11.5(a) of the agreement provides for the negotiation of a supplemental agreement on the wearing of the uniform if that subject is declared a negotiable item. There is no record evidence that either party ever sought or secured such a ruling under the foregoing agreement provision. The evidence indicates that the technicians have, for some period of time, been dissatisfied with the requirement that they wear the uniform while in civilian status, as well as conform their hair styles to regulation requirements. In this connection, the Air Force Manual (AFM) deals with conditions of dress and decorum for employees in their technician capacity, setting forth the applicable criteria for wearing of the uniform and personal appearance, including grooming. AFM 3510 also specifies how infractions will be handled.

In late February 1972, the Base Detachment Commander informed the technicians that the more lenient grooming style permitted by Army standards, as reflected in Army posters, would be adopted. The Administrative Law Judge found the modifications resulting from this announcement explicitly affected AFM 3510's requirements concerning the technicians' appearance in their civilian status. Thereafter, on June 20, 1972, the Base Detachment Commander sent a memorandum to all technicians which stated, in pertinent part, that an inspection would be made on June 23, 1972, of all working areas, and included in such inspection would be personal appearance of technicians. The memorandum went on to say that violations in the areas specified would be reflected in a technician's performance report, which could lead to denial of a step increase, suspension, or affect future military promotion. After the inspection, several technicians were "written-up" for wearing their hair longer than regulation length. The Administrative Law Judge found that, prior to the inspection, the Respondent had tolerated some deviation from the hair grooming standards and that these deviations often gave the impression to the technicians that conformity was largely a matter of personal choice and failure to conform would not affect their employment status.

The record reveals that the Respondent did not inform the Complainant of its intention to issue the memorandum of June 20, 1972, based on the view that it contained no change in established policy. There was no evidence to indicate that the "write ups" which resulted from the inspection were made part of the technicians' files, nor were there any disciplinary actions taken against them. After the inspection, four informal meetings and one formal meeting were held between the parties concerning the memorandum of June 20, 1972.

Throughout these meetings, the Respondent did not retreat from its position that it was privileged to issue the memorandum without prior consultation because it contained merely a reiteration of existing policy or regulation. The Respondent conceded, however, that the memorandum did represent a change in the manner of enforcement with respect to uniform requirements, including hair length.

The Complainant contends that the memorandum of June 20, 1972, in fact, represented a change in the working conditions of unit employees and that the Respondent was required under the Executive Order to inform the Complainant of its intention to change such working conditions and to bargain in this regard upon request. In this connection, the Complainant argues that in February 1972, the Respondent relaxed the grooming standards contained in AFM 3510 but, thereafter, unilaterally returned to a strict policy by virtue of its June 20, 1972, memorandum. It also alleges that the standard with respect to haircuts represented a departure from past practice because it applied to technicians while in civilian as well as military status. The Respondent, on the other hand, argues that it was not obligated to consult on matters involving the wearing of the uniform, and that, in any event, the June 20, 1972, memorandum did not contain a change in policy with respect to grooming.

In his Report and Recommendations, the Administrative Law Judge found that prior to the inspection the Respondent was lax in enforcing hair standards for technicians when employed in their civilian capacity and noted that no technician ever had been "written up" previously for a violation in this respect. He also found that there was substantial noncompliance with the existing standard, but that the degree of deviation from the standards had been slight. However, the Administrative Law Judge rejected the Complainant's contention that by the issuance of the June 20, 1972, memorandum, the Respondent returned to a policy of adherence to AFM 3510 after having relaxed the standards by adopting the less stringent Army standards with respect to grooming. Further, he rejected the Complainant's contention that the memorandum unilaterally changed working conditions while technicians were in civilian status.

Under all of the circumstances, the Administrative Law Judge found that the June 20, 1972, memorandum, in effect, announced a sharp and significant shift in the matter of enforcement of existing grooming standards and, in his view, but for the term of the parties' negotiated agreement, the Respondent's unilateral conduct in this regard would constitute a violation of Section 19(a)(6) of the Order. He noted, however, that Article 11.5(a) of the parties' negotiated agreement provided for the negotiation of a supplemental agreement with respect to "wearing of the uniform," if that subject were declared a negotiable item. Further, he noted that from a reading of the AFM, personal grooming was an integral part of the phrase "wearing of the uniform." In these circumstances, the Administrative Law Judge reasoned that the parties had, in effect, agreed to defer negotiation on the subject of grooming pending the resolution of its negotiability. He noted that the Complainant had not requested such resolution under the appropriate procedures outlined in Section 11(c) of the Order but, rather, had chosen

the inappropriate unfair labor practice forum. Accordingly, the Administrative Law Judge found that the Assistant Secretary was without authority to resolve the issue of negotiability and recommended that the complaint be dismissed in its entirety.

Contrary to the Administrative Law Judge, I find that the evidence does not clearly reflect that the parties had excluded the subject of personal grooming from negotiations. In this connection, it was noted that their negotiated agreement did not clearly and unequivocally indicate that the subject of personal grooming was not bargainable pending the resolution of its negotiability. Thus, neither Section 11.5(a) nor any other provision of the negotiated agreement specifically alludes to personal grooming standards. Further, there is no indication in the agreement that the phrase "wearing of the uniform" was intended to encompass grooming standards or to incorporate AFM 3510 which deals with such standards. Finally, there was no evidence of bargaining history to show that the parties had intended to waive bargaining on this subject pending the resolution of its negotiability. Under all of these circumstances, I find that the evidence does not establish that the parties herein had clearly and unequivocally excluded from bargaining the subject of personal grooming. 1/

However, while I do not find that the parties, by contract, expressly waived as a negotiable item personal grooming standards, I find that such subject is, nevertheless nonnegotiable under the circumstances. In this regard, the Federal Labor Relations Council (Council), in a case involving the same parties as are involved herein, 2/ held proper the determination of the agency head (Chief of the National Guard Bureau) that the Complainant's proposal (apparently in the context of subsequent negotiations not involved herein) concerning the wearing of the uniform was nonnegotiable under agency regulations. As it is clear that personal grooming standards also are established by agency regulations and that, under the regulations, personal grooming is an integral part of the standards for the wearing of the uniform, which subject, as noted above, was found to be non-negotiable by the Council, I find that the Respondent was not obligated to meet and confer on the decision to institute a new policy with respect to the enforcement of personal grooming standards.

In prior decisions, it has been held that notwithstanding the fact that a particular management decision is nonnegotiable, agency or activity management is required under the Order to meet and confer on the procedures management intends to use in implementing the decision involved and on the impact of such decision on adversely affected

1/ Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223.

2/ NFFE Local 1636 and New Mexico National Guard, FLRC No. 73A-13, issued September 17, 1973.

employees. 3/ In the instant case, the evidence establishes that the Respondent did not previously notify the Complainant of the matters contained in the June 20, 1972, memorandum, despite the fact that, as found by the Administrative Law Judge, the policy contained therein represented a significant shift from past practice in the enforcement of grooming standards. Moreover, the Respondent failed to meet and confer with the Complainant on the impact of the institution of its new policy with respect to the enforcement of grooming standards. In my view, such conduct by the Respondent was in derogation of its bargaining obligation under the Order because it is clear that by its actions the Respondent did not afford the Complainant a reasonable opportunity to meet and confer to the extent consonant with law and regulations on the procedures to be utilized in effectuating the Respondent's new policy with respect to the enforcement of grooming standards and on the impact of such policy on adversely affected employees. Under these circumstances, I find that the Respondent violated Section 19(a)(6) of the Order. 4/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations, hereby orders that the New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, shall:

1. Cease and desist from:

Unilaterally implementing its memorandum issued on June 20, 1972, concerning grooming requirements expected to be observed by employees represented exclusively by National Federation of Federal Employees, Local 1636, or any other exclusive representative, without notifying

3/ Cf. United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289; Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329; U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SLMR No. 341. See also Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31, and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56.

4/ As the Complainant did not allege a violation of 19(a)(1) in its complaint, nor moved to amend the complaint in this regard, I find that further proceedings herein under Section 19(a)(1) were unwarranted.

Local 1636, National Federation of Federal Employees, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating its new policy with respect to the enforcement of grooming standards and on the impact such policy will have on the employees adversely affected by such action.

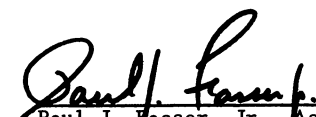
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify Local 1636, National Federation of Federal Employees, or any other exclusive representative, of any intended change in policy with respect to the enforcement of grooming standards and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating its new policy with respect to the enforcement of grooming standards and on the impact such policy will have on the employees adversely affected by such action.

(b) Post at its Air National Guard facility at Albuquerque, New Mexico, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Base Detachment Commander and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Base Detachment Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
February 28, 1974


Paul J. Vasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR-MANAGEMENT RELATIONS

IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a new policy with respect to the enforcement of grooming standards affecting employees exclusively represented by Local 1636, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 1636, National Federation of Federal Employees, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating its new policy changing grooming requirements, and on the impact such policy will have on the employees adversely affected by such action.

WE WILL notify Local 1636, National Federation of Federal Employees, or any other exclusive representative, of any intended change in policy with respect to the enforcement of grooming standards and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating its new policy, and on the impact such policy will have on the employees adversely affected by such action.

(Agency or Activity)

Dated: _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NEW MEXICO AIR NATIONAL GUARD
DEPARTMENT OF MILITARY AFFAIRS
OFFICE OF THE ADJUTANT GENERAL
SANTA FE, NEW MEXICO

Respondent

and

CASE NO. 63-4027(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES
LOCAL 1636
ALBUQUERQUE, NEW MEXICO

Complainant

BEFORE: JOHN H. FENTON
Administrative Law Judge

APPEARANCES: Bill Chappel, Jr., Esquire
Suite 217 - Citizen's Bank Bldg.
Albuquerque, New Mexico 87110, for the Respondent

David Markman, Esquire
1737 H Street, N. W.
Washington, D. C. 20006, for the Complainant

HEARING: January 16, 1973, Albuquerque, New Mexico

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding arose under Executive Order 11491 pursuant to the Notice of Hearing issued on December 8, 1972, by the Regional Administrator of the U. S. Department of Labor, Labor-Management Services Administration, Kansas City Region.

National Federation of Federal Employees Local 1636 filed a complaint on August 31, 1972, against the New Mexico Army

and Air National Guard. The Complaint, as amended on September 18, 1972, alleged that Respondent violated §19(a)(6) of the Executive Order by refusing to consult, confer or negotiate with it prior to the issuance on June 20, 1972, of a letter which called for strict enforcement of the standards for personal grooming.

A hearing was held before the undersigned in Albuquerque, New Mexico, on January 16, 1973. Both parties were represented by counsel, and were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Both parties filed briefs which have been carefully considered. 1/

Upon the entire record, and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

Findings of Fact

At all relevant times Respondent's civilian air technicians have been covered by a collective bargaining agreement with Complainant (NFFE Exhibit 1). Article 7 of the Agreement establishes a procedure for the resolution of technician grievances and disputes over the interpretation and application of the Agreement. Article 5 lays out, largely in language lifted from the Executive Order, the duty of the parties to consult and negotiate. Article 11.5(a) provides for negotiation of a supplemental agreement on the wearing of the uniform if that subject is declared a negotiable item. There is no evidence that either party ever sought or secured a ruling on negotiability.

1/ Briefs were due 21 days after receipt of transcript, which was filed as part of the record on February 26. NFFE's brief was mailed on March 15 and received on March 20. Because of confusion over whether an order was properly placed, Respondent did not receive a copy of the transcript until May 31, and its brief was mailed on June 20 and received on July 9. NFFE's motion of May 30, that the case be decided on the record which existed at that time, is, in the circumstances, denied.

For sometime there has been among the technicians dissatisfaction with the requirement that they wear the uniform and conform their hair style to the regulations while in civilian status.

A civilian air technician is an "excepted" civil service employee who puts in a regular workweek in such status. He is required by law, as a condition of such employment, to belong to the Air National Guard, and he must attend one weekend drill each month as well as two weeks at summer "camp." During the latter periods, he is, of course, in military status. Air National Guard Regulations (ANGR 40-01) at paragraph 2-5 require that "technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties." The Air Force Manual (AFM-3510, at paragraphs 7-8, 7-9 and 1-12) deals with conditions of dress and decorum, sets forth the applicable criteria, and provides that violations will be dealt with "under provisions of Air Force and Air National Guard regulations, as appropriate."

Apparently as a result of the technicians' dissatisfaction with the grooming standards set forth in AFM-3510, Colonel Robert L. Sands, the Base Detachment Commander, addressed himself to the problem in remarks he made to assembled technicians at an awards ceremony in late February 1972. He informed the men that the more lenient grooming style permitted by the Army standards and depicted in Army posters would be adopted. Army illustrations of acceptable appearance were posted around the base, and the limits of hair, sideburn and mustache length were known by the technicians. The testimony of the witnesses who attended the February meeting is inconsistent, and the record in consequence is somewhat confusing with respect to whether relaxation of the standard applied only to active duty time or also to civilian time. I find on the basis of Major Robert Johnson's clear and convincing testimony that the modification explicitly affected AFM-3510's requirements concerning civilian status.

On June 20, 1972, Colonel Sands sent to all technicians a memorandum which in relevant respects said:

"1. On Friday, 23 June 1972, a general inspection will be made of all working areas.

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Items to be inspected include: a) Utilization of safety equipment, b) personal appearance of technicians, and c) general housekeeping practices in work areas. The OIC or designated alternate of each section will conduct this inspection and any subsequent ones.

* * *

"5. Violations in these areas will be reflected in the technician's performance report. This could lead to denial of a step increase or suspension in accordance with ANGR 40-01. In addition, future military promotions could be affected."

On June 23 the scheduled inspection occurred. The inspecting officers "wrote up" a number of men, i.e., after making remarks about inappropriate hair length, they wrote something down on paper. Many technicians were disturbed, as this was the first occasion when any of them was "written up" because of hairstyle not conforming to the regulations, and such action was threatening to them in the context of paragraph 5 of the June 20 memo from Colonel Sands. They were apparently also disturbed over the fact that the Union had assured them that no such "crackdown" was going to take place.

Prior to the issuance of the memo, no such inspection (as respects appearance) had taken place, at least since 1965. Moreover, according to the technicians, there was widespread disregard of the standards. While the testimony of the officers was much more conservative respecting the degree of disregard, and the record is very confusing in this respect, 2/ I find that Respondent in fact tolerated slight

2/ Thus the record is replete with references to the experience of noncomplying technicians that they would be orally reminded of the need for a haircut a day or two before the weekend drill. Some thought, perhaps for this reason, that the standard applied only while in military status. Respondent's answer is that as the technicians ordinarily got their haircuts shortly before drill time, nature provided no occasion for a warning until shortly before the next monthly drill.

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deviation from the standards often enough to give the impression that such deviation was largely a matter of personal choice, and that failure to strictly abide by the criteria would not affect one's employment.

It is undisputed that Respondent did not inform the Union of its intention to issue the memorandum of June 20. Both Lt. Ezequiel Ortiz, a personnel officer, and Major Robert Johnson, New Mexico State Administrative Officer, testified that Colonel Sands took the position that the memo in no way changed existing policy and therefore need not be discussed with the Union. As Ortiz testified, management personnel at a staff meeting discussed the question whether there was any need to consult the Union regarding the memorandum before it issued, and "Colonel Sands said he felt that since there was no change in policies, everything already existed in the regulations, that there was no need to consult with the labor organization."

It is also evident that Respondent attempted to withhold such information from the Union. Thus, there were rumors of impending policy changes and of an inspection. Sergeant Ambrocio Chavez, an alternate steward, asked Lt. Ortiz, apparently on Wednesday before the June 20 memo issued (as Wednesday is Ortiz's day at the base), whether any changes or inspection were about to take place. Ortiz, who had drafted the memorandum, denied knowledge of any such thing. On the morning of June 21 he saw the memo in the mail awaiting distribution, and showed it to Ortiz. Ortiz denied ever having seen it. He then took it to Major Johnson and asked why the matter was not discussed with the Union before the message was communicated to the membership. Major Johnson replied that Colonel Sands had decided there was no need to consult. Apparently he or Ortiz stated in the same conversation that the memo was required because of non-compliance with the grooming standards, but that there was no need for consultation as there was no change in policy.

There was no further discussion between Union and Management officials prior to the inspection on June 23. As noted above, a number of technicians were written up. Thus,

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Ambrocio Chavez, Edmund Baca, and Terry Kawchek testified that they were written up for violation of the grooming standards on June 23, and Kawchek asserted his belief that it had an effect on his twice being denied a promotion.

Union President Donnell Montoya requested that Respondent disclose the names of men noted for violation during the inspection, but his request was refused. He testified that management "did say that no action would be taken against these people. We left it at that. So long as people were not hurt by it, fine and dandy." 3/

The subject of the memo was discussed by Union and management representatives informally on June 28, July 12, July 24, and July 27, and formally on August 2. Respondent did not retreat from its position that it was privileged to issue the memo without any prior consultation because it was a mere reiteration of existing policy or regulation. It agreed to change the word "will" in paragraph 5 of the June 20 memo to "may," so as to make discretionary rather

3/ Since 1969 Respondent has used Form 7B, an employee record card. In addition to personal data and employment history, the card was designed for entry of notes by the supervisor respecting performance, occasions for praise, warning or discipline, results of counselling sessions, etc. Any adverse action recommended had to be cleared through Colonel Thompson, who testified that he has never seen adverse action taken on the basis of an entry on a Form 7B relating to personal grooming, before or since June 20, 1972. After the hearing Complainant's counsel moved the introduction of two exhibits purporting to show: (1) that an entry was made on the Form 7B of Warren Wilson, recording the counselling he received from his supervisor concerning length of sideburns on October 24, 1972, and (2) that Terry Kawchek was denied a promotion because his hair was too long on September 23, 1972. I reject these exhibits as irrelevant. They and the correspondence about them are in the formal file. Assuming both events happened, they occurred after Respondent had fully satisfied any bargaining obligation it may have had respecting the enforcement of grooming regulations. Nor do they contradict the testimony of Respondent's witnesses that no record was kept of the technicians in noncompliance on June 23 and that no adverse action has ever been taken as a result of a grooming notation on Form 7B. There is no evidence that Mr. Wilson was denied a promotion.

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than mandatory the entry of any note reflecting violations in a technician's performance report. Colonel William C. Thompson, Jr., Technician Personnel Officer, credibly testified that Respondent, at the August 2 formal session, offered to drop paragraph 5 altogether, thus eliminating any reference to particular forms of discipline, and to substitute a sentence indicating simply that a technician in violation could be disciplined under existing regulations.

The evidence concerning the degree of noncompliance tolerated by Respondent is highly inconsistent. Union President Montoya testified that Respondent tolerated grooming standards exceeding those set forth in the Army posters. Alternate Steward Chavez asserted that, if deviations of 1/16 of an inch constituted noncompliance, 80 percent of the technicians were in violation of the standard. Chief Steward Warren Wilson testified that his sideburns were too long from 1968 to 1972 without incident, until on October 24, 1972, his supervisor told him they were too long. He routinely shortened them for his monthly drill. Edmund Baca testified that supervisors would not bother men whose sideburns were up to 1/2 inch too long, or whose hair touched their ears, except at or just before, drill time. He estimated over 90 percent of the technicians violated the standards of AFM-3510. Terry Kawchek estimated 50 percent of the men exceeded the limits depicted in the posters, and stated that supervisors would ask whether his hair wasn't too long, always a day or two before drill time. On the other hand, officers estimated noncompliance at zero to 10 percent. The testimony of the technicians strongly suggest that their supervisors mentioned long hair only before drill time. As noted above, Respondent understandably argues that, as the men were properly groomed for drills, there was little occasion for noncompliance until the week before the next drill. It is clear that no inspections concerned with personal grooming had taken place for years, if ever, and that no technicians had ever been "written up," either informally by the taking of a note for the supervisor's personal use, or by entry of a note on the Form 7B. Major Johnson conceded that it is possible such "informal" notes

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might affect a technicians career, and that paragraph 5 of the June 20 memo constituted "a little stricter enforcement of what the policy has always been." He further conceded that somewhat stricter enforcement was, if not a change in the policy of the regulations, a change in manner of enforcement.

CONTENTIONS OF THE PARTIES

Complainant argues that the June 20 memo represented a change in working conditions for members of the unit it exclusively represents, and that the Executive Order therefore required Respondent to inform Complainant of its intention to change its policy and to bargain about it upon request. This argument appears to be two-pronged: (1) that Respondent in February 1972 relaxed the grooming standard of AFM-3510 and thereafter unilaterally returned to a strict policy of adherence to AFM-3510 in the June 20 memo, and (2) that Respondent in any event changed its policy with respect to grooming by departing from a consistent practice of mere oral requests that compliance occur and instituting a procedure which included formal inspections and required a written record of noncompliance, with its impact on step increases, promotions, or suspensions. Complainant also argues that, by the June 20 memo, Respondent instituted a policy of enforcing the standards while technicians were in civilian status, a unilateral departure from its prior policy of enforcing AFM-3510 only when they were in military status. Finally, although the Complaint does not allege it and no motion to amend was ever made, Complainant argues that Respondent's conduct violated §19(a)(1) of the Order in that it thereby demonstrated that it can bypass Complainant at will, thus, discouraging employee participation in Complainant.

Respondent makes two main arguments: (1) that it is not required to consult on issues involving the wearing of the uniform and (2), that the June 20 memo in any event did not change its policy with respect to grooming. It also asserts that in the presence of a contract, any dispute is subject to the grievance procedure, and that, even assuming a bargaining obligation might otherwise have been brought into play, the necessary request was lacking.

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Concluding Findings

Respondent relaxed its grooming standards slightly when, in February 1972, it adopted the standard used by the Army and depicted in its posters. That standard, under the regulations, applied to the men in their civilian capacity as well as while in military status. Respondent was somewhat soft in enforcing that standard, and had consistently done so by a mere word from the supervisor. At least for several years, no technician had ever been reprimanded for noncompliance or told that it would affect his career advancement. No technician had ever been "written up" for dereliction in this respect, and no general inspection concerned with this issue had taken place in years, if ever.

It is apparent that a substantial number of technicians were not complying with the regulations, although the degree of noncompliance was slight. There is no evidence that gross violation of the criteria for hair style was ever tolerated or, for that matter, attempted by the men. Rather hair was slightly longer than the regulations allowed. This, as well as the widespread confusion over whether AFM-3510 or AFM-3510 as modified by the more lenient Army standards applied, no doubt accounts for the tremendous range of the witnesses estimates of noncompliance. I find that there was substantial (i.e., fairly widespread) noncompliance with the standard, but the deviation from that standard on the part of any particular individual was slight.

I reject Complainant's contention that Respondent, by issuance of the June 20 memo, returned to a policy of adherence to AFM-3510 after having relaxed the standard by adopting the Army's standard. This is apparent from a mere reading of the memo, which explicitly incorporates the modification and, indeed, threatens to return to the old standard. I likewise reject Complainant's contention that the June 20 memo unilaterally changed working conditions by calling for enforcement of the standard while the technicians were in civilian status as well as while they were on military status. It is clear from the record that the standard applied during the normal workweek (this, in fact, is what irked the men) and that their supervisors reminded them from time to time of the need to conform.

Respondent's issuance of the June 20 memo can only be construed as a firm statement that continued disregard of the grooming standards would be punished. The regulations on which it was based, of course, spoke in general terms of the existence of disciplinary measures for noncompliance. The memo informed the technicians that noncompliance would be reflected in their performance reports and could lead to specific forms of discipline, including loss of promotions. There can be little doubt, on this record, that these words, coupled with announcement of a general inspection which would include personal grooming, represented a crackdown. The message was clearly conveyed that records of violations would be kept and could lead to severe consequences on careers. I therefore find that the June 20 memo announced a sharp and significant shift in the manner of enforcing existing grooming standards. Were it not for the contract considerations discussed below, I would be persuaded that issuance of the memo was a matter affecting working conditions within the meaning of §11(a) of the Order and that Respondent's unilateral institution of such a change violated §19(a)(6).

However, Article 11.5(a) of the collective bargaining agreement provides for negotiation of a supplemental agreement with respect to "Wearing of the uniform if declared a negotiable item." Although no evidence was taken respecting the intention of the parties, it is clear that they deferred negotiations on this subject pending a resolution of its negotiability. In my judgement the conclusion is compelled that Respondent took the position that it was not negotiable. "Wearing of the uniform" is not defined as encompassing the element of personal grooming, but a reading of the regulations reveals that appropriate hair style is covered as a part of that topic. Thus, Chapter 7 of AFM-3510 is entitled "Wear of Uniforms by Reserve, Retired and Separated Personnel." It prescribes the occasions and conditions for the wearing of the uniform, and it specifically, at paragraph 7-11, requires technicians to "maintain the same standards of dress and appearance when wearing the uniform as prescribed for active duty personnel in paragraph 1-12 * * *." Paragraph 1-12 sets forth the criteria of acceptable grooming.

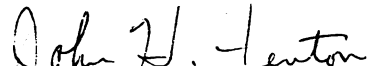
From this I conclude that personal grooming is an integral part of the phrase "wearing of the uniform" and that the

entire subject was excluded from contract negotiations pending a resolution of its negotiability. In Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144, the Assistant Secretary held that §11(c) of the Order provides the exclusive method for resolving such a dispute. Thus, it was incumbent upon the Union if it desired changes in grooming standards to request a determination of the negotiability of the regulations from the head of the Agency, and if unsuccessful at that level, to appeal to the Federal Labor Relations Council. It did not invoke that exclusive method, but brought its complaint to this, an inappropriate forum. I conclude that, as the Assistant Secretary is without authority to resolve the issue of negotiability, no bargaining obligation can be found to exist with respect to the subject. It follows that Respondent was free to alter its policy unilaterally until such time as the head of the Agency or the Council held the subject to be negotiable. Accordingly, I find that Respondent's conduct in changing its enforcement of grooming standards was not violative of §19(a)(1) and (6) of the Order.

Recommendation

In view of the findings and conclusions made above, I recommend that the Assistant Secretary dismiss the complaint in its entirety.

Dated at Washington, D. C., this 12th day of October 1973.



John H. Fenton
Administrative Law Judge

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
FORT APACHE AGENCY,
PHOENIX, ARIZONA
A/SLMR No. 363

This case arose as a result of a representation petition filed by the National Council of Bureau of Indian Affairs Educators/National Education Association (NCBIAE) seeking a unit of all nonsupervisory professional educational employees (1710 series) of the Fort Apache Agency. The record revealed that the employees in the claimed unit were already included in a unit of all nonsupervisory employees of the Activity exclusively represented by the National Federation of Federal Employees, Ind., Local 267 (NFFE). The NFFE took the position that the petitioned for unit was inappropriate, that its currently recognized unit promoted effective dealings and efficiency of agency operations, and that the "unusual circumstances" required to warrant a "carve out" were not present in the instant case. The Activity did not take a position regarding the appropriateness of the claimed unit.

Applying the principles enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, the Assistant Secretary found that the petitioned for unit was not appropriate for the purpose of exclusive recognition. In this regard, the Assistant Secretary noted that the evidence did not establish that the NFFE had failed or refused to render fair and effective representation to any unit employees, including those in the unit sought. Rather, in the Assistant Secretary's view, the record disclosed that a harmonious bargaining relationship had been maintained for several years between the Activity and the NFFE with respect to all unit employees, including those in the petitioned for unit. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
FORT APACHE AGENCY,
PHOENIX, ARIZONA

Activity

and

Case No. 72-3872

NATIONAL COUNCIL OF BUREAU OF INDIAN
AFFAIRS EDUCATORS/NATIONAL EDUCATION
ASSOCIATION

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, IND., LOCAL 267

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Linda Wittlin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

1/ At the hearing, the Hearing Officer, over the objections by the Intervenor, allowed the Petitioner's representative to introduce into evidence a number of handwritten statements by teachers. These exhibits were offered through two teachers who claimed that the statements had been handed to them personally and that they personally knew the authors. Because the authors of these statements were not subject to cross-examination, particularly with respect to the general conclusionary language contained therein, I consider such statements to have little or no probative value. Cf. U. S. Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina, A/SLMR No. 116, at footnote 2.

Upon the entire record in this case, including briefs filed by the National Council of Bureau of Indian Affairs Educators/National Education Association, hereinafter called NCBAIE, and the National Federation of Federal Employees, Ind., Local 267, hereinafter called NFFE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The NCBAIE seeks an election in the following unit:

All professional educational employees (1710 series) of the Fort Apache Agency, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards and supervisors as defined in Executive Order 11491, as amended.

The record reveals that the employees in the claimed unit presently are included in a unit of all nonsupervisory employees of the Fort Apache Agency and are represented exclusively by the NFFE. The NCBAIE contends that the employees sought have not been represented adequately by the NFFE and that, therefore, a separate unit of GS-1710 series employees is appropriate for the purpose of exclusive recognition. The NFFE, on the other hand, contends that the petitioned for unit is inappropriate, that the existing exclusively recognized unit promotes effective dealings and efficiency of agency operations, and that the "unusual circumstances" required to warrant a "carve out" are not present in the instant case. 2/


The Activity is one of 13 installations of the Phoenix Area Office of the Bureau of Indian Affairs located in the states of Arizona and California. 3/ Approximately 117 professional and nonprofessional employees of the Activity are in the unit currently represented exclusively by the NFFE. The Branch of Education of the Activity includes all 31 of the petitioned for GS-1710 series employees who are employed at the Theodore Roosevelt Boarding School and the Cibecue and John F. Kennedy Day Schools. Each of these schools is headed by a principal who is responsible for the entire school operation.

2/ Cf. United States Naval Construction Battalion, A/SLMR No. 8, in which the Assistant Secretary stated, in part, that, "where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances."

3/ Fort Apache, located at White River, Arizona, is one of 10 agencies. In addition to the agencies are three installations: the San Carlos Irrigation Project in Coolidge, Arizona; the Phoenix Indian High School in Phoenix, Arizona; and the Sherman Indian High School in Riverside, California.

IT IS HEREBY ORDERED that the petition in Case No. 72-3872 be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 8, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

The NFFE was granted exclusive recognition on May 3, 1967, by the Phoenix Area Office for the unit at the Fort Apache Agency. The initial negotiated agreement entered into by NFFE and the Activity became effective on December 22, 1967. The most recent agreement between the parties became effective on July 30, 1973. It appears that a GS-1710 series unit employee was on the negotiating team and signed the parties' initial agreement. The record established that, at present, the NFFE has a First Vice President and Chief Steward who are GS-1710 series unit employees. Further, it appears that regular NFFE meeting dates are posted at the Activity and that such meetings are conducted and are attended, on occasion, by employees in the petitioned for unit. There is no evidence in the record that the NFFE has failed or refused to represent any unit employees, including those in the claimed unit, regarding grievances or any other matters affecting their terms and conditions of employment. Indeed, the evidence establishes that when, on one occasion, a personnel problem involving an employee in the claimed unit arose, the president of NFFE acted to initiate an investigation, which was continued by a national representative of the NFFE, and, according to the employee's Chief Steward, the matter resulted in an action by the agency which satisfied the aggrieved employee.

Under all of the circumstances, I find that the petitioned for unit of GS-1710 series employees is not appropriate for the purpose of exclusive recognition. Thus, the evidence does not establish that the NFFE has failed to represent such employees in a fair and effective manner. As noted above, in United States Naval Construction Battalion Center, it was held that, "where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found appropriate except in unusual circumstances." I find no such "unusual circumstances" in the instant case. Rather, the record reveals that a harmonious bargaining relationship has been maintained for several years between the Activity and the NFFE with respect to all unit employees, including those in the petitioned for unit. Based on these considerations, I find that the unit sought by the NCBIAE is inappropriate for the purpose of exclusive recognition. Therefore, I shall order that the subject petition be dismissed. 4/

4/ See Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, affirmed FLRC 72A-24. See also Veterans Administration Center, Togus, Maine, A/SLMR No. 84, affirmed FLRC No. 71A-42, and Veterans Administration Center, Mountain Home, Tennessee, A/SLMR No. 89, affirmed FLRC No. 71A-45. In view of the disposition herein, it was considered unnecessary to decide the eligibility questions raised.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
SOUTHWEST REGION, TULSA AIRWAY
FACILITIES SECTOR
A/SLMR No. 364

The subject case involved an RA petition filed by the Activity seeking an election among all of its eligible electronic and electro-mechanical technicians, including those currently represented on an exclusive basis by the International Association of Machinists and Aerospace Workers, Local Lodge 2266, AFL-CIO (IAM). The Activity asserted, in this regard, that a recent reorganization of its operations has rendered the IAM unit inappropriate and that the only appropriate unit is one which would include all of its eligible technicians including the unrepresented technicians added to its jurisdiction as a result of the reorganization. Also involved in this matter was a petition for clarification of unit filed by the Activity seeking to clarify the status of certain technicians who recently were promoted to the GS-12 level. The IAM claimed that its unit remained intact after the reorganization and, consequently, that it continued to be appropriate for the purpose of exclusive recognition. Both parties agreed that the unit should be clarified to include nonsupervisory GS-12 technicians.

Finding that the unit previously represented by the IAM continues to be appropriate for the purpose of exclusive recognition following the reorganization, the Assistant Secretary dismissed the RA petition. In this regard, he noted that the employees represented by the IAM work in essentially the same locations, under the same supervision and working conditions, and perform the same duties as prior to the reorganization; the unit employees have little or no work related contacts with those placed under the Activity's jurisdiction as a result of the reorganization; and that stable and effective labor-management relations have been experienced in the unit as evidenced by several negotiated agreements between the IAM and the Activity.

With respect to the CU petition, the Assistant Secretary found, based on the parties' stipulation, as supported by the evidence, that the promotion of the employees in question did not involve a change in their duties, working conditions, or any of the personnel policies under which they work. Accordingly, as requested, the Assistant Secretary issued an order clarifying the unit to include all of the Activity's electronic and electro-mechanical technicians assigned to the facilities involved.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
SOUTHWEST REGION, TULSA AIRWAY
FACILITIES SECTOR

Activity-Petitioner

and

Case Nos. 63-4374(RA) and
63-4529(CU)

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, LOCAL LODGE 2266,
AFFILIATED WITH AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Jose Q. Rodriguez. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, the Assistant Secretary finds:

In Case No. 64-4374(RA) the Activity filed an RA petition seeking an election in a unit consisting of all of its full-time permanent Classification Act and Wage Grade employees, excluding clerk-stenographers, secretary to the Airways Facility Sector manager, professional employees, administrative officers, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order. The foregoing unit describes certain of the Activity's employees who currently are represented on an exclusive basis by the International Association of Machinists and Aerospace Workers, Local Lodge 2266, affiliated with the AFL-CIO, herein called IAM, as well as certain other employees who were placed under the Activity's jurisdiction as a result of a reorganization of the Southwest Region of the Federal Aviation Administration (FAA) which occurred after the IAM achieved its exclusive representative status. The Activity contends that the reorganization rendered the existing unit represented

by the IAM inappropriate and that the only appropriate unit is a unit which would consist of all of its eligible employees, including those placed under its jurisdiction as a result of the reorganization. In this regard, it asserts that the community of interest among its employees is on an Activity-wide basis and that a unit of a lesser scope, such as that represented by the IAM, would fail to promote effective dealings and efficiency of agency operations.

In Case No. 63-4529(CU), the Activity filed a petition for clarification of unit (CU) seeking to clarify the existing unit represented by the IAM by changing the inclusions in the existing unit description from "all nonsupervisory electronic technicians, GS-11 and below and all electro-mechanical technicians" to all nonsupervisory Classification Act and Wage Grade employees. The Activity contends that the proposed change is designed merely to reflect the change in the journeyman grade level of the unit employees from GS-11 to GS-12. 1/ The IAM agreed with the Activity's position concerning the proposed change in the unit description.

The FAA, which is engaged in providing for the safe and expeditious flow of air traffic, is divided into some 13 geographic regions, including the Southwest Region involved herein. The Southwest Region is divided into four operating divisions including the Airway Facilities Division which, in turn, is divided into sectors responsible for the maintenance of navigational aids in a specific geographic area. The Tulsa Airway Facilities Sector, the Activity herein, is one of some 19 sectors in the Southwest Region and has jurisdiction over certain areas of the states of Arkansas and Oklahoma. It is headquartered at Tulsa, Oklahoma, and currently is responsible for four field offices.

The bargaining history reveals that on October 12, 1966, the Activity granted the IAM recognition as the exclusive representative of all of its eligible technical General Schedule and Wage Grade employees. An initial negotiated agreement was executed on April 7, 1967, and, thereafter, the parties continued their contractual relationship until their most recent agreement expired on or about June 21, 1973. At the time the IAM obtained exclusive recognition, the Activity's operations consisted of its headquarters at Tulsa, Oklahoma, and two field offices located at Bartlesville and Ponca City, Oklahoma. In September 1971, the Southwest Region reorganized its Airway Facilities Division by abolishing certain sectors and increasing the size of others. In this connection, it abolished the Fort Smith, Arkansas, Sector and assigned its offices, located at Fayetteville and Fort Smith, Arkansas, and McAlester, Oklahoma, to the Activity. The assignment of these offices

1/ The evidence established that the change in the journeyman grade of the unit employees did not affect the duties, responsibilities, or working conditions of such employees.

to the Activity resulted in an increase in the number of the latter's rank and file technical employees from approximately 31 to approximately 45. 2/

The record reveals that all of the Activity's employees, including those added to its jurisdiction as a result of the reorganization, remain in essentially the same physical locations and perform the same job functions as prior to the reorganization, and that there has been no change in their working conditions. Also, while all of the Activity's employees are under the overall direction of its Sector manager, who has the authority and responsibility for personnel actions which relate to removals, reassignments, promotions, awards, demotions and disciplinary matters, 3/ the immediate supervision of the employees remains the same as before the reorganization. In addition, while the employees represented by the IAM and those added to the Activity's jurisdiction as a result of the reorganization, share common skills, have comparable working conditions and training, and perform essentially the same duties, the record reveals that there is little or no interchange between these two groups of employees and that they have few job related contacts.

Based on all of the foregoing, I find that the employees in the existing unit represented by the IAM continue after the reorganization to share a clear and identifiable community of interest. Thus, as noted above, the employees represented by the IAM work in essentially the same locations, under the same supervision and working conditions, and perform the same duties as prior to the reorganization. Also, the unit employees have little or no work related contacts with those employees placed under the Activity's jurisdiction as a result of the reorganization. The evidence further establishes that the unit represented by the IAM has experienced stable and effective labor-management relations as evidenced by several negotiated agreements between the Activity and the IAM. 4/

2/ Prior to the reorganization, the employees assigned to the Fort Smith Sector were represented by the National Association of Government Employees. Since the reorganization, the evidence establishes that no labor organization has expressed an interest in representing such employees.

3/ The Sector manager also is responsible for negotiating and administering all negotiated agreements applicable to the Activity's employees.

4/ Noting the established bargaining history with respect to the unit represented by the IAM, the fact, standing alone, that an additional unit or units subsequently may be established to cover those employees added to the Activity's jurisdiction as a result of the reorganization was not considered to require a finding that the unit represented by the IAM necessarily will fail to promote effective dealings and efficiency of agency operations.

Under these circumstances, I find that the unit represented by the IAM continues to be appropriate for the purpose of exclusive recognition. Accordingly, I shall order that the subject RA petition be dismissed. 5/

March 14, 1974

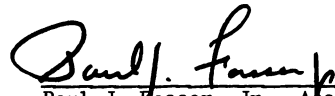
With respect to the instant CU petition, based on the parties' stipulation, as supported by the evidence, that the promotion of the employees in question did not involve a change in their duties, working conditions, or any of the personnel policies under which they work, I find that the exclusively recognized unit should be clarified, as requested, to include all of the Activity's nonsupervisory electronic and electro-mechanical technicians assigned to Tulsa, Ponca City, and Bartlesville, Oklahoma.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the International Association of Machinists and Aerospace Workers, Local Lodge 2266, affiliated with AFL-CIO, received recognition as exclusive bargaining representative on October 12, 1966, under Executive Order 10988 be, and herein is, clarified to include all non-supervisory electronic and electro-mechanical technicians assigned to the Activity's facilities at Tulsa, Ponca City, and Bartlesville, Oklahoma.

IT IS FURTHER ORDERED that the petition in Case No. 63-4374(RA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 14, 1974



Paul J. Hasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

5/ Cf. Headquarters, U.S. Army Aviation Systems Command, St., Louis, Missouri, A/SLMR No. 160.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DIRECTORATE OF MAINTENANCE, MANUFACTURE
AND REPAIR PRODUCTION BRANCH (MANPSM),
WARNER ROBINS AIR MATERIEL AREA (WRAMA),
ROBINS AIR FORCE BASE, GEORGIA
A/SLMR No. 365

The unfair labor practice complaint in this case filed against the Directorate of Maintenance, Manufacture and Repair Production Branch, Warner Robins Air Materiel Area, Robins Air Force Base (Respondent), by Local 987, American Federation of Government Employees (AFGE), alleged that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, by denying an employee member of the Complainant the opportunity to act or be detailed as a supervisor either during temporary absences or after the retirement of the employee's supervisor because the employee was a shop steward.

Based on credited evidence, the Administrative Law Judge found that the Respondent had a rule or practice that a union shop steward could be detailed or act as a supervisor, but that such a person could not hold both positions simultaneously and would have to resign the position as shop steward for the period he served as supervisor. Further, the Administrative Law Judge found that the record failed to establish that the union steward in this matter was offered less of an opportunity to serve as a supervisor than any other journeyman employee. Noting that the evidence revealed that a supervisor dealt with employee and union grievances at the early stages and that, during the first steps of the grievance procedure, dealt with the union shop stewards, the Administrative Law Judge concluded that to allow a person to act as both a union shop steward and a supervisor would, in fact, create a conflict of interest and put the person in a position where he could not perform either of his responsibilities properly. Accordingly, the Administrative Law Judge concluded that the Respondent's rule herein was clearly not unreasonable and did not interfere with employee rights assured by the Order. He therefore recommended that the complaint be dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS



DIRECTORATE OF MAINTENANCE, MANUFACTURE
AND REPAIR PRODUCTION BRANCH (MANPSM),
WARNER ROBINS AIR MATERIEL AREA (WRAMA),
ROBINS AIR FORCE BASE, GEORGIA

Respondent

and

Case No. 40-4715(CA)

LOCAL 987, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

Complainant

DECISION AND ORDER

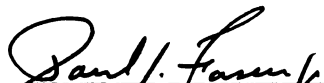
On January 11, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-4715(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 14, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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In the Matter of :
:
DIRECTORATE OF MAINTENANCE, MANUFACTURE :
AND REPAIR PRODUCTION BRANCH (MANPSM) :
WARNER ROBINS AIR MATERIEL AREA (WRAMA) :
ROBINS AIR FORCE BASE, GEORGIA, :
Respondent :
:
and :
:
LOCAL 987, AMERICAN FEDERATION OF :
GOVERNMENT EMPLOYEES, :
Complainant :
:
.....

Jackie K. Cooper, Attorney Advisor
Office of Staff Judge Advocate
WRAMA/JA
Robins Air Force Base, Georgia 31098

Michael A. Deep, Attorney Advisor
Office of Staff Judge Advocate
WRAMA/JA
Robins Air Force Base, Georgia 31098

For the Respondent

Bobby L. Harnage, Special Assistant
Local 987, AFGE
141 South Commercial Circle
Warner Robins, Georgia 31093

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

Pursuant to a complaint filed March 1, 1973, under Executive Order 11491, as amended (hereinafter called the Order) by American Federation of Government Employees, Local 987 (herein called the Complainant or Union) against Directorate of Maintenance Manufacture and Repair Production Branch, Warner Robins Air Materiel Area, Robins Air Force Base, (herein called Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the Atlanta Region on May 15, 1973.

A hearing was held in this matter before the undersigned on July 10, 1973, in Warner Robins Georgia. All parties were represented and afforded a full opportunity to be heard and to present witnesses and to introduce other relevant evidence on the issues involved. Upon the conclusion of the taking of testimony both parties were given an opportunity to make oral argument and submitted briefs.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

The Warner Robins Air Materiel Area is divided into several directorates one of which is the Directorate of Maintenance. This Directorate is in turn subdivided into, divisions, then branches, then sections and finally units. The Union is the collective bargaining representative for a unit of civilian employees of the Activity.

Prior to August 1972, Mr. George Stokes was the wood-working foreman in the Maintenance Directorate; he was a first level supervisor. Foreman Stokes retired from service on or about August 18, 1972. It is undisputed that he was a supervisor within the meaning of the Order and processed grievances at the first step with the union shop stewards. At all times material herein, Mr. Jack Johnson was a civilian employee of the Activity in the wood-working shop, a member of the collective bargaining unit represented by the Union and the branch union shop steward.

Some three or four weeks prior to his retirement Foreman Stokes approached employees under his supervision, including Mr. Johnson, and asked if they were interested in acting as

a supervisor during Mr. Stokes' temporary absences.^{1/} Mr. Stokes testified that, after checking with Unit Chief Fred A. Capps, he advised Mr. Johnson that he could serve as an acting supervisor, but that he could not both act as a supervisor and be a shop steward at the same time. Mr. Stokes testified that Mr. Johnson stated to Mr. Stokes he need only give up the shop steward's position for the period of time he acted as supervisor. Mr. Stokes testified further that Mr. Johnson's name was included on the list he was compiling although Mr. Johnson had not yet stated whether he would resign his shop steward position for those periods of time he would serve as a supervisor. Mr. Stokes testified that he was unaware of Mr. Johnson ever having been appointed to act as a supervisor during any of Mr. Stokes' temporary absences.^{2/}

Mr. Lawrence D. Reese ^{3/} testified that he had advised Mr. Johnson during a meeting with Mr. Stokes and Mr. Johnson in Mr. Stokes' office on or about August 10, that Mr. Johnson could act as a supervisor so long as he relinquished his shop steward's position while serving as supervisor. This conversation was not specifically denied by Mr. Johnson.^{4/}

Prior to Foreman Stokes' retirement Mr. Bernie Gilbert and Mr. Johnson met with Division Manager Yaeger at their regular monthly meeting and Mr. Johnson asked Mr. Yaeger why he could not be detailed in Mr. Stokes absence. Mr. Yaeger replied "you can, I had better not find anyone doing anything about it, discriminating against my stewards."

^{1/} This request apparently related to periods of time that Mr. Stokes would be temporarily on leave, not for the period after Mr. Stokes retirement.

^{3/} Mr. Johnson's version was that after hearing that all employees had been asked if they wanted to act as supervisor, except himself, he asked Mr. Stokes why he had not been asked. Mr. Johnson states that Mr. Stokes told him, after checking, that he could not serve because he was a shop steward. Mr. Stokes' version is credited rather than Mr. Johnson's because it is more consistent with the other facts and circumstances of this case.

^{3/} An Employee Utilization Specialist for the Activity.

^{4/} Similarly prior to August 21, 1972, Mr. Bernie Gilbert, the Chief Division Shop Steward, and Mr. Brooks, the Union President, advised Mr. Johnson that he could act as supervisor but he would have to give up his shop steward position for the period of time he served as a supervisor.

During the latter part of August 1972, Mr. Levi Arnold was temporarily detailed to act as the supervisor after Mr. Stokes' retirement. Mr. Johnson alleges that apparently after Mr. Arnold's appointment he asked Mr. Fred A. Capps, Unit Chief, the second level supervisor, why he (Johnson) could not act as supervisor. Mr. Johnson alleges further that Mr. Capps advised him either that day or the next that it was "settled," which Mr. Johnson took to mean that he (Johnson) could act as supervisor.

During approximately the middle portion of October 1971, when Mr. Arnold's detail was almost up Mr. Capps went down the list of journeymen and only two were interested in being detailed as a supervisor, Mr. Jack Johnson and Mr. Jack Laster. They were called to Mr. Arnold's office by Mr. Capps. Mr. Johnson asked if he could serve a temporary as supervisor and Mr. Capps replied that he thought Mr. Johnson already knew the answer, but he would verify it. Mr. Capps then telephoned Mr. Reese, who advised Mr. Capps that a union steward could serve as a temporary supervisor so long as he gave up his duties as shop steward. Mr. Capps so advised Mr. Johnson. Mr. Capps advised Mr. Johnson and Mr. Laster that the detail would be for a period until the job was permanently filled, anywhere from two weeks to two months. Mr. Johnson stated that he would not give up his shop steward job for a two-week detail. Mr. Capps stated that "I said I could not tell you whether it will be for two weeks or two months." Mr. Capps told Mr. Johnson and Mr. Laster that it was between them. Each said at first that he did not want it and then Mr. Johnson told Mr. Laster that he (Laster) should take it. Mr. Laster took the offer and served as supervisor for about 45-50 days, at which time the position was permanently filled.^{5/} Mr. Johnson's version of this meeting, although very similar to Mr. Capps, differs with respect to some aspects. Where there is conflict, I credit Mr. Capps version based upon my observation of demeanor of the witnesses, and because Mr. Johnson's testimony was confused, contradictory and evasive and further because Mr. Capps was corroborated on certain important issues by other witnesses.

After Mr. Laster had been detailed as temporary supervisor, Mr. Johnson and Mr. Gilbert went to see Mr. Reese concerning, not the detail but rather, the evaluations of Mr. Johnson and other employees. Also present during part of of conversation was Mr. Victor Wilson.^{6/} Mr. Johnson testified

^{5/} Mr. Levi Arnold was given the job.

^{6/} A Personnel Staffing Specialist for the Activity

to the effect that during the conversation about evaluations, in order "to see if he would tell me the truth," he asked Mr. Reese if he (Johnson) could serve as a supervisor and Mr. Reese replied that it would be a "conflict of interest." Mr. Johnson alleges that he asked further "even if I resign my position as union steward?," to which Mr. Reese allegedly replied "I still say it's a conflict of interest..." This meeting lasted approximately 30 minutes. Mr. Johnson testified that he left with Mr. Gilbert. Although Mr. Gilbert corroborated Mr. Johnson's version in many material respects, he testified that he was rushed because he had another meeting; that this subject was not the main topic of the meeting but was something Mr. Johnson raised on his own; that the statements of Mr. Reese as testified to by Mr. Johnson coincided with Mr. Gilbert's own personal opinion; and that he (Mr. Gilbert) left Mr. Johnson talking to Mr. Reese in Mr. Reese's office.

Mr. Reese testified that he cannot recall any discussion concerning stewards holding supervisory positions until after Mr. Gilbert left. He recalls, after Mr. Gilbert left advising Mr. Johnson that if he were chosen a permanent supervisor he would have to choose between his shop steward position and this supervisory job. He does not recall advising Mr. Johnson that even if he resigned as a union shop steward it would be a conflict of interest. Mr. Wilson substantially corroborated Mr. Reese's version of the conversation.

It is found, based on an evaluation of all the evidence, that, although the conversation might have been unclear because this "conflict of interest" question was interposed by Mr. Johnson and was only a peripheral matter, Mr. Reese advised Mr. Johnson that he could not serve simultaneously as a shop steward and supervisor and that Mr. Reese did not state that even in the event Mr. Johnson resigned as shop steward, Mr. Johnson would still not be permitted to act as supervisor. The evidence further establishes that shop stewards had served as temporary supervisors but had designated others to perform their shop steward duties while they served as supervisors.

Contentions of the Parties

The Union contends that the Activity violated Sections 19(a)(1) and (2) of the Order by denying Mr. Johnson the opportunity to act or be detailed as a supervisor either during Supervisor Stokes' temporary absences or after his retirement because Mr. Johnson was a union shop steward. The Activity contends that Mr. Johnson was offered the opportunity to be detailed as a supervisor, provided, however, that Mr. Johnson could not serve as a supervisor while at the same

time performing his duties as a shop steward. He would have to resign his position as shop steward for the period of time he served as a supervisor.

Conclusions of Law

Except for a general statement by Mr. Stokes that Mr. Johnson had not been appointed to act as a supervisor during Mr. Stokes temporary absences; there was no evidence submitted as to precisely when such opportunities became available and whether it would have been Mr. Johnson's turn. Therefore this record does not establish that Mr. Johnson had been unlawfully denied such opportunities because of his position as union shop steward during that period of time prior to the filing of the subject Unfair Labor Practice Complaint Charge that would permit such instances to be considered under the Order.

The credited evidences establishes that the Activity had a rule or practice that a union shop steward could be detailed or act as a supervisor, but that such a person could not hold both positions simultaneously and would have to resign the position as shop steward for the period he served as supervisor. The credited evidence further establishes that although some of the conversations between Mr. Johnson and his supervisors might have been less than crystal clear, Mr. Johnson was well aware of this rule and requirement.^{7/}

The Activity went down the list of journeymen alphabetically to detail employees to act as supervisors after Mr. Stokes retirement. After Mr. Levi Arnold served the first such detail, the Activity offered the position to Mr. Johnson and Mr. Laster on the same terms. Mr. Johnson contends he was only offered a two-week detail because he was shop steward, ^{8/} but the record establishes he was offered the detail until the

^{7/} Although Mr. Johnson expressed some confusion as to whether he was specifically told that he need relinquish his shop steward duties only for the period he served as supervisor, the record establishes that Mr. Johnson was in fact aware of this, the Activity did not advise him to the contrary, and the record does not establish any instance of the Activity setting any requirements as to who can serve as shop steward, except to the extent that the Activity did not permit a supervisor to perform shop steward duties while a supervisor. Whether he chose to give up his shop steward position permanently or temporarily was a matter between Mr. Johnson and the Union.

^{8/} A position which contradicts Mr. Johnson's allegation that the Activity would not offer him the detail because he was a Shop Steward.

job was filled which could be a period from two weeks to two months, and the same terms were applied to Mr. Laster, who was not a shop steward. Mr. Johnson, who had never previously stated whether he would resign his steward position for the period to serve as a supervisor, ^{9/} decided he did not want to give up his shop steward duties to serve as a supervisor. Mr. Laster took the job. The record fails to establish that Mr. Johnson was offered less of an opportunity to serve as a supervisor than any other journeyman. Rather the single question presented is whether the rule that requires that a shop steward resign his position as shop steward while he serves as a supervisor, violates Section 19(a)(1) and (2) of the Order.

In the subject situation the parties have stipulated that the position formerly held by Mr. Stokes is a supervisory position within the meaning of the Order. Further the record establishes that such a supervisor deals with employee and union grievances at the early stages and, during the first steps of the grievance procedure, deals with the union shop stewards. In fact, Supervisor Stokes testified that he would deal in such situations with Mr. Johnson, the branch union shop steward. In such circumstances to allow a person to act as both a union shop steward and a supervisor would in fact create a "conflict of interest" and put the person in a position where he could not perform either of his responsibilities properly.^{10/} The record further establishes that an acting or detailed supervisor performs all the duties and has all the responsibilities of a regular supervisor. Therefore, to require a person acting or detailed as a supervisor to give up his shop steward duties while performing his supervisory duties is clearly not unreasonable and does not either interfere with an employees rights as proscribed by Sections 19(a)(1) and (2) of the Order.

It is concluded based on the foregoing that Respondent Activity's rule that a union shop steward must resign his shop steward position for the period of time he serves as a supervisor does not constitute a violation of Section 19(a)(1) and (2) of the Order.

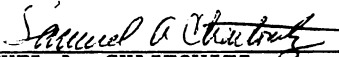
^{9/} A matter concerning which Mr. Stokes had inquired about, but which Mr. Johnson had not yet decided.

^{10/} Without deciding it in this case, it should be noted that to permit such a situation to exist might itself constitute a violation of the Order.

Recommendation

In view of the findings and conclusions made above, it is recommended that the Assistant Secretary of Labor for Labor Management Relations dismiss the complaint.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED


SAMUEL A. CHAITOVITZ
Administrative Law Judge

ARMY AND AIR FORCE EXCHANGE SERVICE,
VANDENBERG AIR FORCE BASE EXCHANGE
A/SLMR No. 366

Dated: January 11, 1974
Washington, D.C.

This case involves an unfair labor practice complaint filed by the National Federation of Federal Employees, Local Union 1001 (Complainant) against Army and Air Force Exchange Service, Vandenberg Air Force Base Exchange (Respondent) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by assigning Josefa Grossi to undesirable work hours and terminating her because of her union activities.

The evidence established that Grossi commenced employment with the Respondent in September 1969 as a regular part-time cook and worked without material incident until November 1971, at which time she was told she would have to work six days a week instead of her customary five. Grossi objected and filed a grievance over the matter which was denied by the Respondent. In January 1972, the Respondent advised Grossi that she was no longer needed as a part-time cook during her assigned work hours and offered her two alternative positions, neither of which proved acceptable to Grossi. Thereafter, the Respondent made several attempts to fashion a schedule that would prove satisfactory to Grossi, and, finally, after receiving no response and issuing a written warning, the Respondent terminated her employment.

The record revealed that Grossi had been active in soliciting support for a labor organization in an unsuccessful attempt to organize the Respondent's employees during 1970 and 1971 and in a subsequent successful organizing campaign.

The Administrative Law Judge concluded that the Complainant had failed to establish either that Grossi was a victim of disparate treatment or that there was any causal relation between her union activities and the Respondent's decision to change her work hours and subsequently to terminate her. Further, the Administrative Law Judge noted that Respondent had sought to find a way to accommodate Grossi's personal needs while satisfying the demands of its operation. Under all of the circumstances, he concluded that the Complainant had not met its burden of proving the allegations in the complaint by a preponderance of the evidence and recommended that such complaint be dismissed in its entirety.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge. Accordingly, he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
VANDENBERG AIR FORCE BASE EXCHANGE

Respondent

and

Case No. 72-3655

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL UNION 1001

Complainant

DECISION AND ORDER

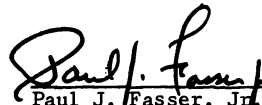
On January 4, 1974, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions, and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-3655 be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 14, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



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In the Matter of :
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ARMY AND AIR FORCE EXCHANGE SERVICE, :
VANDENBERG AIR FORCE BASE EXCHANGE, :
Respondent :
:
:
and : Case No. 72-3655
:
:
NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL UNION 1001, :
Complainant :
.....

Mr. Homer R. Hoisington
Regional Business Agent
Rialto, California

and

Ms. Marie Brogan
President of Local 1001
Lompoc, California
For the Complainant

John W. Bowlin and Robert D. Edwards, Esqs.
Dallas, Texas
For the Respondent

Before: GORDON J. MYATT
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a complaint filed May 9, 1972, 1/ under Executive Order 11491, as amended, by National Federation of Federal Employees, Local Union 1001 (hereinafter called the Union) against Army and Air Force Exchange Service,

1/ Unless otherwise indicated all dates herein refer to the year 1972.

Vandenberg Air Force Base Exchange (hereinafter called the Respondent), a Notice of Hearing on complaint was issued by the Regional Administrator for the San Francisco Region on June 28, 1973. The complaint alleged, among other things, that the Respondent engaged in violations of Section 19(a) (1) and (2) of the Executive Order.

A hearing was held on this matter on July 26, 1973, in Santa Maria, California. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved. A brief was filed by the Respondent and duly considered by me in arriving at my determination in this matter.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendation:

Findings of Fact

The Respondent Activity is an organizational element of the Army and Air Force Exchange Service and is located at the Vandenberg Air Force Base. The Respondent is basically a retail organization whose purpose is to supply merchandise and services to authorized base patrons.

On January 26, 1972, the Union petitioned the U. S. Department of Labor, Labor-Management Services Administration to be allowed to represent the hourly employees of the Respondent. On January 19, 1973, the Union was duly certified as the representative of the employees at the Base Exchange.

Josefa Grossi, the person around whom the controversy in this case centers, was first hired by the Base Exchange in August 1960. This period of employment lasted until early July 1968. At that time Mrs. Grossi was classified as a mobile driver operating a vehicle as part of a mobile concessionaire business run by Respondent. She was reemployed by Respondent on September 15, 1969, as a regular part-time employee and was classified as a cook. She worked the grill at a cafeteria known as the Orbit Inn. As a regular part-time employee, Mrs. Grossi worked approximately 34 hours per week with virtually no overtime except in emergency situations. Her hours were from 9:00 a.m. to 3:00 p.m., Mondays through Fridays. It was understood by management officials that Mrs. Grossi had custody of a young granddaughter and that it was necessary for her to get the child off to school in the morning and to be at home when she returned.

Sometime during the summer of 1971, management officials determined that another one of its facilities, the Missile Man

Inn, was not operating profitably because of a lack of customers. A decision was made to reduce the services offered by that operation and a regular full-time cook was transferred to the morning shift at the Orbit Inn. Thus Mrs. Grossi and the full-time cook were both on duty during the hours that Mrs. Grossi worked.

In November 1971, Mrs. Grossi was told by her supervisor that she would have to work six days a week instead of the customary five which she had been working in the past. Mrs. Grossi was unhappy over this development and filed a grievance. She was represented by Karl Deutsch, then president of an AFGE local at the Base. Management took the position that the grievance had to be disallowed because it questioned the substantive content of a Base Exchange regulation governing the working hours of employees. 2/

On January 6, 1972, Mrs. Sheehan, then manager at the Orbit Inn, informed Mrs. Grossi that two cooks were not needed at that facility. Mrs. Sheehan offered Mrs. Grossi a job as a grill cook at the Missile Man Inn. The hours for this job were intended to be from 6:30 a.m. until 1:00 p.m. with the weekends free. According to Joseph Caracci, the food operations manager, a decision was made to open the Missile Man Inn for breakfast only because patronage was decreasing at other hours. This created an opening for a grill cook and since the two cooks were not needed at the Orbit Inn, the job was considered one which would allow Mrs. Grossi to work 5 days a week.

At the time that Mrs. Sheehan offered the job at the Missile Man Inn, she also presented another alternative to Mrs. Grossi. She stated that Mrs. Grossi could work as a grill cook at the Orbit Inn, but the hours would have to be from 5:00 p.m. until midnight. Mrs. Grossi became very disturbed over the prospect of changing her hours and left work due to illness.

Although Mrs. Grossi remained away from her job on sick leave, Deutsch continued to make some effort to have management

2/ It is evident from the testimony that a regulation had been promulgated by the Exchange Service allowing individual base exchanges to work employees up to 10 hours per day for six days a week. This regulation was the basis of the decision to increase the days in Mrs. Grossi's work week.

accommodate her special hours. On January 17, Deutsch met with Johnson, the general manager, Stardahl, personnel manager, and Caracci in an effort to discuss the Grossi problem. The management officials agreed to make an effort to find a job during the hours that Mrs. Grossi indicated she preferred to work.

On January 25, Mrs. Grossi came to the Base Exchange and met with Caracci. He renewed the offers which were made to her on January 6, by Sheehan. Caracci testified that he did not consider Mrs. Grossi for any other positions because the peak loads at the Base Exchange facilities were at 7:00 a.m. or 6:00 p.m.; hours which were always before or after the time periods that Mrs. Grossi indicated she was available for work. Mrs. Grossi agreed to look for a babysitter to take care of her grandchild so that she would be able to work in the mornings. However, she did not do this right away and continued to remain away from her job on leave without pay. 3/

On March 30, Mrs. Grossi returned from a camping trip and met with Stardahl at the Base. She was accompanied by Marie Brogan, president of the Union. Caracci was also called into the meeting. Brogan wanted to discuss the matter of Mrs. Grossi's hours with the Base Exchange officials. Caracci took the position that the Union was not the exclusive representative at that time and that it was not necessary to discuss the matter with Brogan present. Brogan left after having advised Mrs. Grossi to find out what management was going to offer her. Because Mrs. Grossi had to leave to pay the rental fee on her camping trailer, she made arrangements to meet with the Base Exchange officials on April 3. On April 3, the parties met and the Respondent's officials offered her a job as a sandwich maker from 2:00 p.m. to 5:00 p.m., Sunday through Thursday. The offer also carried the understanding that in the event an employee called in sick or was on vacation leave, she would work whatever hours were necessary to replace them. Mrs. Grossi advised the management officials that she would consider the offer and let them know whether she intended to accept the position. On April 14, 1972, Johnson wrote Mrs. Grossi a letter repeating the offer made on April 3, and advised her that since the Exchange had not received any word from her, management was placing her on ninety day leave-without-pay status effective April 7. The letter concluded by stating that if management did not hear from her by the end of the ninety days, the Exchange would have to initiate separation action.

3/ Mrs. Grossi testified that she did not actively seek a babysitter until sometime in February, and when she informed Caracci of this, he told her that the morning job at the Missile Man Inn was filled. She also testified that she told Stardahl sometime in February that she was available to work anytime between the hours of 8:00 a.m. and 5:00 p.m.

On July 17, 1972, Johnson wrote another letter to Mrs. Grossi advising her that inasmuch as she had failed to contact the Exchange officials regarding their offer and her ninety day period of leave without pay had expired, the Exchange was taking steps to effect separation action. In terms of the Respondent's personnel records, Mrs. Grossi was considered separated for "abandonment of position."

Mrs. Grossi's Activities on Behalf of the Union

The testimony indicates that Mrs. Grossi was active in soliciting employee support for the AFGE local when it was attempting to organize the Exchange employees in 1970 and 1971. 3/ Mrs. Grossi testified that sometime during the summer of 1971, Stardahl called her into the office and questioned her about where and what times she was discussing Union matters with employees. This was the only occasion that Mrs. Grossi was ever questioned by a management official about union activities, and it is apparent that Stardahl was seeking to ascertain whether she was discussing union matters during working hours in working areas.

The record is not precise regarding Mrs. Grossi's activities on behalf of Local 1001 after January 1972, but the testimony would seem to indicate that she was assisting Brogan in soliciting employee support even though she was not actively working at the Base Exchange. She accompanied Brogan on occasion to meetings with management. After Local 1001 was certified in January 1973, she became a member of the Union consultation team.

Concluding Findings

The thrust of the complaint is that the Respondent interfered with, restrained and coerced Mrs. Grossi in the exercise of rights assured by the Executive Order, and thereby did discourage membership in the Union by discriminating against her regarding hire, tenure, promotion and other conditions of employment. The Complainant contends that the Respondent engaged in the alleged misconduct because Mrs. Grossi was actively involved in activities on behalf of the Union.

Try as I might, I cannot find support to sustain these contentions in this record. The evidence indicates that on one occasion Mrs. Grossi was questioned about her union activities by a management official in 1971. But this single incident, and the circumstances under which it occurred, is

4/ Although the record is not clear, the testimony would appear to indicate that the AFGE local was active among the Exchange employees until the beginning of 1972. At that time the Complainant became active among the employees and achieved certification on January 19, 1973.

not sufficient to establish a nexus between her union activity and the decision to change her working hours in January 1972. Furthermore, it is evident that no other management official, especially those who had immediate supervisory responsibility over Mrs. Grossi, ever questioned her about activities on behalf of the Union. Nor is there any evidence that they were even aware of her union involvement.

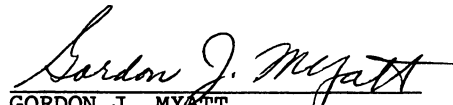
The Complainant has not come forward with any evidence to establish that Mrs. Grossi was the victim of disparate treatment. Indeed, the evidence compels the conclusion that she was receiving preferential treatment in order to accommodate her personal problems. When the Respondent required her to work 6 days a week instead of 5 in November 1971, it was merely applying the regulation promulgated by the Exchange Service to all of the Base Exchange employees.

More central to the issues here, the record fails to support a finding that Mrs. Grossi's job assignment was changed in January 1972, because of activities on behalf of the Union. Rather, the state of this record leads to the conclusion that the officials of the Respondent were seeking to find a way to accommodate Mrs. Grossi's personal needs while attempting to meet the demands on the placement of their personnel as dictated by business needs. The Complainant has failed to come forward with any evidence, other than a visceral feeling, that the change in Mrs. Grossi's assignment was motivated by reasons other than those asserted by the Respondent. There is no showing as to what jobs were available during what hours. Nor is there any substantive evidence, other than the bald assertion by the Complainant's witnesses, that other employees were selected to work the hours which Mrs. Grossi desired. Moreover, there is nothing here to indicate that the three job offers made to Mrs. Grossi in 1972, were not made in good faith. Nor is there any evidence of any other employee experiencing unlawful treatment because of union membership or activities on behalf of the Union.

Accordingly, I find and conclude that the Complainant has not met the burden of proving the allegations of the complaint by a preponderance of the probative evidence as required by Section 203.14 of the Regulations governing this proceeding. Moody Air Force Base, Georgia, A/SLMR No. 248.

Recommendation

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the complaint herein be dismissed in its entirety.


GORDON J. MYATT
Administrative Law Judge

Dated: January 4, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. DEPARTMENT OF THE ARMY,
UNITED STATES ARMY MISSILE COMMAND,
HUNTSVILLE, ALABAMA
A/SLMR No. 367

The proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, Fifth District, for Local 1858 (Complainant). The complaint alleged that the Respondent Activity's failure to consider an Arbitrator's advisory award, and to issue a decision within 30 days after receipt of such award as well as its failure to provide the employee involved or his personal representative with a copy of the award, while providing such copy to Local 1858, violated Section 19(a)(1) and (6) of the Order. At the hearing, the Complainant amended its complaint to allege that the Respondent's conduct in rejecting the unfair labor practice charge filed by the Complainant's chosen representative constituted an additional violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary adopted the Administrative Law Judge's conclusion that neither the Respondent's failure to issue a decision within 30 days after receipt of the Arbitrator's advisory opinion nor its failure to furnish the AFGE Fifth District's representative with a copy of that decision, while furnishing AFGE Local 1858 with a copy, constituted a violation of Section 19(a)(1) and (6) of the Order. In addition, he adopted the Administrative Law Judge's conclusion that the Respondent's alleged rejection of the December 5, 1972, unfair labor practice charge filed by the Complainant was not violative of Section 19(a)(6) of the Order.

Noting that the evidence established that in rejecting the unfair labor practice charge, the Respondent raised a question whether AFGE Local 1858 had appointed a Fifth District National Representative to act as its agent with respect to the charge, and that, upon being advised that the Fifth District National Representative was indeed the agent of AFGE Local 1858, the Respondent met with and sought to resolve informally the unfair labor practice charge within the 30-day period provided for in the Regulations, the Assistant Secretary found, contrary to the Administrative Law Judge, that further proceedings under Section 19(a)(1) were unwarranted. Having decided the 19(a)(1) issue on the merits, the Assistant Secretary found it unnecessary to decide the procedural question raised by the Respondent as to whether or not the matter was properly before the Administrative Law Judge because no pre-complaint charge in this regard had been filed with the Respondent prior to the hearing. Accordingly, he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE ARMY,
UNITED STATES ARMY MISSILE COMMAND,
HUNTSVILLE, ALABAMA

Respondent

and

Case No. 40-4648(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, FIFTH DISTRICT,
FOR LOCAL 1858

Complainant

DECISION AND ORDER

On December 11, 1973, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action, as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions and supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge as modified below. 1/

In agreement with the Administrative Law Judge, I find that neither the Respondent's failure to issue a decision within 30 days after receipt of the Arbitrator's advisory opinion nor its failure to furnish the AFGE

1/ At page 4 of his Report and Recommendations, the Administrative Law Judge inadvertently noted that the letter from Commanding General Donley rejecting the unfair labor practice charge in this matter was received on December 9, 1972, rather than on December 19, 1972. This inadvertency is hereby corrected.

Fifth District's representative with a copy of that decision, while furnishing AFGE Local 1858 with a copy, constituted a violation of Section 19(a)(1) and (6) of the Order. In addition, I agree with the Administrative Law Judge that the Respondent's alleged rejection of the December 5, 1972, unfair labor practice charge filed by the Complainant was not violative of Section 19(a)(6) of the Order.

The Respondent excepted to the Administrative Law Judge's finding of violation of Section 19(a)(1) on the basis of, among other things, alleged procedural defects. In this regard, at the hearing and in its exceptions the Respondent raised the contention that no pre-complaint charge, as required by the Assistant Secretary's Regulations, had been filed with respect to certain conduct which the Administrative Law Judge found violative of the Order. Specifically, during the course of the hearing, the Complainant sought to amend its complaint, alleging an additional violation of Section 19(a)(1) and (6) of the Order based on the Respondent's rejection of the December 5, 1972, unfair labor practice charge filed by an AFGE Fifth District representative. The Respondent contended at the hearing that the amendment of the complaint at that stage of the proceeding, in effect, constituted surprise and that it was unable properly to defend against allegations not included in the initial unfair labor practice charge or complaint. Nevertheless, the Administrative Law Judge allowed the amendment and, although dismissing the 19(a)(6) allegation pertaining thereto, found a violation of Section 19(a)(1) based on the theory that the Respondent's conduct herein constituted an attempt to obstruct the Complainant from confronting the Respondent with its charge and that such action constituted an interference with the Complainant's rights assured by the Order.

While, in my view, the Administrative Law Judge's permitting an amendment of the complaint during the course of the hearing with respect to a matter which had not been the subject of a pre-complaint charge raised a substantial procedural question as to whether such matter was properly before the Administrative Law Judge, I find it unnecessary to decide this procedural question in view of the disposition of the allegation involved on its merits. Thus, under the circumstances, I find, contrary to the Administrative Law Judge, that the Respondent's rejection of the December 5, 1972, unfair labor practice charge was not violative of Section 19(a)(1) of the Order. In this regard, it was noted that the evidence established that in rejecting the unfair labor practice charge on December 19, 1972, the Respondent raised a question whether AFGE Local 1858 had appointed a Fifth District National Representative to act as its agent with respect to the unfair labor practice charge, and that, upon being advised that the Fifth District National Representative was indeed the agent of AFGE Local 1858, the Respondent met with and sought to resolve informally the unfair labor practice charge within the prescribed 30-day period provided for in the Assistant Secretary's Regulations. In my view, such circumstances do not warrant

a finding that the Respondent improperly sought to obstruct, prevent, or delay the processing of the unfair labor practice charge. Accordingly, I find that further proceedings in this regard under Section 19(a)(1) were unwarranted.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-4648(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 14, 1974

Paul J. Fauser, Jr.
Paul J. Fauser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

..... :

U.S. Department of the Army :
United States Army Missile Command :
Huntsville, Alabama :

Respondent :

and :

CASE NO. 40-4648(CA)

American Federation of Government :
Employees :
Fifth District, For Local 1858 :
Complainant :

.....

James L. Neustadt
Office of the General Counsel
American Federation of Government
Employees (AFL-CIO)
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

For the Complainant

Arnold M. Kohn
Legal Officer
United States Army Missile Command
Redstone Arsenal, Alabama 35009

For the Respondent

Before: RHEA M. BURROW
Administrative Law Judge

Statement of the Case

This proceeding arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing issued by the Assistant Regional Director of the U.S. Department of Labor, Labor Management Services Administration, Atlanta Region.

On January 24, 1973, a complaint was filed by Kenneth T. Blaylock as National Vice President of American Federation of Government Employees, (hereinafter referred to as complainant and/or AFGE) Fifth District, for Local 1858 against the Department of the Army, United States Army Missile Command Huntsville, Alabama, (hereinafter called the Respondent). In essence, AFGE charged the Respondent with having violated Sections 19(a)(1) and (6) of the Order because the MICOM ^{1/} Commander contra to Article VIII, Section d of the negotiated agreement, failed to consider an advisory award made in favor of Respondent's employee Roy D. Jones, by the Arbitrator in a grievance proceeding and issue a decision within 30 days after receipt of such opinion and did not inform the employee Jones or his personal representative, Richard J. Shaw of the AFGE Fifth District Office until November 20, 1972. The failure of management to abide by the time limits imposed by Section d, Article VIII of the negotiated agreement with Local 1858 and failure to provide the employee or his personal representative with a copy of the Commanding General's decision within the prescribed time limits was alleged to constitute violations of Section 19(a)(1) and (6) of the Order. There is also for consideration the amended complaint ^{2/} alleging that General Donley's action on December 19, 1972, in refusing to recognize Richard J. Shaw, as the chosen representative and agent in the filing of an unfair labor practice charge on December 5, 1972, was an act with constituted violation of 19(a)(1) and (6) of the Order.

^{1/} Missile Command.

^{2/} Amendment permitted during hearing over objection of Respondent, transcript pp. 246 and 247. Also see Complainant's opening statement, p. 22, and Administrative Law Judge's statement, p. 180, regarding advanced notice as to the subject amendment.

A hearing in the above-entitled matter was held before the undersigned on August 15, 1973. At the hearing motions that had been made by the Respondent before the Assistant Regional Director, requesting the appearance of Kenneth Blaylock, National Vice President, AFGE, Fifth District as a witness and production of certain documents, were renewed.^{3/} No significant new or additional information was presented that had not previously been considered by the Assistant Regional Director, and I found no reason to reach a conclusion different from that he had made denying the motions.

The parties were represented by counsel who were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues and to file briefs including proposed findings of fact and conclusions of law. There were no briefs filed for consideration with the undersigned.

From the entire record in the case including observation of witnesses and their demeanor, and all testimony adduced at the hearing the undersigned makes the following findings, conclusions and recommendations.

Findings and Conclusions

I

The material facts as herein reported were not in essential dispute and found to be as follows:

In September 1971 Roy D. Jones, a Respondent Employee filed a grievance against the Respondent alleging promotion irregularities in the filling of a vacancy for meatcutter leader, WL 7407-08. The matter was not resolved to Mr. Jones' satisfaction and on November 15, 1971, he requested that the matter be arbitrated. In his letter he stated: "I shall be represented by AFGE in any and all matters pertaining

^{3/} On August 7, 1973, the Acting Assistant Regional Director (formerly referred to as Regional Administrator) denied Respondent's motion to have Kenneth T. Blaylock present at the hearing on the basis that it did not appear that his testimony would be necessary in the matter; that Richard J. Shaw would replace him and be available to testify to those matters material to the issue as requested of Mr. Blaylock. As to production of documents, Richard J. Shaw was directed to produce (1) the AFGE constitution; (2) the by-laws of AFGE; and (3) copies of any and all agreements purporting to set forth a contractual relationship between the Fifth District AFGE and the U.S. Army Missile Command. With the exception of the above all other requests for production of documents were denied as not being described with sufficient particularity to establish necessity or relevance.

to my grievance." Copies of the letter were directed to AFGE Fifth District and AFGE Local 1858. There was an endorsement to his letter signed by Coy W. Mattox, President, AFGE Local 1858 that "AFGE Local 1858 has approved the use of an arbitrator to resolve Mr. Jones' grievance ." Major General E. Donley, U. S. A., Commanding Officer, of the Missile Command approved the use of an arbitrator on February 2, 1972, and so advised Mr. Jones.

An arbitrator, Sherman Dallas, was later selected. Richard J. Shaw, National Representative, AFGE Fifth District, acted as representative for employee Jones and AFGE Local 1858 at the arbitration hearing on May 24, 1972; Mr. Shaw had also appeared for employee Jones and represented him in connection with his grievance proceeding; Arnold Kohn legal officer, represented the respondent agency in the grievance proceeding and at the arbitration hearing. On August 21, 1972, one copy each, of the arbitration award that was recommended by the arbitrator was forwarded to the respondent agency and to the AFGE Fifth District Office, 4/ AFGE Local 1858 and employee Jones were advised of the arbitrator's recommendation by Mr. Shaw.

The Commanding General, MICOM, issued his letter of decision on the grievance matter that had been subject to arbitration on October 18, 1972, and forwarded a copy of it to the President of AFGE Local 1858 without notifying or furnishing copies to AFGE, Fifth District, National Representative Richard J. Shaw or to the employee Roy D. Jones. The two apparently did not learn of the decision until about November 20, 1972, when Mr. Shaw had a telephone conversation with Raymond Swaim, President of AFGE Local 1858.

4/ Tr. pp. 47, 48, 49 Article VIII, Section 1 of the October 30, 1969, negotiated agreement between AFGE Local 1858 and the respondent provided in part that "such arbitration shall be advisory in nature with any decision or recommendation subject to the approval of the MICOM commander..."

Mr. Shaw testified that after consulting with Local 1858, an unfair labor practice charge was filed by the Fifth District Officer on behalf of Local 1858, with General Donley on December 5, 1972; the charge was stated to have been filed at the request of AFGE Local 1858 President, Raymond J. Swaim, and alleged violation of the negotiated agreement by failure of the Commanding General to issue his decision within the time frame of the agreement and secondly that the Local's chosen representative in the matter of Roy Jones grievance was not furnished a copy of the Commanding General's decision nor was employee Jones.^{5/} Mr. Shaw further testified that on December 9, 1972, he received a letter from Commanding General Donley wherein he summarily rejected the unfair labor practice charge for the reason that I was not the agent of AFGE Local 1858 and he felt that his response was only to the Local and he did not have to recognize the AFGE District Office; ^{6/} later in December 1972 AFGE Local 1858 President Raymond Swaim notified General Donley that I (Shaw) was the agent of AFGE Local 1858 and had handled the Roy Jones grievance from its outset.^{7/} The parties were unable to resolve their differences and the unfair labor practice complaint was filed.

II

Article VIII Section 2 c of the negotiated agreement between the parties provides that "the arbitrator will be requested to render his advisory opinion to the MICOM Commander and the Union as quickly as possible, but in any event, no later than thirty (30) calendar days after the conclusion of the hearing unless the parties otherwise agree." (Underscoring supplied.)

Section d provides that "the MICOM Commander will consider the opinion of the Arbitrator and will render his decision within thirty (30) calendar days of receipt of such opinion unless extenuating circumstances cause a delay. The decision of the MICOM Commander will be final."

The negotiated agreement specifies that it is between "United States Army Missile Command...and Local 1858 AFGE." There is no reference to the AFGE Fifth District being a party to the agreement.

The policy enunciated by Section 1(a) of the Order provides that: "Each employee of the executive branch of the Federal Government has the right, freely, and without

5/ Tr. pp. 60, 61, 62.
 6/ Tr. pp. 62, 63.
 7/ Tr. p. 62.

fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order; the right to assist a labor organization extends to participation in the management of the organization and acting for the organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within the agency to encourage or discourage membership in a labor organization."

Sections 19(a) (1) and (6) of the Order which are alleged to have been violated provide that: "Agency management shall not - (1) interfere with, restrain, or coerce, an employee in the exercise of rights assured by this Order; ... (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order."

Section 203.14 of the regulations for the Department of Labor, Office of the Assistant Secretary for Labor Management Relations provide that: "A complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

III

One of the charges alleged in the complaint is that the MICOM Commanding General failed to consider an advisory award recommended in favor of its employee, Roy D. Jones, by the Arbitrator in a grievance proceeding and issue a decision within 30 days after receipt of such opinion. The negotiated agreement between the parties required the Arbitrator to render his advisory opinion within thirty (30) calendar days after conclusion of the hearing. The hearing was held on May 24, 1972, and the advisory opinion issued on August 21, 1972. The MICOM Commanding General thereafter issued his letter of decision in the matter on October 18, 1972. Viewing the total picture, it is evident that neither the Complainant or the Respondent considered the matter of sufficient urgency while it was before the Arbitrator from May 24 to August 21, 1972, to request that the opinion be expedited. The MICOM Commanding General issued his decision less than two months after the advisory opinion was promulgated but not within the 30-day provision of Article VIII, Section (d) of the negotiated agreement. While Respondent

contended, and there may very well have been extenuating circumstances causing delay in issuing the final decision on October 18, 1972, it took no action to advise the Complainant of the existence or nature thereof nor did the Complainant request that the decision be expedited.

Thus, with respect to the unfair labor practice allegation based on the alleged failure of the Respondent to issue its decision within thirty days after receipt of the Arbitrator's opinion, I find the the delay did not interfere with, restrain, or coerce employee Jones in the exercise of any rights assured by the Order. His claim had proceeded to hearing on May 24, 1972, and underwent consideration by the Arbitrator until his recommendation issued on August 21, 1972. Thereafter, the MICOM Commander had the case under consideration until his decision was issued on October 18, 1972. It is clear that the failure of Respondent to file its decision within 30 days after receipt of the Arbitrator's opinion is not the gravamen of the Complaint herein but refusal of the Respondent to recognize AFGE Fifth District National Representative as employee Jones representative.

Every dispute which arises as to interpretation or application of a negotiated agreement does not necessarily constitute a 19(a) (6) violation simply because one party accuses the other of violating such agreement. Viewing the circumstances in this case, I find that the Respondent's failure to issue a decision within 30 days after receipt of the Arbitrator's advisory opinion did not constitute a refusal to consult, confer, or negotiate within the meaning of Section 19(a) (6) of the Order.

In U.S. Department of Defense, Department of the Army, Army Material Command, Automated Logistics Management Systems Agency, A/SLMR 211, it was held that with respect to the unfair labor practice allegation based on alleged failure of the Respondent to reply to the charge filed by the Complainant within 30 days of its receipt, that such a reply was not required under Section 203.2 of the Assistant Secretary's Regulations and that in any event, a failure to follow the Regulations in this regard would not constitute a refusal to consult, confer, or negotiate within the meaning of the Order.

IV

The failure of the Respondent to provide its employee, Roy D. Jones, and his representative, Richard J. Shaw, of the AFGE Fifth District Office with a copy of the MICOM Commanding General's letter of Decision on October 18, 1972, has been alleged, with the failure to timely reply, as constituting violations of Sections 19(a)(1) and (6) of the Order. It is undisputed that the President of AFGE Local 1858 was furnished a copy of the decision.

In Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, the Activity was held to have violated Section 19(a)(6) of the Order where it unilaterally altered the manner in which shifts would be scheduled in Nursing Service and put into effect a schedule which was at variance with the terms of its negotiated agreement. In affirming the Administrative Law Judge's decision the Assistant Secretary stated in pertinent part as follows:

"The obligation of an agency or activity to consult, confer and negotiate with an exclusive representative to negotiate a binding agreement would become meaningless if a party to such relationship was free to make unilateral changes in the agreement negotiated. Every dispute which arises as to interpretation or application of a provision of a negotiated agreement does not necessarily constitute a 19(a)(6) or 19(b)(6) violation simply because one party accuses the other of violating such agreement. However, where, without prior negotiations, a party initiates a course of action which clearly contravenes the agreed upon terms of its negotiated agreement...the bargaining requirements of the Order have been violated". (underscoring supplied.)

The negotiated agreement dated October 30, 1969, is between the United States Army Missile Command and Local 1858 AFGE. Signatures to the agreement include the President of Local 1858 and the Acting Commander, USA-MICOM. Article VIII, Section 2(c) of the agreement designates the MICOM Commander and the Union as the parties to whom the Arbitrator will furnish his decision within 30 days after the conclusion of the hearing in the matter. In the absence of any contra provision which is not shown in this case, this is construed to relate to the President of AFGE Local 1858 as the official representative of the Union to whom one of the copies of the Arbitrator's decision will be furnished.

Article VIII Section 2(d) of the negotiated agreement requires the MICOM Commander to consider the opinion of the Arbitrator and render a decision within 30 calendar days of receipt of such opinion unless extenuating circumstances cause a delay. The decision of the MICOM Commander is final. There is no specific provision in this Section as to whom disposition of the decision will be made. Since the AFGE Local 1858 is the official party to the agreement for the Union and Sections 2 a, b, c, d, of the agreement relate to arbitration procedures, it is reasonable to conclude that Sections 2 c and d must be read in conjunction to ascertain the intent comprehended by the parties as to the terms of agreement. It is evident that the President is the official of AFGE Local 1858 to receive the copy of the MICOM Commander's decision on behalf of the union under the negotiated agreement.

I find that the Respondent did not violate the provisions of Article VIII Section 2 d of its agreement or Sections 19(a)(1) and (6) of the Order as to service of the MICOM Commander's decision on the President of AFGE Local 1858. AFGE Local 1858 was not free to make a unilateral change without prior negotiations as to whom would get a copy of the MICOM Commander's October 18, 1972 decision. different from that comprehended by negotiated agreement.

The AFGE Fifth District representative who in the complaint and at the hearing claimed that it was acting as designated agent of AFGE Local 1858 had no rights superior to those of its principal under the negotiated agreement. Further, it was not claimed at the hearing that it had any greater rights under the Order than afforded AFGE Local 1858 or that the Local had initiated any action for issuance of decisions subject to arbitration different from that contained in the negotiated agreement. Thus, unlike the situation in A/SLMR Decision No. 87, supra, it is the Complainant herein and not the Activity who is insisting on a course of action which is contra to the terms of the negotiated agreement. The finding of A/SLMR No. 87 that "...where without prior negotiations, a party initiates a course of action which clearly contravenes the agreed upon terms of its negotiated agreement...the bargaining requirements have been violated," applies to the union as well as to the Agency and may not be unilaterally changed without prior negotiation.

The Complainant at the hearing referred to A/SLMR Decision No. 2428/ as supporting its contention that Local 1858 has the right to choose its representative and since it had designated Richard J. Shaw of the Fifth District Office as its representative, the refusal of Respondent to furnish him a copy of the MICOM Commander's October 16, 1972, letter of decision fell within the scope of Section 10(e) of the Order.

Under Section 10 (e) of the Order the exclusive representative must be given the opportunity to be represented at formal discussions between management and employees concerning grievances, personnel policies and procedures, or other matters affecting general working conditions of employees in the unit, and agents and activities have the corresponding obligation to afford the exclusive representative such an opportunity. It is not within the purview of management to decide who fulfills that aspect of Section 10(e) which requires that "labor organization(s) shall be given the opportunity to be represented at formal discussions" of this nature. The right to choose its representative at such discussions must be left to the discretion of the exclusive bargaining representative and not to the whim of management. It is clear that management did not interfere in anyway with Local 1858's designated AFGE representative Shaw from pursuing employee Jones' grievance action to completion through arbitration proceeding and hearing and consideration by the MICOM Commander. It was not the Respondent who chose AFGE Local 1858 as the party to be served the MICOM Commander's decision but the Local itself in its negotiated agreement. It follows from the foregoing that the Respondent did not violate the agreement of Section 19(a)(6) of the Order by not sending a copy of the October 18, 1972 decision to the AFGE Fifth District representative. In addition, the Respondent did not by failure to furnish the AFGE Fifth District representative a copy engage in any type of conduct which interfered with, restrained or coerced any employee in the exercise of rights assured by the Executive Order in Section 19(a)(1).

8/ U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina.

There remains for consideration the allegation in the amendment to the complaint at the hearing whether the MICOM Commander's refusal on December 19, 1972 to recognize Richard J. Shaw as the chosen representative and agent of employee Roy D. Jones and AFGE Local 1858 in the filing of an unfair labor practice charge on December 5, 1972, was an act which violated Sections 19(a)(1) and (6) of the Order.

Heretofore, I found there was no violation of Sections 19(a)(1) and (6) of the Order by reason of the MICOM Commander sending a copy of the October 18, 1972 decision to the President of AFGE Local 1858, only, because service was accomplished within the terms of the negotiated agreement between the parties; the question of entitlement of the AFGE Fifth District Representative to service of the MICOM Commander's decision was not determined on the basis of recognition, but under the terms of the negotiated contract between AFGE Local 1858 and the Respondent.

There was no need to question recognition of the representative before the MICOM Commander entered the October 18, 1972 decision because AFGE Fifth District representative Richard J. Shaw had in fact been shown to have appeared throughout the grievance and arbitration proceedings for the employee, Roy D. Jones and Local 1858.

It is undisputed that after the MICOM Commander's decision was issued, Richard J. Shaw, AFGE Fifth District Representative filed an unfair labor practice charge on behalf of Local 1858 against the Respondent on September 5, 1972, and that the charge was summarily rejected on December 19, 1972, because Mr. Shaw was not considered by the Respondent to be the agent of AFGE Local 1858. Recognition of the representative at this stage did become an issue for consideration.

Section 19(a)(1) of the Order provides that Agency management shall not interfere with, restrain or coerce an employee in the exercise of rights assured by the Order. Employee Jones and Local 1858 had designated AFGE Fifth District Representative Shaw to represent them in the aforesaid grievance proceeding and the subsequent

unfair labor practice action. The regulations^{9/} provide that an employee, an agency, activity, or labor organization may file a complaint under Section 19(a) of the Order. The charge is a preliminary step toward filing a formal complaint. It is not within the province of a Respondent to interfere with or control the selection of Complainant's Representative in a collective bargaining, grievance or unfair labor practice proceeding when it is being confronted with a charge or complaint of violation of its agreement.

I conclude that the Respondent's rejection of the December 5, 1972 charge filed by AFGE Fifth District Representative Richard Shaw on December 19, 1972, was an unwarranted attempt to prevent or obstruct the Complainant from confronting the Respondent with its charge and such action constituted an interference in the exercise of the Complainant's rights assured by Section 1 of the Order and a violation of Section 19(a) (1) of the Order.^{10/}

I do not find it material to determine whether the AFGE Fifth District Council is a separate and autonomous labor organization with authority to file a complaint in its own name as urged by Respondent. It is sufficient that it is an intermediate echelon between the Local and National AFGE organization and is recognized in the absence of some contra agreement between the contracting parties, as empowered to aid and assist the Local Union. The testimony at the hearing reflected that aiding and assisting Local labor organizations in the AFGE in filing charges and complaints on behalf of the Local and employees it represents is a frequent and common practice and a part of the duties fulfilled by various District Councils.

The record reveals that after Respondent summarily rejected the unfair labor practice charge filed on December 5, 1972, it did in fact confer and consult with the Complainant regarding its representation. I do not find that the allegation of a violation of Section 19(a) (6) of the

^{9/} Regulations of the Assistant Secretary for Labor Management Relations, 203.1, 203.2.

^{10/} As to representation of an exclusive representative pursuant to Section 10(e) of the Order see A/SLMR Decision, No. 242, supra.

the Order is substantiated by the evidence.

On the basis of the foregoing and the entire record^{11/} I find:

(1) That the failure of the Respondent to issue a decision within 30 calendar days after receipt of the Arbitrator's opinion and furnish a copy thereof to AFGE Fifth District Representative Richard J. Shaw did not constitute violations of Sections 19(a) (1) and (6) of the Order, as alleged;

(2) That the Respondent's rejection of the December 5 unfair labor practice charge filed by AFGE representative Richard J. Shaw, on behalf of Local 1858 constituted an interference in the exercise of Complainant's rights assured by Section 1 of the Order and a violation of Section 19(a) (1) of the Order. Such rejection and the evidence of record, however, do not substantiate a violation of Section 19(a) (6) of the Order.

Recommendations

Having found that Respondent has engaged in certain conduct prohibited by Section 19(a) (1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designated to effectuate the policies of the Order. I also recommend that the Section 19(a) (1) allegation with respect to failure of Respondent to issue a decision within 30 calendar days after receipt of the Arbitrator's opinion and furnish a copy thereof to AFGE Fifth District Representative Richard Shaw be dismissed along with all allegations of violations of Section 19(a) (6) of the Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the

^{11/} Attached hereto as Appendix "B" are errata sheets showing changes in the transcript of items, the Complainant and Respondent submitted for required correction which are approved.

Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army, United States Army Missile Command, Huntsville, Alabama, shall:

(1) Cease and desist from -

a. Interfering with or attempting to control the Union's choice of representative in any collective bargaining proceeding;

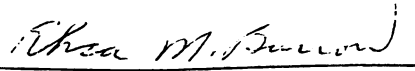
b. Interfering with or attempting to obstruct a representative selected by the Union from confronting it with a charge of alleged violations of Section 19(a) of the Order and its negotiated agreement.

c. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491.

(2) Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

a. Post at its facilities at the United States Army Missile Command, Huntsville, Alabama, copies of the attached notice marked "Appendix 1" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they will be signed by the Commanding Officer, United States Army Missile Command, Huntsville, Alabama, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily placed. The Commanding Officer shall take reasonable steps to insure that Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.


Rhea M. Burrow
Administrative Law Judge

Dated: December 11, 1973

Washington, D.C.

APPENDIX A

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with or attempt to control the selection of a representative by a union having exclusive representation of employees in any collective bargaining grievance or unfair labor practice proceeding when attempting to confront the Respondent with a charge of violations of the Order and/or the negotiated agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491.

(Agency or Activity)

Dated _____ By: _____

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director of the Labor-Management Services Administration, United States Department of Labor, whose address is 1371 Peachtree Street, Northeast, Room 110, Atlanta, Georgia 33309.

APPENDIX B

(ERRATA SHEET)

Corrections in the Transcript

	Page	Line	Presently Reads	Should Read
	5	20	will incumbent	will be incumbent
	5	21	attachment	attachments
	9	2	General Kenneth	General and Kenneth
	12	6	privity	privy
	13	24	can testify myself	cannot testify himself
	15	1	Garrison	Kohn
	21	7 and 13	solvent	silent
	21	25	claimant's	complainant's
	22	15	19() (6)	19(a) (1) and (6)
	25	17	notified	given notice
	26	12	and Local 1858	and the agreement with Local 1858
	26	20	unilateral and	unilateral act
	28	23	agent as	representative of
	30	22	objection	motion
	34	25	that	the Jones arbitration
	39	8	Shaw	Jones
	51	24	know	show
	58	18	December	November
	105	12-14	a policy the procedure that has been negotiated for extenuating circumstances	a personnel policy or procedure negotiated for
	110	17&21	Gunn	Gunter
	116	2	complainant	respondent
	126	21	not	now
	130	14	7	27
	132	14	complaint	complying
	155	11	consultation	consultation from Dick Shaw
	168	3	shall	should
	168	4	up	forth
	168	23	for unfair	or an unfair labor practice
	168	23	unfair (and)	unfair labor practice
	169	14	it was not assured	it was not a mandatory policy
	169	19	and	against
	170	21	local	National
	172	13	and AFGE	AFGE Local 1858
	185	25	concept	administration of the nationwide unit accorded to the Federation
	188	13	could	did

March 14, 1974

Page	Line	Presently Reads	Should Read
188	15	do it	bargain
189	7	National	National recognition
189	11	Hugh	HEW
190	19	that	(delete)
218	6	were	weren't
226	21	Kohn	Neustadt
234	11	can't	can
239	10	the	my
239	10	wasn't	was
239	17	even though	(delete)
239	22	in lieu	in view
240	12	objections	motions
241	4	agency	agency principles of law
242	3	grievances	grievant's
246	22	has	had
247	11	Respondent	Respondent immediately prior to and
248	4	actions	actions immediately prior to and
249	12	subsequent to (delete)	surrounding
251	18	agent	agreement
251	18 and 25	Executive	exclusive
252	12	subsequent to	surrounding
252	14	matters	matter
252	15	violation to	violation not to
254	23	matters subsequent	matters prior to and subsequent
256	4 and 5	evident	evidence
256	9	contract	content
256	17	to	by
257	3	agency	agency principle
257	7	agency	agency concept
257	8	with my objection to the authenticity	with or without Respondent's sustained objection to authenticity of Complainant's documents
257	9	bearing	relevance
257	13	as well as	as well,
257	13	irrelevant labor	irrelevant the labor

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER CLARIFYING UNITS
 OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,
 COLUMBIA, SOUTH CAROLINA
 A/SLMR No. 368

This case involved petitions for clarification of unit (CU) filed by the Veterans Administration Hospital, Columbia, South Carolina (Hospital) seeking to include in an existing unit of Hospital professional employees, and an existing unit of Hospital nonprofessional employees, those professional and nonprofessional employees formerly employed by the Veterans Administration Outpatient Clinic, Columbia, South Carolina. The professional and nonprofessional units of the Hospital currently are represented by Local 1915, American Federation of Government Employees, AFL-CIO (AFGE), and the National Federation of Federal Employees, Local 1495 (NFFE), represented a unit of professional employees and a unit of nonprofessional employees at the Outpatient Clinic. There are current agreements in all four units. At the hearing, the NFFE moved that the petitions be dismissed because: (1) RA petitions, not CU petitions, were the appropriate petitions to seek a determination that a labor organization should cease to represent certain employees; and (2) the subject petitions were untimely as they were barred by the existing NFFE negotiated agreements.

The Assistant Secretary denied the NFFE's motion, stating that, under the circumstances in these cases, CU petitions were the appropriate vehicles, and, in view of his finding of accretion, the instant CU petitions did not raise a question concerning representation and, therefore, the agreement bar principle was not applicable.

In 1973 the Outpatient Clinic in Columbia was abolished and its functions and personnel were absorbed by the Hospital. As a result, the functions of the former Outpatient Clinic were absorbed throughout the various subdivisions within the Hospital.

The Assistant Secretary, in ordering the proposed clarifications, found that the employees in the nonprofessional and professional units at the former Outpatient Clinic had been thoroughly combined and integrated into the existing units at the Hospital represented by the AFGE so as to constitute accretions to the AFGE units. In this respect, he noted that following the merger the former Outpatient Clinic employees were dispersed throughout the Hospital, working side by side and under common supervision with Hospital employees and, in many instances, performing the same duties as Hospital employees.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
COLUMBIA, SOUTH CAROLINA

Activity-Petitioner

and

Case Nos. 40-4946(CU) and
40-4952(CU)

LOCAL 1915, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

and

LOCAL 1495, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Labor Organization

DECISION AND ORDER CLARIFYING UNITS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer George M. Hildreth. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, including a brief filed by Local 1495, National Federation of Federal Employees, herein called NFFE, the Assistant Secretary finds:

In Case No. 40-4946(CU), the Activity-Petitioner seeks to clarify an existing nonprofessional employee unit at the Veterans Administration Hospital, Columbia, South Carolina (Hospital) to include those eligible nonprofessional employees previously represented in a nonprofessional employee unit at the Veterans Administration Outpatient Clinic in Columbia.

Further, in Case No. 40-4952(CU), the Activity-Petitioner seeks to clarify an existing professional employee unit at the Hospital to include those professional employees previously represented in a professional employee unit at the Outpatient Clinic. The Activity-Petitioner also proposes to clarify the existing professional and nonprofessional employee units at the Hospital by excluding temporary and intermittent employees from both units and continuing to exclude part-time employees from the professional employee unit.

On August 25, 1967, Local 1915, American Federation of Government Employees, AFL-CIO, herein called AFGE, was granted exclusive recognition for a unit of nonprofessional employees at the Hospital, excluding Outpatient Clinic employees; and on October 23, 1967, it was granted exclusive recognition for a unit of professional employees at the Hospital, excluding Outpatient Clinic employees. 1/ On September 19, 1967, the NFFE was granted exclusive recognition for a unit of nonprofessional employees and a unit of professional employees at the Outpatient Clinic. 2/

The record reveals that in 1967 the Outpatient Clinic, which was located approximately six miles from the Hospital, was placed under the administrative control of the Hospital. In early or mid-1973 the Outpatient Clinic was abolished with its functions and personnel being merged with and absorbed by the Hospital. 3/ The Activity-Petitioner contends that as a result of the merger the employees of the former Outpatient Clinic became intermingled with those of the Hospital and accreted to the AFGE's bargaining units. The AFGE takes essentially the same position as the Activity-Petitioner. The NFFE, on the other hand, contends that there has been no alteration of the existing units other than the fact that the employees of the Outpatient Clinic have been moved to another location and, therefore, its units continue to be appropriate for the purpose of exclusive recognition.

At the hearing, the NFFE moved that the subject petitions be dismissed on the basis that an RA petition, rather than a petition for clarification of unit (CU), is the sole procedure available to an Activity to raise a contention that a labor organization should cease to be the exclusive representative. Further, it was asserted that the NFFE's negotiated agreements covering the employees of the Outpatient Clinic constituted bars to the filing of such petitions.

1/ Subsequently, on July 2, 1970, the AFGE was certified as the exclusive representative of all nonsupervisory nurses at the Hospital. The evidence establishes that there is a current negotiated agreement between the AFGE and the Hospital covering the latter's nonprofessional employees which expires on November 19, 1974. Also, there is a current negotiated agreement covering the Hospital's professional employees, including the nurses, which has a termination date of March 13, 1974.

2/ The evidence reveals that there are negotiated agreements covering both of the units represented by the NFFE. Both agreements have a termination date of January 17, 1975.

3/ The record does not disclose the exact date on which the Outpatient Clinic was disbanded.

It has been held previously that a CU petition is a vehicle by which parties may seek to illuminate and clarify, consistent with their intent, the unit inclusions or exclusions after the basic question of representation has been resolved. 4/ In my view, the subject CU petitions seeking a determination as to whether accretions to existing units had occurred, were appropriately filed within the meaning of the rationale of Head-Quarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, cited above. 8/ Moreover, in view of the finding of accretion, as discussed below, the instant CU petitions were not deemed to have raised questions concerning representation and, thus, the possibility of raising a rival claim by such petitions was precluded. Accordingly, it is clear that the agreement bar principle established under Section 202.3(c) of the Assistant Secretary's Regulations would not be applicable. 6/ Under these circumstances, the NFFE's motion to dismiss is hereby denied.

The record reveals that the Hospital provides general medical and surgical care to eligible veterans and has approximately 700 employees. Prior to its dissolution, the Outpatient Clinic provided certain outpatient medical services to eligible veterans and had approximately 45 employees. As noted above, since 1967 the Outpatient Clinic had been under the administrative control of the Hospital. Thus, the Outpatient Clinic, as well as the Hospital, was headed by the Hospital's Director and liaison services between the Hospital and Outpatient Clinic were performed by two employees located at the Hospital. 7/

The evidence establishes that when the Outpatient Clinic was disbanded at its previous location, it was not placed as an organizational entity within the Hospital and no organizational unit similar to the former Outpatient Clinic was established within the Hospital to deal solely with outpatients. Rather, the evidence establishes that the functions and personnel of the Outpatient Clinic were dispersed throughout the Hospital. Thus, the employees of the former Outpatient Clinic now work alongside and share common supervision with employees who had previously worked at the Hospital, and, further, employees who transferred

4/ See Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160.

8/ Cf. also in this regard, U.S. Army Safeguard Systems Command, P.O. Box 1500, Huntsville, Alabama, A/SLMR No. 288.

6/ Cf. Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey, A/SLMR No. 195.

7/ Prior to the absorption of the Outpatient Clinic, the Hospital also had an outpatient service; however, rather than being a specific organizational entity, this operation involved merely physicians and administrative personnel who dealt with outpatients.

from the Outpatient Clinic now, in many instances, perform the same duties as employees who previously were located at the Hospital. Moreover, while prior to the consolidation of the Hospital and the Outpatient Clinic employees at the Outpatient Clinic dealt solely with outpatients, now virtually all of the employees of the former Outpatient Clinic deal with both inpatients and outpatients at the Hospital.

Based on the foregoing circumstances, I find that the nonprofessional and professional employees at the former Outpatient Clinic have been thoroughly combined and integrated into the existing units at the Hospital represented by the AFGE so as to constitute accretions to the AFGE units. In this regard, it was noted particularly that, following the merger, the former Outpatient Clinic employees and Hospital employees work side by side at the Hospital, share common supervision and, in many instances, perform the same job duties. Accordingly, I find that the existing unit of Hospital nonprofessional employees should be clarified to include all eligible nonprofessional employees previously employed at the Outpatient Clinic, and that the existing unit of Hospital professionals should be clarified to include all eligible professional employees previously employed at the Outpatient Clinic.

ORDER

IT IS HEREBY ORDERED that the unit of all nonprofessional employees of the Veterans Administration Hospital, Columbia, South Carolina, for which Local 1915, American Federation of Government Employees, AFL-CIO, was granted exclusive recognition on August 25, 1967, be, and it hereby is, clarified to include in said unit all eligible 8/ nonprofessional employees previously employed by the Veterans Administration Outpatient Clinic, Columbia, South Carolina.

IT IS FURTHER ORDERED that the unit of all professional employees of the Veterans Administration Hospital, Columbia, South Carolina, for which

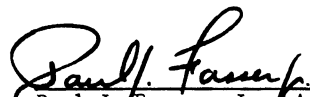
8/ With respect to the Activity-Petitioner's contention that the professional and nonprofessional employee units at the Hospital should be clarified to exclude temporary and intermittent employees, and that the professional employee unit should be clarified to continue to exclude part-time employees, I find that the evidence is insufficient to enable me to make such determinations. Accordingly, I shall make no findings in this regard.

Local 1915, American Federation of Government Employees, AFL-CIO, was granted exclusive recognition on October 23, 1967, be, and it hereby is, clarified to include in said unit all eligible professional employees previously employed by the Veterans Administration Outpatient Clinic, Columbia, South Carolina.

March 14, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Dated, Washington, D.C.
March 14, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF AGRICULTURE,
AGRICULTURAL RESEARCH SERVICE,
BEE RESEARCH LABORATORY COMPLEX,
TUCSON, ARIZONA
A/SLMR No. 369

This case involves a representation petition filed by the American Federation of Government Employees, Local 3439, AFL-CIO, (AFGE), for a unit of all employees of the United States Department of Agriculture, Agricultural Research Service, Bee Research Laboratory Complex, Tucson, Arizona. The Activity contended that the only appropriate unit would include all employees of the Western Region of the Agricultural Research Service, or, alternatively, would include all employees of the Southern Arizona-New Mexico Area of the Western Region of the Service.

The Assistant Secretary concluded that the petitioned for unit was not appropriate for the purpose of exclusive recognition. In reaching this determination, the Assistant Secretary noted that the Area Director of the Southern Arizona-New Mexico Area is responsible for directing the work of 12 research units in the Area and that the claimed unit of employees at the Bee Research Laboratory Complex would include only some of the research units located in Tucson or in the Area. He noted also that each of the research units in the Area reports independently to the Area Director; that there is interchange and transfer among the various research units in the Area; that the area of consideration for employee promotions is broader than the claimed unit; and that ultimate responsibility for most personnel functions for employees in the Western Region of the Service is centralized in the Western Regional Administrative Office. Under these circumstances, the Assistant Secretary concluded that the employees in the Bee Research Laboratory Complex did not share a clear and identifiable community of interest separate and distinct from certain other Service employees and that such a fragmented unit would not promote effective dealings and efficiency of agency operations.

Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF AGRICULTURE,
AGRICULTURAL RESEARCH SERVICE,
BEE RESEARCH LABORATORY COMPLEX,
TUCSON, ARIZONA

Activity

and

Case No. 72-4288(RO)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3439, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Linda Wittlin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, Local 3439, AFL-CIO, herein called AFGE, seeks an election in a unit of all employees of the United States Department of Agriculture, Agricultural Research Service, Bee Research Laboratory Complex, Tucson, Arizona, excluding management officials, supervisors, guards, casual employees, employees engaged in Federal personnel work other than purely clerical in nature, work study and cooperative education students. 1/

1/ The unit description appears as described in the amended petition filed by the AFGE on July 6, 1973. At the hearing and in its post-hearing brief, the Activity contended that the original petition filed by the AFGE on June 6, 1973, was procedurally defective in that it was signed by an employee the Activity alleges to be a supervisor. At the hearing, the AFGE moved to withdraw its original petition and requested that its amended petition, not signed by the same employee, be treated as the
(continued)

The Activity asserts that the proposed unit is inappropriate because all of the employees of the Western Region of the Agricultural Research Service (ARS), or as a minimum, all of the employees of the Southern Arizona-New Mexico Area of the Western Region of the ARS, of which the Bee Research Laboratory Complex is a component, share a community of interest. It notes, in this regard, that personnel and labor relations authority for these employees rests with the Regional Director of the Western Region of the ARS, and that the unit sought herein, consisting of only four of the twelve research units within the Southern Arizona-New Mexico Area of the Western Region of the ARS, would not promote effective dealings and efficiency of agency operations.

The mission of the ARS is to conduct basic applied and developmental research on the marketing, production and utilization of agricultural products. It is divided into four Regional Offices, each of which is under the supervision of a Deputy Administrator. The Western Region of the ARS encompasses the western portion of the United States and is headquartered in Berkeley, California. Within the Western Region there are Area Offices located at Phoenix, Arizona; Tucson, Arizona; Fresno, California; Riverside, California; Fort Collins, Colorado; Logan, Utah; and Pullman, Washington. There also is a Regional Research Center located at Albany, California.

The Area Office located in Tucson, Arizona, is responsible for the Southern Arizona-New Mexico Area of the ARS and consists of twelve research units. Eight of these research units are located in Tucson, Arizona, i.e., Barley Breeding Research, Forage Insects Research, Honey Bee Pollination Research, Cotton Insects-Biological Control Research, Aridlands Grass Breeding Research, Oilseed Crops Production Research, Rangelands Weeds and Brush Control Research, and Watershed Management Research. Three research units of the Tucson Area Office -- Cotton Breeding Research, Cotton Ginning Research, and Range Management Research are located at Las Cruces, New Mexico, while the External Parasites of Livestock Research Unit is located at Albuquerque, New Mexico. There also are satellite facilities at Tombstone, Arizona and Santa Rosa, New Mexico. The claimed unit of some 30 employees is located at the Bee Research Laboratory Complex, which contains only four of the eight research units found in Tucson, -- Forage Insects Research, Honey Bee Pollination Research, Cotton Insects-Biological Control Research, and Rangelands Weeds and Brush Control Research. The Complex consists of some twenty structures on about four and one-half acres of land.

The record reveals that the Southern Arizona-New Mexico Area Office of the Western Region is headed by an Area Director who reports to the Deputy Administrator of the Western Region located at Berkeley, California. The Area Director is responsible for the work of all of the twelve research units within the Area. Each of these research units,

1/ operable petition in this matter, although it did not concede that the signatory to the original petition was a supervisor. In view of the disposition herein, I find it unnecessary to rule on either the motion made by the AFGE or the contention by the Activity.


including the four units located at the Bee Research Laboratory Complex, is headed by a Research Leader who reports directly to the Area Director. The record reveals also that the Area Director issues memoranda which establish the administrative procedures for all the employees of the Area and that he holds quarterly meetings with the research leaders in order to consult with them regarding the implementation of Area Office procedures. An Administrative Officer attached to the Area Director's office provides personnel, financial and administrative services for all the research units within the Area. The Area Director has the authority to reassign employees between the research units and the evidence establishes that employee interchange and transfers have occurred among the various research units in the Area, including units located in and outside of the Bee Research Laboratory Complex. Moreover, the area of consideration for employee promotions is not limited to individual research units or to employees in the four units located at the Complex. Thus, the area of consideration for all Wage Grade employees and General Schedule employees below GS-6 is the local commuting area, is regionwide for GS-7 through GS-11 and is agencywide for GS-12 and above. In addition, the record reflects that final responsibility for most personnel matters for employees of the Western Region resides within the Regional Administrative Office (RAO) at Berkeley, California. In this connection, the RAO maintains merit promotion files, has final authority regarding disciplinary actions, has job classification authority and is responsible for labor-management functions in the Western Region.

Based on the foregoing circumstances, I find that the unit sought by the AFGE in the instant case is not appropriate for the purpose of exclusive recognition under the Order. In this regard, it was noted particularly that the Area Director of the Southern Arizona-New Mexico Area is responsible for directing the work of the 12 research units in the Area; that the claimed unit of employees at the Bee Research Laboratory Complex would include only some of the research units located in Tucson, or in the Area; that each of the research units in the Area reports independently to the Area Director; that there is interchange and transfer among the various research units in the Area; that the area of consideration for employee promotions is broader than the claimed unit; and that ultimate responsibility for most personnel functions for employees in the Western Region of the ARS is centralized in the Western Region RAO. Under these circumstances, I find that the employees of the Bee Research Laboratory Complex do not share a clear and identifiable community of interest separate and distinct from certain other ARS employees and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the AFGE's petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 72-4288(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 14, 1974


Paul J. Fesser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

March 14, 1974

A/SLMR No. 370

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ILLINOIS ARMY NATIONAL GUARD,
1st BATTALION, 202nd AIR DEFENSE ARTILLERY,
ARLINGTON HEIGHTS, ILLINOIS
A/SLMR No. 370

This case involved a petition for clarification of unit (CU) filed by the Chicago Chapter, Association of Civilian Technicians, Incorporated (Petitioner), seeking to clarify the status of certain employees who are classified as Guided Missile Mechanical Equipment Repairers, also called Launcher Crewmen, WG-6 and WG-7. The Activity contended that the incumbents in the subject classification performed guard duty of a nature separate and apart from the normal security functions performed by all technicians in the air defense program which would require the exclusion of this classification from the unit. The Petitioner, on the other hand, contended that the primary duty of the incumbents in the disputed classification was that of maintenance on equipment and that the employees in this position are not guards within the meaning of the Order.

The Assistant Secretary found that the employees in the disputed classification performed guard duty on a regular, recurring basis for substantial periods of time, and therefore were guards within the meaning of Section 2(d) of the Order. Cf. Virginia Air National Guard Headquarters, 4th Battalion, 11th Artillery, A/SLMR No. 69. Accordingly, he clarified the unit by excluding the employees in the classification of Guided Missile Mechanical Equipment Repairer (Launcher Crewman, WG-6 and WG-7) from the unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ILLINOIS ARMY NATIONAL GUARD,
1st BATTALION, 202nd AIR DEFENSE ARTILLERY,
ARLINGTON HEIGHTS, ILLINOIS

Activity

and

Case No. 50-9599

CHICAGO CHAPTER, ASSOCIATION OF
CIVILIAN TECHNICIANS, INCORPORATED

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer John R. Lund. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Petitioner and the Activity, the Assistant Secretary finds:

The Petitioner filed a petition for clarification of unit (CU) in the subject case seeking clarification of a certain classification of employees. ^{1/} Specifically, the Petitioner seeks to clarify the status of those employees classified as Guided Missile Mechanical Equipment Repairer, also referred to as Launcher Crewman, WG-6 and WG-7, claiming that they should be included in the exclusively recognized bargaining unit. The Activity, on the other hand, contends that the employees in this classification are guards within the meaning of Section 2(d) of the Order and, thus, should be excluded from the exclusively recognized unit.

^{1/} During the course of these proceedings, the parties agreed to the confidential, supervisory, or guard status of certain employee classifications for which clarification had initially been sought. There is no evidence which would indicate that the parties' agreement in this regard was improper. As indicated in New Jersey Department of Defense, A/SLMR No. 121, the parties' agreement was viewed as, in effect, a withdrawal request of that portion of the subject petition seeking clarification of the status of the agreed upon classifications. In these circumstances, I find it unnecessary to make a determination with respect to the status of any of these agreed upon classifications.

The record indicates that the Petitioner was certified on April 16, 1973, as the exclusive bargaining representative in a unit of Illinois Army National Guard, Air Defense Technicians, excluding guards and certain other categories of employees. Headquartered at Arlington Heights, Illinois, the Activity is engaged in a daily operational mission within the North American Air Defense Command under the control of the Chicago Army Air Defense Command. Its function is to provide command, administration, supply, organizational maintenance and operational control for the Air Defense Battalion, Nike Hercules. The Activity's Batteries A, B, and D, located respectively at Homewood, Addison and Northfield, Illinois, are subordinate units which provide the missile launching and firing control components of the Air Defense Battalion, Nike Hercules.

DISPUTED JOB CLASSIFICATION

Guided Missile Mechanical Equipment Repairer (Launcher Crewman, WG-6 and WG-7)

This job position is located in each launching platoon of the Activity's subordinate batteries. The Activity contends that an incumbent in this position performs guard duty of a nature which is separate and apart from the normal security functions performed by all technicians in the air defense program and which, therefore, requires the exclusion of this position from the unit. The Petitioner, on the other hand, states that the primary duty of the subject position is that of maintenance on equipment and that incumbents in this position are not guards within the meaning of the Order.

The job description for the Guided Missile Mechanical Equipment Repairer (Launcher Crewman), specifically requires that, in addition to the performance of duties necessary to the preparation, operation, and firing of Nike Hercules missiles, and in addition to maintenance functions, the employees in this job classification shall: "Perform[s] as an armed guard responsible for ensuring that maximum security is provided in the Nike Hercules launching area. Responsibility includes maintenance of law and order, the prevention of unauthorized entry and the protection of the area from sabotage, espionage, fire and other acts detrimental to the safeguard of buildings and equipment which may include nuclear weapons."

The record reveals that incumbents in the subject position, in fact, perform the guard functions set forth in the job description on a regular, recurring basis and that, on the average, such guard duty accounts for more than thirty percent of their total work hours. Thus, the record reflects that almost all of the employees who were in the disputed classification for the six-month period prior to the hearing in this matter spent over thirty percent of their work time on guard duty, and that some forty percent of these employees spent fifty percent or more of their work time performing such guard duty. While

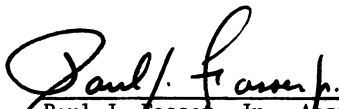
there is evidence to indicate that certain general maintenance duties are performed on occasion while the employees at issue are assigned to guard duty, the record reveals that the employees' primary responsibility and function while on guard duty is the maintenance of the security of their assigned post. The record reveals further that the employees in the disputed classification are given specific training for the purpose of the proper performance of their guard duty and that they are assigned such duty on a rotational basis throughout a twenty-four hour shift. Moreover, the record indicates that during each of their recurrent twenty-four hour work shifts, the employees at issue are required to be in uniform and to remain on the installation, are issued weapons after 4:00 p.m. regardless of whether they are on assigned guard duty or not, and are required to maintain themselves in a state of readiness throughout their tour of duty.

Based on the foregoing, I find that Guided Missile Mechanical Equipment Repairer (Launcher Crewman, WG-6 and WG-7) are guards within the meaning of Section 2(d) of the Executive Order. In this regard, noted particularly was the substantial amount of time spent, on a regular and recurrent basis, in the performing of armed guard duty by the employees in the above classification. 2/ Accordingly, I find the existing exclusively recognized unit should be clarified to exclude employees in the classification of Guided Missile Mechanical Equipment Repairer (Launcher Crewman, WG-6 and WG-7).

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the Chicago Chapter, Association of Civilian Technicians, Incorporated, was certified on April 16, 1973, be, and hereby is, clarified by excluding from the said unit the employee classification Guided Missile Mechanical Equipment Repairer (Launcher Crewman, WG-6 and WG-7).

Dated, Washington, D.C.
March 14, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

2/ Cf. Virginia Air National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER AMENDING RECOGNITION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
KIRTLAND AIR FORCE BASE EXCHANGE 1/

Activity

ARMY AND AIR FORCE EXCHANGE SERVICE,
KIRTLAND AIR FORCE BASE EXCHANGE
A/SLMR No. 371

and

Case Nos. 63-4410(CU) and
63-4508(AC)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2263

Petitioner

DECISION AND ORDER AMENDING RECOGNITION

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2263 filed a petition for clarification of unit (CU) seeking to clarify an existing exclusively recognized bargaining unit in order to have it conform to a new organizational structure brought about by the reorganization of the Sandia Area Exchange of the Army and Air Force Exchange Service. Specifically, the AFGE sought to add the approximately 46 unrepresented employees of the former Kirtland Air Force Base Exchange to the unit of approximately 116 employees of the former Sandia Base Exchange who currently are represented by the AFGE. The AFGE also filed a petition for amendment of certification (AC) seeking to amend the designation of the Activity and the labor organization named in the prior recognition.

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Paul Hall. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Assistant Secretary found that there was insufficient basis to support the AFGE's contention that the reorganization resulted in an accretion or addition to its exclusively represented unit. In this connection, he noted the fact that notwithstanding the reorganization and change in designation of the Activity, there remained viable and identifiable groups of employees performing the former Sandia Base Exchange and Kirtland Air Force Base Exchange functions. Accordingly, he ordered that the CU petition be dismissed.

Upon the entire record in these cases, the Assistant Secretary finds:

The record revealed that as a result of the reorganization effected in July 1971 the designation for the Activity was, in fact, changed. Accordingly, consistent with the request of the parties, the Assistant Secretary amended the prior recognition to conform to the existing circumstances resulting from the change.

In Case No. 63-4410(CU), the Petitioner, American Federation of Government Employees, AFL-CIO, Local 2263, herein called AFGE, filed a petition for clarification of unit (CU) seeking to clarify an existing exclusively recognized bargaining unit in order to have it conform to a new organizational structure brought about by the reorganization of the Sandia Area Exchange of the Army and Air Force Exchange Service. An effect of this reorganization was the administrative merger of the Kirtland Air Force Base Exchange and the Sandia Base Exchange, both of which had been part of the Sandia Area Exchange of the Army and Air Force Exchange Service. More specifically, the AFGE seeks to add the approximately 46 unrepresented employees of the former Kirtland Air Force Base Exchange to the unit of approximately 116 employees of the

The record revealed also that in July 1971, concurrent with the Activity's reorganization, Sandia Base Lodge No. 2346 AFGE, AFL-CIO, which was the exclusive representative of the former Sandia Base Exchange employees, merged into the AFGE, AFL-CIO Local 2263. In these circumstances, and consistent with the agreement of the parties, the Assistant Secretary amended the prior recognition to conform to this change.

1/ The name of the Activity appears as amended at the hearing.

former Sandia Base Exchange who currently are represented by the AFGE. 2/
The proposed unit description includes:

All regular full-time and regular part-time employees of the Army and Air Force Exchange Service at Kirtland Air Force Base, New Mexico. Excluded are professional employees, temporary part-time employees, temporary full-time employees, casual employees, supervisors, management officials, personnel employees employed in other than a purely clerical capacity, and guards as defined in Executive Order 11491.

The AFGE also filed a petition for amendment of certification (AC) in Case No. 63-4508(AC) seeking to amend the designation of the Activity and the labor organization named in the prior recognition. The parties agreed that the requested clarification of unit and amendments to the certification should be granted.

The Sandia Base Exchange and the Kirtland Air Force Base Exchange are located immediately adjacent to each other near Albuquerque, New Mexico. Prior to July 1971, these two Exchanges were part of the Sandia Area Exchange of the Army and Air Force Exchange Service and were designated as the Sandia Base Exchange (East) and the Kirtland Air Force Base Exchange (West). In 1965, the Sandia Area Exchange accorded exclusive recognition to AFGE Sandia Base Lodge No. 2346 for a unit of all full-time and regular part-time employees located at Sandia Base Exchange (East).

Prior to July 1971, the Sandia Base Exchange and the Kirtland Air Force Base Exchange were under separate commanders who were responsible for their respective Exchange facilities, including the responsibility for personnel and labor-management relations matters. Reporting to the two commanders was a single general manager who was responsible for the administrative and operational functions at both Exchanges. 3/ While the record is not clear with respect to the area of consideration for vacancies or promotions at these Exchanges, it is clear that the area of consideration for reduction-in-force purposes included the entire Sandia Area Exchange. Further, the record reveals that there was no interchange or transfer of employees between the two Exchanges and that both Exchanges

2/ In July 1971, concurrent with the Activity's reorganization, AFGE Sandia Base Lodge No. 2346, which was the exclusive representative of the former Sandia Base Exchange employees, merged into AFGE Local 2263.

3/ Under the general manager apparently were five divisions: Accounting, Retail Operations, Food Operations, Service Operations, and Personnel.

were subject to the same Army and Air Force Exchange Service regulations, provided the same services, employed employees in similar job classifications, and utilized a common personnel office. 4/

In July 1971, the Sandia Area Exchange was reorganized and, as a result, the Sandia Base Exchange (East) and the Kirtland Air Force Base Exchange (West) were administratively consolidated into one organizational entity now known as the Army and Air Force Exchange, Kirtland Air Force Base Exchange. 5/ There are approximately 116 employees located at Kirtland East and approximately 46 employees located at Kirtland West. The administrative reorganization was designed to delegate responsibility for the operations of the two Exchanges to a single Exchange manager, including the responsibility for conducting collective bargaining. Under the authority of the Exchange manager are the main store east, main store west, cafeteria east, cafeteria west, service station east, service station west, retail branch store east and retail branch store west.

In prior decisions, 6/ it has been indicated that in deciding matters involving reorganizations, the Assistant Secretary will consider the actual impact on employees resulting from such reorganizations. The record reveals that the reorganization herein has not resulted in the physical relocation of any of the employees involved, nor has it substantially affected the terms and conditions of their employment. Thus, although there is evidence of minimal interchange and transfer between employees of the two Exchanges, the record discloses that the employees are still engaged in providing essentially the same services, are employed in the same job classifications, and are working essentially at the same locations under the same immediate supervision as prior to the reorganization.

Under the circumstances presented in this case, I find insufficient basis to support the AFGE's contention that the reorganization resulted in an accretion or addition to its exclusively represented unit. Thus, the evidence establishes that, notwithstanding the reorganization and

4/ Prior to the administrative merger, the personnel office for both Exchanges was located at the Sandia Area Exchange.

5/ For the purposes of this decision, the former Sandia Base Exchange is hereinafter referred to as Kirtland East and the former Kirtland Base Exchange is hereinafter referred to as Kirtland West.

6/ See, e.g., Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360; Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona, A/SLMR No. 351; Department of the Army, Headquarters, U. S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 328; and AMC Ammunition Center, Savanna, Illinois, A/SLMR No. 291.

change in designation of the Activity, there still remain viable and identifiable groups of employees performing the former Sandia Base Exchange and Kirtland Air Force Base Exchange functions. 7/ Accordingly, notwithstanding the agreement of the parties, I shall dismiss the CU petition in Case No. 63-4410(CU).

As noted above, by its AC petition, the AFGE proposes to amend the prior recognition to reflect the change in the designation of the Activity and its employees' exclusive representative. With regard to the designation of the Activity, the evidence, as noted above, discloses that as a result of a reorganization effected in July 1971, the designation of the Activity was, in fact, changed. Accordingly, consistent with the request of the parties, I shall order that the prior recognition be amended to conform to the existing circumstances resulting from the change in the designation of the Activity precipitated by the agency reorganization.

In addition, the AFGE proposes to amend the prior recognition to reflect the change in the designation of the incumbent labor organization. In this connection, the evidence, as noted above, discloses that concurrent with the above noted reorganization, two AFGE locals merged with a resulting change in the designation of the incumbent labor organization. Accordingly, consistent with the agreement of the parties, I shall order that the prior recognition be amended to conform to the existing circumstances resulting from the change in the identity of the incumbent labor organization precipitated by the merger of the two AFGE locals.

ORDER

IT IS HEREBY ORDERED that the recognition accorded the Sandia Base Lodge No. 2346, American Federation of Government Employees, AFL-CIO in 1965 be, and it hereby is, amended by substituting therein as the designation of the Activity, Army and Air Force Exchange Service, Kirtland Air Force Base Exchange for Sandia Area Exchange, Army and Air Force Exchange Service. 8/


7/ Cf. Aberdeen Proving Ground Command, Department of the Army, A/SLMR No. 282.

8/ It should be noted that while I have ordered that a change in the designation of the Activity is appropriate under the circumstances, the scope of the unit, as noted in the dismissal of the instant CU petition, continues to encompass only those employees located at the former Sandia Base Exchange (Kirtland East).

IT IS FURTHER ORDERED that the designation of the Sandia Base Lodge No. 2346, American Federation of Government Employees, AFL-CIO, described in the prior recognition be changed to American Federation of Government Employees, AFL-CIO, Local 2263.

IT IS FURTHER ORDERED that the petition in Case No. 63-4410(CU) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 19, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

March 25, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTIONS
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), COLUMBUS, OHIO

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), AKRON, OHIO
A/SLMR No. 372

This case arose as a result of a petition by Local 73, National Federation of Federal Employees, seeking a unit of all employees assigned to the Defense Contract Administration Services Office (DCASO), Columbus, Ohio, and a petition filed by Local 3426, American Federation of Government Employees, AFL-CIO, seeking a unit of all employees assigned to the Defense Contract Administration Services Office (DCASO), Akron, Ohio. The Activities contended that the petitioned for units were not appropriate because they excluded employees who shared a community of interest with the employees in the units sought. In this regard, the Activities asserted that the appropriate unit should be Regionwide in scope, including all employees in the four exclusively recognized bargaining units currently in existence within the Region, in addition to all eligible employees who currently are not included in any exclusively recognized unit. In the alternative, the Activities contended that the appropriate unit should consist of all eligible employees, Regionwide, who are in exclusively recognized units for which there is no current negotiated agreement, together with all eligible employees who are not included in any exclusively recognized unit. As another alternative, the Activities indicated that they would accept as an appropriate unit all eligible employees of the Region who currently were not included in exclusively recognized units.

Under all of the circumstances, the Assistant Secretary found that the units sought herein are appropriate for the purpose of exclusive recognition under the Order. In this regard, the Assistant Secretary noted that within each of the claimed units the employees enjoy common supervision, are subject to similar personnel policies and job benefits,

similar working conditions, and perform their duties within an assigned geographical locality. Further, the employees assigned to a particular DCASO do not interchange with employees of other offices, districts, or headquarters of the Region and, generally, transfer only in situations involving promotion or reduction-in-force procedures. Moreover, noting that currently there are four exclusively recognized units within the Region, two of which are covered by a negotiated agreement, the Assistant Secretary found that each of the units sought would promote effective dealings and efficiency of agency operations. The Assistant Secretary rejected the contention made by the Activities that the certification of a less than Regionwide unit would limit the scope of negotiations within that unit solely to those matters within the delegated discretionary authority of the particular chief of the individual subordinate organizational unit. Citing the decision of the Federal Labor Relations Council (Council) in United Federation of College Teachers, Local 1460, and U.S. Merchant Marine Academy, FLRC No. 71A-15, and applying the Council's rationale to the instant situation, the Assistant Secretary noted that where, as here, certain labor relations and personnel policies are established by the Regional headquarters, it is the obligation of the latter to provide representatives with respect to the units found appropriate herein "who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit."

Accordingly, the Assistant Secretary ordered that elections be conducted in the units found appropriate.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), COLUMBUS, OHIO 1/

Activity

and

Case No. 53-6652

LOCAL 73, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Petitioner

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
CLEVELAND, OHIO, DEFENSE
CONTRACT ADMINISTRATION SERVICES
OFFICE (DCASO), AKRON, OHIO 2/

Activity

and

Case No. 53-6733

LOCAL 3426, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Francis R. Flannery. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

1/ The name of this Activity appears as amended at the hearing.

2/ The name of this Activity appears as amended at the hearing.

Upon the entire record in these cases, including the briefs filed by the Activities and by Petitioner Local 73, National Federation of Federal Employees, herein called NFFE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activities.

2. In Case No. 53-6652, the NFFE seeks an election in a unit of all regular full-time General Schedule and Wage Grade employees of the Defense Contract Administration Services Office (DCASO), Columbus, Ohio, excluding all military employees, management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees and security guards. In Case No. 53-6733, Local 3426, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all regular full-time General Schedule employees assigned and reporting to DCASO, Akron, Ohio, excluding all management officials, supervisors, professional employees, military employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and security guards.

The Activities contend that the only appropriate unit is a unit made up of all eligible employees of the Defense Contract Administration Services Region (DCASR), Cleveland, Ohio. In the Activities' view, such a Regionwide unit would include all of the employees in the four exclusively recognized units currently in existence within the Region, in addition to all eligible employees who currently are not included in any exclusively recognized unit. In the alternative, the Activities contend that the appropriate unit should consist of all eligible employees in exclusively recognized units for which there is no current negotiated agreement, together with all eligible employees who currently are not included in any exclusively recognized unit. A second alternative the Activities indicated they would accept is a unit consisting of all eligible employees of the Region currently not included in exclusively recognized units, including the employees sought in the two petitions herein. With respect to the units petitioned for in the subject cases, the Activities assert that they are not appropriate because they exclude employees who share a community of interest with the employees in the units sought and, further, that the claimed units will not promote effective dealings and efficiency of agency operations.

The DCASR, Cleveland, is one of 11 such regions of the Defense Supply Agency and is a primary level field activity of that Agency. It provides contract administration services in support of the Department of Defense as well as other Federal agencies, and encompasses a geographic area which includes the states of Ohio, Kentucky, and the three western-most counties of the state of Pennsylvania. There are two Defense Contract Administration Services Districts (DCASD's) within DCASR, Cleveland; namely, DCASD, Dayton, and DCASD, Cincinnati. In addition, DCASR, Cleveland, includes

four DCASO's located in Toledo, Akron, and Columbus, Ohio, and at the Gould Plant in Cleveland, Ohio. Both the DCASD's and the DCASO's report directly to the headquarters DCASR, Cleveland. Approximately 1,250 civilians are employed throughout the DCASR, Cleveland.

DCASR, Cleveland, is headed by a Regional Commander (a military officer) whose office is located at the DCASR headquarters in Cleveland. Directly under the Commander and located at the headquarters are a number of offices and directorates which are responsible for planning and monitoring all facets of the DCASR's operations. The offices are concerned primarily with matters regarding planning, administration, contract compliance problems and security problems at defense plants; the directorates are concerned with matters regarding contract administration, production and quality assurance. While personnel management is centralized at DCASR, Cleveland, headquarters, the record reveals that there are personnel management specialists located at each of the DCASD's in Dayton and Cincinnati who perform various personnel functions and are responsible for promotions and evaluation of clerical positions in those districts.

At present, there are four separate exclusive bargaining units within DCASR, Cleveland. The NFFE is the exclusive bargaining representative for a unit of all nonsupervisory, nonprofessional employees assigned to DCASR headquarters. Included in this unit are all nonsupervisory, nonprofessional employees assigned to the DCASO at the Gould plant, which is located in the Cleveland metropolitan area. The NFFE also represents a unit of all General Schedule and Wage Grade employees working in Elyria, Jefferson, and Ashtabula counties in the states of Ohio and Pennsylvania. These two units currently are covered by a single negotiated agreement which has a termination date of April 7, 1975. NFFE Local 75 is the exclusive bargaining representative for a unit of all nonsupervisory employees, including professional employees, assigned to the DCASD, Cincinnati. In this regard, the record discloses that the parties currently are engaged in negotiating an agreement for this unit. Lastly, NFFE Local 42 is the exclusive bargaining representative for a unit of all nonsupervisory General Schedule employees assigned to the DCASO, Toledo, office. The record reveals that there is no agreement covering this unit. There is no history of collective bargaining concerning the employees assigned to the DCASD, Dayton, or as to the employees sought by the instant petitions at the DCASO, Columbus, and the DCASO, Akron.

Although an administrative distinction is made in the organization of the DCASR between a DCASD and a DCASO, the evidence establishes that they are essentially the same type of organization. Thus, both are subdivisions of the DCASR and are concerned primarily with the day-to-day functions of the DCASR within a given geographical area. Generally, a DCASD is somewhat larger than a DCASO in terms of numbers of personnel and performs a limited number of functions not normally assigned to a DCASO. However, as noted above, both organizations report directly to

the Regional Commander at DCASR, Cleveland, headquarters and the relationship between them and headquarters is essentially the same. The DCASO's are under the supervision of a chief and organizationally are subdivided to correspond with the directorates of the Regional headquarters. Thus, in each DCASO, there is a Division of Contract Administration, a Division of Production, a Division of Quality Assurance, and an Office of Administrative Services. Depending upon the number of personnel assigned to each DCASO, it may be further organizationally subdivided with each division having two or more branches. In addition, the record reveals that there are a number of Resident Offices attached to each of the DCASO's. These Resident Offices either are assigned to one particular manufacturing facility, or to a specific sub-geographical area encompassed by the larger geographical area of the DCASO. Although the employees assigned to these Resident Offices do not report daily to the DCASO to which they are assigned, they conduct their duties in exactly the same manner in which the employees assigned to and working out of the DCASO's perform their duties. Thus, all employees submit daily reports of their activities to their first-line supervisors, who then transmit these reports to the branch or division chief of the DCASO and, thereafter, to the chief of the DCASO.

The record reveals that all of the employees of the DCASO's perform their duties pursuant to policies and procedures established by the Regional headquarters' staff and that employees within the Region are subject to uniform personnel policies and job benefits. The record does not indicate any degree of interchange of employees from office to office, or from district to district, or between the headquarters' staff and the offices within the DCASR. While the evidence establishes that there is some degree of transfer of employees among the various geographical organizational components within the DCASR, generally such transfers occur within the context of promotion or reduction-in-force procedures. The record discloses that the area of consideration for promotion and for reduction-in-force for all employees classified GS-8 and above is Region-wide, whereas the area of consideration for promotion and reduction-in-force for employees classified GS-7 and below is within the geographical area of the location of the employee involved. A significant number of the employees assigned to the DCASO's perform their duties at the sites where the contracts for particular products or services are being performed and, to this extent, the working conditions of the employees may vary from one assignment to another. Employees assigned to a particular DCASO perform their duties only within the geographical area assigned to that DCASO and work under the supervision of the chief of the DCASO and his subordinate supervisors. The record reveals that employees assigned to a particular division within a DCASO share common job classifications with other employees in the same division and that employees so classified utilize basically similar skills and perform substantially similar duties.

Based on all of the foregoing, I find that the units sought herein are appropriate for the purpose of exclusive recognition under the Order.

Thus, the evidence establishes that within each of the claimed units the employees enjoy common supervision, are subject to similar personnel policies and job benefits, similar working conditions, and perform their duties within an assigned geographical locality. Further, employees assigned to a particular DCASO do not interchange with any other employees of the DCASR and, generally, transfer from that location only in situations involving promotion or reduction-in-force procedures. Under these circumstances, I find that the employees in each of the units petitioned for herein share a clear and identifiable community of interest separate and distinct from other employees of the DCASR, Cleveland. ^{3/} Moreover, I find that the units sought will promote effective dealings and efficiency of agency operations. In this regard, it was noted that currently there are four exclusively recognized units within the DCASR, Cleveland, two of which currently are covered by a negotiated agreement. Further, I reject the contention made by the Activities that the certification of a less than Regionwide unit would limit the scope of negotiations solely to those matters within the delegated discretionary authority of the particular chief of the particular individual subordinate unit involved. As stated by the Federal Labor Relations Council (Council) in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15, "Clearly, the Order requires the parties to provide representatives who are empowered to negotiate and to enter into agreements on all matters within the scope of negotiations in the bargaining unit." Applying the Council's rationale to the instant situation, where certain labor relations and personnel policies are established by the DCASR headquarters, in my view, it is the obligation of the DCASR to provide representatives with respect to the units found appropriate herein "who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit."

Accordingly, based on the foregoing, I find that the following units are appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: ^{4/}

^{3/} Cf. Defense Supply Agency, DCASR Boston-Quality Assurance, A/SLMR No. 97 and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Boston, Massachusetts, A/SLMR No. 271.

^{4/} I am advised administratively that there are no Wage Grade employees assigned to DCASO, Columbus. As to the requested exclusion of military personnel, I find such an exclusion to be too broad in the absence of evidence that there are, in fact, no off-duty military personnel employed by the Activities who properly would be included in the claimed units. Accordingly, I shall not specifically exclude military personnel from the units found appropriate. Cf. Department of the Navy, Navy Exchange, Mayport, Florida, A/SLMR No. 24 and Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134.

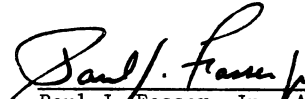
In Case No. 53-6652: All employees assigned to the Defense Contract Administration Services Office (DCASO), Columbus, Ohio, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

In Case No. 53-6733: All employees assigned to the Defense Contract Administration Services Office (DCASO), Akron, Ohio, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTIONS

Election by secret ballot shall be conducted among the employees in the units found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible in Case No. 53-6652 shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 73, National Federation of Federal Employees. Those eligible to vote in Case No. 53-6733 shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 3426, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.
March 25, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

April 4, 1974

A/SLMR No. 373

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
HUNTERS POINT NAVAL SHIPYARD
A/SLMR No. 373

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
HUNTERS POINT NAVAL SHIPYARD

Respondent

and

Case No. 70-2481

ROBERT BLUEFORD

Complainant

This case involves an unfair labor practice complaint filed by an individual (Complainant) against the Department of the Navy, Hunters Point Naval Shipyard (Respondent) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by terminating his employment because of his having processed two grievances against the Respondent pursuant to the provisions of a negotiated agreement between the Respondent and the Hunters Point Metal Trades Council (MTC).

The evidence established that the Respondent hired the Complainant as a sheetmetal mechanic on a trial basis under a Temporary Limited Appointment in June 1972, and that the latter worked without incident until September 1972. In September and October 1972, the Complainant filed grievances alleging violation of various sections of the negotiated agreement between the Respondent and the MTC and harassment by his supervisor. The Respondent denied both grievances, and the Complainant did not attempt to process either of them through the additional steps in the grievance procedure.

On November 20, 1972, the Respondent advised the Complainant that his work was unsatisfactory and, for that reason, his employment was being terminated. On November 21, 1972, after having determined that the Complainant's request to be transferred to a job for which he was better suited could not be honored and that there was no basis for honoring the Complainant's request that "lack of work" be given as the reason for his termination, the Respondent advised the Complainant that his employment would be terminated effective November 29, 1972.

The Chief Administrative Law Judge concluded that the Complainant had failed to establish that his termination was based on improper considerations. He found that the evidence presented indicated that the Complainant's work was unsatisfactory, and that he had failed to establish any relation between his termination and his having filed grievances against the Respondent. Accordingly, he concluded that the Complainant had not met his burden of proving the allegations in the complaint by a preponderance of the evidence and recommended that such complaint be dismissed in its entirety.

Upon consideration of the Chief Administrative Law Judge's Report and Recommendation and the entire record in the case, and noting that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendation of the Chief Administrative Law Judge. He therefore ordered that the complaint be dismissed.

DECISION AND ORDER

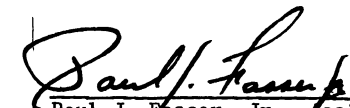
On February 15, 1974, Chief Administrative Law Judge H. Stephan Gordon issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Chief Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Chief Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Chief Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions, and recommendation of the Chief Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-2481 be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 4, 1974


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



Point Naval Shipyard, San Francisco, California (the Activity), alleging violations of Executive Order 11491, as amended (the Order). A Notice of Hearing on Complaint was issued October 11, 1973, and a hearing was held in San Francisco, California on the 13th, 15th and 16th days of November, 1973.

Both parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses and adduce evidence. A post-hearing brief has been filed by the Activity and has been given due consideration. No brief has been filed on behalf of the Complainant.

Upon the entire record herein, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

Findings of Fact

1. On June 29, 1972, Complainant was hired by the Activity as a Sheetmetal Mechanic under a Temporary Limited Appointment. 1/ He was assigned to the Sheetmetal Shop (Shop 17) of the Production Department, Structural Group, for work on the restructuring and modification of naval vessels. Complainant's previous experience in the sheetmetal trade was limited to his employment in the 1940's as an aircraft sheetmetal repair mechanic. Although this experience was considered by management to indicate only marginal qualification for placement in a sheetmetal mechanic position, Mr. Blueford was hired on a trial basis because of an unusually heavy workload in Shop 17.

2. The Hunters Point Metal Trades Council (MTC) was the exclusive representative for workers employed at the Activity

1/ The status of such an appointment is described in Chapter 316, Subchapter 4, of the Federal Personnel Manual (FPM). In brief, a temporary limited appointee is employed to fill positions not expected to last more than one year, seasonal and part-time positions and continuing positions when temporarily vacated for periods of less than one year, or when filled by persons 70 years or older. Such appointments are made for a specified period not to exceed one year. Appointees do not have the protection of reduction-in-force procedures and may be separated at any time upon notice in writing from an appointing officer.

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In the Matter of :
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DEPARTMENT OF THE NAVY :
HUNTERS POINT NAVAL SHIPYARD, :
Respondent :
and : Case No. 70-2481
 :
ROBERT BLUEFORD, :
Complainant :
.....

Richard C. Wells
Labor Relations Advisor
Regional Office of Civilian
Manpower Management
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San Francisco, California 94102
For the Respondent

Willie J. Minniweather
Vice President
Metal Trades Council
Hunters Point Naval Shipyard
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San Francisco, California 94115
For the Complainant

Before: H. STEPHAN GORDON
Chief Administrative
Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arose from a Complaint filed on January 23, 1973, by Robert Blueford (the Complainant), against Hunters

at the time of Complainant's appointment. An agreement negotiated in 1971 controlled management-labor relations at the Activity. 2/ Upon Complainant's employment he joined the MTC and was a member at all times material hereto.

3. According to Complainant's own testimony, he had difficulty performing the work of a sheetmetal mechanic. He ascribed this difficulty partly to his lack of experience and training and partly to the failure of his supervisors to give him adequate guidance. Complainant also testified that he was uncomfortable working with sheetmetal and had hoped for a transfer to the shipfitting shop at the Activity where because of his experience and skills he would be more comfortable with the work.

4. On September 14, 1972, Complainant filed a grievance appeal with the Structural Group Supervisor, G. J. Gioana, the second grievance step under procedures provided for in the negotiated agreement. 3/ The grievance, alleging violation of various sections of the agreement and requesting certain relief, stemmed from Complainant's belief that he had been required by his supervisor, Mr. Cortes, to perform a work task under unsafe working conditions. The merits of this grievance are not here relevant.

5. Supervisor Gioana issued his decision on Complainant's grievance appeal on October 10, 1972. 4/ He found that Mr. Cortes was justified in assigning Complainant work as he had, but directed that Complainant be reassigned to another supervisor in order to avoid the possibility of further dissatisfaction due to a clash of personalities.

While Complainant continued to believe in the validity of his September 14 grievance he did not avail himself of appeal procedures provided for in the negotiated agreement for review of Mr. Gioana's second step decision.

2/ Joint Exhibit No. 3.

3/ Claimant's Exhibit No. 1.

4/ Activity Exhibit No. 1.

6. On October 4, 1972, after the filing of his first grievance appeal but before Mr. Gioana's decision was issued, Complainant filed a second grievance appeal. 5/ This grievance flowed from an encounter Complainant had with Mr. Cortes on October 3, 1972, at which Cortes allegedly told Complainant to bring problems to his attention first, before filing a formal grievance. Complainant contended that this order constituted harrassment and interfered with his exercise of rights guaranteed by the negotiated agreement.

Supervisor Gioana, in his decision on this grievance appeal, found no violation of the agreement, terming Mr. Cortes' directive both "prudent and reasonable" under the applicable grievance procedures. 6/ Moreover, since under the terms of the first grievance adjustment, Complainant was to be reassigned to a new supervisor, no further action appeared warranted. As with his first grievance, Complainant chose not to press his appeal at the higher steps available to him.

7. On November 20, 1973, a meeting between Group Supervisor Gioana and the Complainant and his representative, Union President Curry Brooks, was held at Mr. Gioana's request. Complainant was informed that numerous reports and evaluations of his work performance indicated that the quality and quantity of his output as a sheetmetal mechanic were inadequate. In the course of this meeting Complainant and his representative requested of Mr. Gioana that if alternate work was available at the Activity which better suited Complainant's experience a transfer be arranged. Complainant also requested that if termination was indicated it not be for cause, but rather under the reduction-in-force (RIF) procedures. In this respect, it is noteworthy that the remedy requested by Complainant in the instant case is not necessarily reinstatement to his prior position, but rather that his dismissal letter be based on a purported lack of work at the Activity instead of his alleged inability to perform the tasks of a sheetmetal mechanic. The fact that such a letter would be spurious and constitute a sham reason for his dismissal is undisputed. (See Transcript pp. 198-201.)

5/ Joint Exhibit No. 2.

6/ Activity Exhibit No. 2.

8. Mr. Gioana determined that there were no alternative positions available at the Activity for which Complainant was qualified and that a RIF action in Complainant's case was not justifiable. Therefore, on November 21, 1973, on his recommendation a Notification of Termination of Temporary Limited Appointment was sent to the Complainant from P. D. Kieldgaard, Production Officer at the Activity. Complainant was therein advised that effective November 29, 1972 he was terminated from employment because of a demonstrated inability to perform the duties of a sheetmetal mechanic. On November 28, 1972 Complainant filed a formal charge against the Activity alleging that his discharge violated sections 19(a)(1) and (2) of the Order.

9. Relatively little evidence regarding Complainant's competence as a sheetmetal mechanic was introduced at the hearing of this matter. As indicated above Complainant himself testified regarding his lack of familiarity with this type of work and as to the difficulty he experienced in performing certain tasks required in his position. Donald Maxey, a journeyman sheetmetal worker and MTC steward at the Activity, testified that Complainant's work performance was "very good." Mr. Maxey based his appraisal on an admittedly casual observation of Complainant's work, and the limited experience of occasionally working with Complainant as a fellow employee.

Mr. Gioana testified that Complainant's termination was prompted solely by numerous written reports received from supervisors regarding Complainant's incompetence. Gioana testified that he confirmed these reports to his own satisfaction by independent follow-up investigation. However, the record fails to reflect that Complainant was made privy to these reports prior to termination, and when asked to produce the reports at the hearing Mr. Gioana responded that he did not know of the present whereabouts of Complainant's file and suggested that possibly it was in the possession of Mr. Cortes who has retired from the Activity since Complainant's termination.

10. There was unanimity in the testimony of Messrs. Maxey, Gioana and Terrance Wright, labor-management relations specialist at the Activity, that grievance actions were not an uncommon occurrence at Shop 17, where Complainant

was employed. Gioana and Wright testified that more second step grievances were processed from Shop 17 than from any of the other three shops in the Structural Group. No evidence was adduced at the hearing regarding the number of grievances filed by temporary employees as compared with permanent, tenured employees, or whether there were instances in the recent history of the Activity of the termination of temporary employees following their exercise of their grievance rights.

11. There was, however, a direct conflict of testimony upon which I feel compelled to comment at this time. Union President Brooks testified that during the first part of December 1972, after Complainant's termination, he had occasion to meet informally with Mr. Donald Casey, a labor relations officer at the Activity. At this time the Union was processing the grievance of another Shop 17 temporary employee, Sam Cordova. Mr. Brooks testified that at his meeting with Mr. Casey the latter told him that it would be "foolish" to press the Cordova grievance further, because Mr. Cordova could meet the same fate as Mr. Blueford. Mr. Casey, while recalling a meeting with Mr. Brooks, categorically denied making the statement attributed to him. Since there were no witnesses to the alleged statement, no evidence corroborating Brooks' version of the meeting was offered. Nor did Complainant adduce any evidence as to the fate of Cordova's grievance or what, if any, action the Activity actually took against him. I find it noteworthy, however, that even though the import of the statement Brooks attributed to Casey is clear, and its impact on the instant case obvious, 7/ Mr. Brooks did not feel compelled to report it at the informal conference on Complainant's charges held December 20, 1972. Nor was this alleged statement ever brought to the attention of the Activity prior to Mr. Brooks' testimony in the instant hearing. Under all the circumstances and in view of Mr. Casey's unqualified denial, I cannot credit Mr. Brooks' recollection.

7/ Complainant considered this testimony of sufficient import to request Mr. Brooks' appearance at the hearing, even though this witness was then employed at the Activity's Norfolk Naval Shipyard in Virginia. At Complainant's insistence the witness was flown to San Francisco for the purpose of appearing as a witness in this case.

Conclusion of Law

1. In his Complaint filed with the Assistant Secretary on January 23, 1973, Complainant alleges that his termination by the Activity was "based in part on his having filed two grievances against his supervisors under the procedures of the collective bargaining agreement between the Metal Trades Council and the Shipyard." 8/ This action, Complainant contends, violated section 19(a) (1) and (2) of Executive Order 11491. 9/

2. Complainant's appointment with the Activity as a temporary limited employee does not affect the rights guaranteed to him by the Executive Order or compromise the injunctions of section 19. 10/

3. To support his allegation that the Activity has engaged in conduct violative of sections 19(a) (1) and (2), Complainant must be found to have shown by a preponderance of the evidence that his termination from employment was a result of his grievance activities, 29 C.F.R. 203.14. While this ultimate burden of proof resides with the Complainant throughout the proceeding, if he were to present a prima facie showing that his discharge was unlawfully motivated

8/ Assistant Secretary's Exhibit No. 1(a).

9/ Sec. 19. Unfair Labor Practices. (a) Agency management shall not -

(1) interfere with, restrain, or coerce any employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

* * *

10/ Termination procedures under the Federal Personnel Manual and applicable regulations of the Department of the Navy treat employees with temporary limited appointments differently than other employees in ways not here relevant.

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the Activity would be obliged to demonstrate that its actions were lawful. 11/

4. When examining an Activity action for signs of unlawful motivation the timing of that action may be illuminative. In the present case notice of Complainant's proposed termination was given some seven weeks following the filing of his second grievance. Even if the Complainant were a permanent, tenured employee a finding of illicit motive premised on the timing of the action complained of would be difficult. When one considers the temporary nature of Complainant's appointment, which in any case could not have exceeded one year, the suggestion of unlawful motivation based on timing is even more faint. Thus, the Activity effected Complainant's termination almost at the half-way point of his temporary appointment. A further delay would have rendered any effort to terminate this employee practically meaningless. When this is viewed in the context that Complainant, because of his admitted lack of experience, was hired originally on an experimental basis; that his performance, because of his unfamiliarity with the work, was at best marginal; and that by his own admission he requested a transfer to work assignments at which he would feel more competent, I cannot, on the basis of the available evidence, infer that the discharge was illegally motivated. While the Order protects employees from discrimination because of the exercise of protected activities, it is also axiomatic that the exercise of such activities does not cloak an individual with immunity from otherwise legitimate and justified actions taken against him.

5. Nor does the testimony of Mr. Maxey as to Complainant's competence establish a prima facie showing that the Activity's justification for termination was merely a pretext to disguise an improper motive. Maxey was employed at the Activity as a journeyman sheetmetal mechanic and served as a MTC steward.

11/ This shift in the burden of going forward is recognized by the National Labor Relations Board in cases arising under section 8(a) (3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a) (3), NLRB v. Whittin Machine Works, 204 F.2d 833 (C.A. 1, 1953), Heck's, Inc., 156 NLRB 760 (1966). Where, as here, experience under the NLRA may be instructive in cases arising under the Executive Order, the Assistant Secretary will look to that experience for guidance, Charleston Naval Shipyard, A/SLMR No. 1.

- 8 -

April 4, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

He never directed Complainant's work as he did with other temporary employees and never was required to, or in fact did, formally evaluate Complainant's performance. His observation of Complainant's work was casual, brief and informal. His characterization of Complainant's performance, standing alone and in the face of other evidence, must be accorded little weight.


6. Finally, a careful review of all the creditable evidence fails to show any Activity animus against the MTC, its members, or other employees for their exercise of any of the rights guaranteed under the Executive Order.

7. I therefore find and conclude that Complainant has failed to establish a prima facie case that his discharge was based, even in part, on his grievance filing activity.

8. Even if, however, such a prima facie case were to be found, a review of the entire record persuades me that Complainant has failed to carry the ultimate burden of proof. The evidence demonstrates that Complainant was given a temporary limited appointment to help the Activity meet an extraordinarily heavy production schedule. He was terminated when it became apparent from his supervisor's evaluations that his marginal experience in sheetmetal work did not allow him to perform adequately the duties of his position. While Complainant had filed several grievances prior to his discharge, I find that this activity had no bearing on his termination.

Recommendation

On the basis of the foregoing findings and conclusions, I hereby recommend to the Assistant Secretary that the Complaint here in issue be dismissed in its entirety.


H. Stephan Gordon
Chief Judge

Dated: February 15, 1974
Washington, D.C.

DIRECTORATE OF MAINTENANCE,
PRODUCTION BRANCH,
WARNER ROBINS AIR MATERIEL AREA,
ROBINS AIR FORCE BASE
A/SLMR No. 374

This unfair labor practice proceeding involves a complaint filed by the American Federation of Government Employees, Local 987 (Complainant), alleging that the Directorate of Maintenance, Production Branch, Warner Robins Air Materiel Area, Robins Air Force Base (Respondent) violated Section 19(a) (1) and (6) of the Executive Order by frustrating the attempts of a duly designated union shop steward to confer with the Respondent's employees concerning grievances and other problems by requiring the union shop steward to secure an administrative permit before leaving his work area and going into another work area. At the hearing, the Complainant alleged also that Section 19(a)(6) of the Order had been violated because the requirement that an employee have an administrative permit to leave his work area constituted a unilateral change in working conditions. The Respondent denied that there was any interference with employee or union rights and contended that the use of the administrative permit had existed for some time and was used for security and administrative purposes. Further, the Respondent moved to dismiss the allegation made by the Complainant that there was a unilateral change in working conditions on the grounds that such allegation was not included within the complaint and, therefore, did not comply with the requirements of the Assistant Secretary's Regulations.

The Administrative Law Judge noted that the requirement of an administrative permit in order to enter a work section within the Activity's security control area had been applied to employees other than those on union business and that such permit could be obtained without undue delay or inconvenience. He concluded that the administrative permit requirement was not unreasonable nor did it unduly interfere with the union shop steward's performance of union duties. Further, he concluded that the permit requirement did not, in and of itself, constitute a violation of Section 19(a)(1) of the Order. Accordingly, he found that the refusal by the Respondent to allow a union shop steward to enter a particular work section within the security control area and speak to employees, without first having secured an administrative permit from his supervisor, did not constitute a violation of Section 19(a)(1) of the Order.

Similarly, the Administrative Law Judge reasoned that since the requirement of the administrative permit was not, in and of itself, violative of Section 19(a)(1), it could not be concluded that such requirement deprived

employees of their right to be represented by the Complainant, nor deprived the Complainant of its right to represent the employees in question, inasmuch as the union steward, by routinely obtaining the permit, could have had access to the employees involved for the purpose of representing them. Accordingly, the Administrative Law Judge found that the existence of the permit rule and its application in the circumstances herein, did not constitute a violation of Section 19(a)(6) of the Order.

The Administrative Law Judge also found that the Complainant's additional Section 19(a)(6) allegation made at the hearing was outside of the scope of the complaint and could not be considered. However, he considered the merits of the allegation and found that the requirement concerning the administrative permit was a long-standing Respondent policy, at least as it was applied in a work section within the security control area, and, therefore, did not constitute a unilateral change in working conditions. Accordingly, he found that the Respondent did not violate Section 19(a)(6) of the Order.

Upon review of the entire record in this proceeding, including the Report and Recommendation of the Administrative Law Judge, and noting the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge.

A/SLMR No. 374

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DIRECTORATE OF MAINTENANCE,
PRODUCTION BRANCH,
WARNER ROBINS AIR MATERIEL AREA,
ROBINS AIR FORCE BASE

Respondent

and

Case No. 40-4700(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Complainant

DECISION AND ORDER

On February 4, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged and recommending that the complaint be dismissed. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the findings, conclusions, and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-4700(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 4, 1974


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



.....
In the Matter of :

DIRECTORATE OF MAINTENANCE, :
PRODUCTION BRANCH :
WARNER ROBINS AIR MATERIEL AREA : CASE NO. 40-4700 (CA)
ROBINS AIR FORCE BASE, :

Respondent :

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 987, :

Complainant :
.....

Pursuant to a complaint filed February 16, 1973, under Executive Order 11491, as amended, (hereinafter called the Order) by American Federation of Government Employees, Local 987, (hereinafter called the Complainant or Union) against Directorate of Maintenance, Production Branch, Warner Robins Air Materiel Area, Robins Air Force Base, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the Atlanta Region on May 4, 1973.

A hearing was held in this matter before the undersigned on July 11 and 12, 1973, 1/ at Robins Air Force Base, Georgia. All parties were represented and afforded full opportunity to be heard and to introduce other relevant evidence on the issues involved. Upon the conclusion of the taking of testimony both parties were given an opportunity to make oral argument. Both parties submitted briefs.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendation:

Findings of Fact

The Warner Robins Air Materiel Area is divided into several directorates, one of which is the Directorate of Maintenance. The Directorate of Maintenance is divided into several divisions, one of which is the Electronics Division. The Electronics Production Branch (hereinafter called Production Branch) is a branch within the Electronics Division and was headed by Branch Chief Otto R. Bailey. The Production Branch is divided into several sections including an Aero Missile Overhaul Section supervised by Section Chief Oscar Noles and a Bomb Navigation System Section under the supervision of Section Chief Sherman A. Morgan. Mr. Doug Collins was a civilian employee of the Activity who worked in Mr. Noles' Aero Missile Overhaul Section; Mr. Collins was also a shop steward for the Union. The Union was and is the collective bargaining representative for a unit of civilian employees of the Activity, including those employed in the Aero Missile Overhaul Section and the Bomb Navigation Systems Section. There was a collective bargaining agreement between the Union and the Activity.

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BEFORE: SAMUEL A. CHAITOVITZ
Administrative Law Judge

REPORT AND RECOMMENDATION

1/ The transcript of this hearing, erroneously states that the subject hearing was held as scheduled, on July 12 and 13, 1973. With the consent of both parties, however, the hearing was actually held on July 11 and 12, 1973.

During October 1972, Building 640 on the Robins Air Force Base was composed of a main building (hereinafter called Building 640) and an Annex, which was attached. Building 640 and the Annex had a security fence around it with a guard at the gate. 2/ Building 640 consisted of a hi-bay area, a lo-bay area and a mezzanine or balcony located above the lo-bay area. During October 1972, because of construction work being done the hi-bay area was fenced off and doors were welded closed so it was effectively cut off from the rest of Building 640 and the Annex. In order to go from the lo-bay area or mezzanine, of Building 640 to the Annex an employee would have to leave Building 640 and enter the Annex from the outside. Such an employee did not have to leave or exit the security control area. Mr. Doug Collins worked in a "clean room" located on the mezzanine in Building 640.

On October 19, 1972, in the morning, Mr. Collins asked his line forewoman, Ms. Louer, if he could go to Mr. Morgan's Section, which is located in the Annex, to speak to an employee, Mr. Robinson, on Union business. Ms. Louer gave her permission to Mr. Collins.

Mr. Collins then went to the Annex to speak to Mr. Robinson. Mr. Robinson's line foreman was Mr. Miller. The record does not establish that Mr. Collins asked permission of Mr. Miller to speak to Mr. Robinson. 3/

Mr. Collins had been previously advised by a Mr. Duckworth, Mr. Collins' uncle and a co-worker of Mr. Robinson, that Mr. Robinson was dissatisfied and had a question as to whether certain notations made by the Activity on one of his personnel forms were correct and that he wanted to see Mr. Collins. Mr. Collins and the Union were then involved with processing a grievance on behalf of Mr. Duckworth that raised a very similar point. 4/

2/ The area within the security fence will be called herein, the security control area. The supervisors within the security control area were very security conscious,

3/ In this regard, at first Mr. Collins testified that he did request it of Mr. Miller. Then he testified that he was not sure he requested it of Mr. Miller and could not identify whom he asked. Mr. Miller in his testimony denies he was either asked by Mr. Collins or granted such permission. I credit Mr. Miller's version, because Mr. Collins' recollection did not seem as clear.

4/ Mr. Duckworth's grievance had been formally filed on October 17, 1972.

Mr. Collins met with and spoke to Mr. Robinson about his complaints. Mr. Morgan observed Mr. Collins and asked two of the supervisors, Mr. Miller and Mr. Powell if they knew why Mr. Collins was there. They replied in the negative. As Mr. Collins was leaving he was approached by Mr. Morgan who asked him if he had an administrative permit. 5/ Mr. Collins replied that he did not, but that his supervisor had given him oral permission. Mr. Morgan then informed Mr. Collins that he would have to get an administrative permit before he could enter the area.

Mr. Morgan, after attempting unsuccessfully to reach Section Chief Noles, spoke to Ms. Louer over the telephone. He ascertained that Mr. Collins was under her supervision, and then informed her what had occurred. Mr. Morgan then advised Ms. Louer that Mr. Collins could not enter his section again without an administrative permit and Ms. Louer replied "okay" and apparently agreed with Mr. Morgan.

Upon his return to the clean room area, Mr. Collins told Ms. Louer what had occurred. According to Mr. Collins, and undisputed by Ms. Louer's testimony, she advised him that she didn't need to give him an administrative permit. Mr. Collins also called the Union office and advised them as to what had occurred. He was told that the Union would check it out. On October 20th, in the morning, Mr. Collins called the Union and was advised that there would not be any problem about administrative permits. Mr. Collins then told Ms. Louer that he had to visit Mr. Robinson again. She gave him oral permission to go. 6/

Mr. Collins went to the Annex and asked Mr. Miller for permission to see Mr. Robinson. Mr. Miller asked him if he had an administrative permit. Mr. Collins replied that he did not. Mr. Miller then advised him that he could not see Mr. Robinson without an administrative permit. Mr. Collins demanded the reasons in writing. They both went to see Mr. Miller's immediate supervisor, Mr. Powell, who repeated that Mr. Collins would not be permitted to see Mr. Robinson without an administrative permit, despite Mr. Collins' statements that his supervisor knew where he was.

5/ The administrative permit referred to a document that the Activity had assigned the Number Form-368.

6/ Mr. Collins testified that he requested an administrative permit, but that Ms. Louer said she was not going to issue him one, that her oral permission was sufficient. Ms. Louer denied that Mr. Collins asked for a permit. In this regard, I credit Ms. Louer, especially in light of the facts that Mr. Collins had apparently been advised by the Union that there would not be

Mr. Collins returned to his work area but did not advise Ms. Louer as to what had occurred or that he had been unable to see Mr. Robinson.

On October 24, 1972,^{7/} Mr. Collins advised Ms. Louer that he had to see two people, Mr. Robinson and Mr. Duckworth, in Mr. Morgan's area. She gave him oral permission.^{8/}

Mr. Collins went to the Annex and asked Mr. Wayne Rogers, Mr. Duckworth's acting line foreman,^{9/} if he could speak with Mr. Duckworth. Mr. Rogers said he could. Mr. Miller, who on this day was Acting Unit Chief and hence Mr. Rogers' supervisor, observed Mr. Collins and Mr. Duckworth heading for a "break" area. Mr. Miller asked Mr. Rogers if Mr. Collins had an administrative permit. Mr. Rogers told Mr. Miller that he did not know. Mr. Miller instructed Mr. Rogers to find out and if Mr. Collins did not have an administrative permit, he would have to leave. Mr. Rogers approached Mr. Collins and asked for the permit and when Mr. Collins said he had none, he told Mr. Collins that he would have to leave and Mr. Duckworth that he should return to work.

Mr. Collins then approached Mr. Miller and asked if he could see Mr. Robinson. Mr. Miller asked if Mr. Collins had an administrative permit. Mr. Collins showed him an authorization from Mr. Robinson to represent him in a grievance. This authorization which Mr. Robinson had signed was delivered to Mr. Collins by another employee. There is some question whether Mr. Robinson intended to file a grievance and whether he understood the nature of the authorization. The authenticity of the authorization was not questioned at the time. In any event it is clear that Mr. Robinson was displeased with the notation on his personnel form and was, through the Union, trying to ascertain what the facts were, before he decided whether to formally file a grievance.

(Con't.)

any further problems about administrative permits and that Ms. Louer was called to testify on behalf of the Union and appeared to be an impartial witness with an accurate recall of the events.

- ^{7/} There was no work on October 21, 22, and 23, 1972, because it was a weekend and a Monday holiday.
- ^{8/} Again Mr. Collins contends that he asked for an administrative permit and that Ms. Louer said he did not need one. Ms. Louer testified that he did not ask for such a permit.
- ^{9/} The regular line foreman was absent.

Mr. Miller advised Mr. Collins, that despite the authorization from Mr. Robinson, he still needed an administrative permit and could not therefore see Mr. Robinson. Mr. Collins returned to the clean room area. On October 24th, after Mr. Collins had left to see Mr. Robinson, and Mr. Duckworth, Mr. Sanders, Ms. Louer's immediate supervisor advised her, that she should issue administrative permits to anyone moving from one work area to another work area within the security control area.

From that time on until February 21, 1973,^{10/} Ms. Louer issued administrative permits to employees, including Mr. Collins, who were going to other work areas within the security control area, whether it was on union business or for other reasons. She had authority to issue these administrative permits and the issuance was a routine matter that took her only a few minutes.^{11/} There was no evidence that after October 24th, either Mr. Collins or any other union steward or agent was ever denied an administrative permit or unduly delayed or inconvenienced in obtaining one.

Section Chief Sherman A. Morgan testified that in the Bomb Navigation Systems Section it has been the practice for six or eight years to require that administrative permits^{12/} be shown by those employees who enter that work area who are not performing part of their normal or usual employee duties.^{13/} This was his interpretation of the Activity's policy^{14/} and he applied it to employees under supervision and required the permit of those who entered his area. Mr. Morgan testified that the administrative permit served primarily for employee control^{15/} but also was used for billing purposes and as a part of the security program.^{16/} Mr. Morgan had in the past, stressed

- ^{10/} As of February 21, 1973, the Activity apparently ceased requiring the use of administrative permits for shop stewards handling matters under Article 7 of the Collective bargaining Agreement, unless they left the security control area.
- ^{11/} Mr. Collins stated that on the first one or two occasions he requested a permit Ms. Louer asked her supervisor. Ms. Louer denies she ever had to check, and, in any event, Mr. Collins stated that on these alleged occasions, it only took a few minutes to get the permit.
- ^{12/} Either Form-368 or the prior form that served the same purpose.
- ^{13/} When "stranger" employees were to enter this area to perform duties related to their job functions, they were usually escorted or advance arrangements had been made through the supervisors.
- ^{14/} The Activity's policy was set forth in "MAOI 11-9" dated July 22, 1970, which is attached hereto to "Appendix A".
- ^{15/} It provided a means for a supervisor to know where his employees were and what they were doing there and why stranger employees were in his area.
- ^{16/} It is not necessary to decide whether the use of the administrative permit efficiently performed these functions.

to the supervisors in his section that they should be more diligent in controlling their employees and their areas.

Mr. Morgan's understanding and interpretation of the use of the administrative permit, as well as his contention that it had been so used for a number of years was confirmed and substantiated by Section Chief Noles of the Aero Missile Overhaul Section and by Mr. O.R. Bailey, Chief of the Production Branch. Mr. Bailey is both Mr. Noles' and Mr. Morgan's immediate supervisor.

Ms. Louer testified that her practice 17/ had been to use and issue administrative permits on occasion. She stated, however, that normally an employee who wanted to go to a different work area but who was going to stay in the security control area only needed her oral permission and not an administrative permit.

Positions of the Parties

The complaint herein alleges that the Activity violated Section 19(a)(1) and (6) of the Order. The complaint sets forth the facts relating to Mr. Collins attempts on October 19, 20, and 24, 1972, to see Mr. Robinson and Mr. Duckworth and that variously Mr. Morgan, Mr. Miller, Mr. Powell, and Mr. Rogers did not permit Mr. Collins to see Mr. Robinson and Mr. Duckworth unless he had an administrative permit. The complaint then concluded:

"Mr. Morgan's actions interfered with Mr. Collins, Mr. Duckworth, and Mr. Robinson in the exercise of their rights as assured by the Order and discouraged membership in the labor organization by discrimination against Mr. Collins in regards to conditions of employment. Such actions violate Sections 19(a)(1), 19(a)(2), and 19(a)(6) of the Order.

"The remedies sought by the Union are that the Employer be found in violation of Section 19(a) of the Order; that he be ordered to cease and desist from such violations; that the employees be advised of

17/ Arrived at after checking with her immediate supervisor, Mr. Sanders.

their rights and they shall be protected in the exercise of those rights; and, the findings and action taken be posted on all official bulletin boards on Robins Air Force Base."

At the hearing the Union stated that this requirement that Mr. Collins have an administrative permit violated Section 19(a)(1) of the Order insofar as it interferes with employees Duckworth's and Robinson's desire to be represented by the Union in the consideration of their dissatisfaction with certain working conditions. Further the permit requirement subjected Union Shop Steward Collins to surveillance and to more onerous conditions than other employees who were not engaged in union activities. This conduct also allegedly constituted a violation of Section 19(a)(6) of the Order by interfering with the employees' and the Union's rights to participate and be represented in a grievance.

At the hearing herein the Union, in addition, alleged that Section 19(a)(6) of the Order had been violated because this requirement that an employee have an administrative permit to leave his work area constituted a unilateral change in working conditions.

The Activity denied that there was any interference with employee or union rights, and contends that the use of administrative permit had existed for some time and was used for security and administrative purposes. The Activity also moved to dismiss the allegation that there was a unilateral change of working conditions on the grounds that it was not included within the complaint herein, and therefore, did not comply with the requirements of the Rules and Regulations (29 CFR 203.2(a)(3) and 203.3(a)(3)) which state that the charge and complaint shall contain a clear and concise statement of the facts constituting the alleged unfair labor practice including the time and place of the particular acts.

Conclusions of Law

Shop Steward Collins was required to get an administrative permit before he could leave his work area in Building 640 to go to the Annex to see employees concerning existing or potential grievances. The record establishes that the permit could be obtained easily from Mr. Collin's immediate supervisor, line forewoman Louer, and only took a few minutes to secure. The Activity contends that the permit allows the supervisor who issues it to keep a better track of the employees under his supervision and assists the supervisor of the area to which the employee is going to keep track of "strangers" entering his area, and to know percisely why the stranger is there. The record establishes that at least with respect to Mr. Morgan's area the

permit was also required of employees other than those on union business. In these circumstances there has been no showing that the requirement that the permit be secured was an unreasonable requirement or unduly interfered with the performance by the Union Shop Stewards of their Union duties or was in anyway onerous inconvenient. Further, nothing more was required of union stewards or agents than of other employees, nor did the obtaining of a permit cause any undue delay or inconvenience. It must be further noted that as a practice oral permission had been secured by Mr. Collins and there was no contention that the requirement that oral permission be obtained interfered with anyone's protected activity. The record does not establish that the requirement that the permission be in writing was in any substantial degree more onerous or inconvenient or in any other way interfered with protected rights more than the requirement that oral permission be obtained.

The only incidents of actual interference alleged are that on October 20 and 24, 1972, Mr. Collins was prevented from seeing Mr. Duckworth and Mr. Robinson because he did not have a permit. Any alleged interference was presumably Ms. Louer's alleged refusal to give Mr. Collins an administrative permit. The credited evidence establishes that Ms. Louer was not advised that Mr. Collins was actually being prevented from seeing the two employees nor did Mr. Collins specifically request such an administrative permit.

It is concluded, therefore, that Ms. Louer did not refuse to issue Mr. Collins an administrative permit, and thus did not in any way interfere with his or any other employee's protected rights. ^{18/} Further since, as concluded above, the requirement that an administrative permit be secured did not in and of itself constitute a violation of Section 19(a)(1) of the Order, Mr. Morgan's refusal to allow Mr. Collins to enter his section to speak to the two employees unless Mr. Collins first secured such a permit from his supervisor did not constitute a violation of Section 19(a)(1) of the Order.

^{18/} Even assuming that Ms. Louer did on these two occasions refuse to issue a permit, they were isolated incidents that resulted from her confusion as to when such permits were required. This confusion was cleared up on October 24 and from that time on Mr. Collins received such passes promptly whenever they were required and requested. Therefore, any interference with protected rights was de minimus and no finding that there was a violation of Section 19(a)(1) of the Order is warranted.

Similarly since, as discussed above, the requirement that Mr. Collins secure an administrative permit did not violate Section 19(a)(1) of the Order, was neither onerous nor inconvenient, and was no more than was required of other employees who wished to leave their work area on matters other than their normal jobs; it cannot be concluded that this requirement, as applied by Mr. Morgan deprived either Mr. Duckworth or Mr. Robinson of any of their rights to be represented by the Union or deprived of the Union of its rights to represent employees. By merely obtaining the permit, which as described above is a routine matter, Union Shop Steward Collins could have freely gone to other work areas and Mr. Duckworth and Mr. Robinson could have been represented by the Union. Therefore, it must be concluded that the existence of the permit rule itself and its application by Mr. Morgan did not constitute a violation of Section 19(a)(6) of the Order.

Finally the Union contends, as set forth orally at the hearing, that the requirement of an administrative permit was a unilateral change of working conditions and therefore constituted a violation of Section 19(a)(6) of the Order. The Activity first contended that this allegation was outside the scope of the complaint and moved at the hearing that this allegation be dismissed. The undersigned reserved ruling on this motion and advised the Activity to produce any evidence it deemed relevant with respect to the merits of this alleged violation. Further, if any additional time was needed and was requested by the Activity in order to allow it to defend against this allegation it would be considered. ^{19/}

The Rules and Regulations require that the complaint shall contain a clear and concise statement of the facts constituting the alleged unfair labor practice. The subject complaint addressed itself to the fact that the requirement that Mr. Collins have an administrative permit was used by Mr. Morgan to prevent Mr. Collins, a shop steward, from seeing two employees concerning alleged grievances. The complaint alleges that this interfered with the employees' right to be represented by the Union and the Union's right to represent these employees. There

^{19/} No such additional time was requested.

is no allegation, or even mention that this requirement was a unilateral change of existing conditions, nor did the complaint allege that the Activity failed to notify the Union of any such change or that the Activity refused to discuss and negotiate concerning any such change.

Although it may be argued that the complaint should be read broadly and that the precision required of pleadings in other courts should not apply here, nevertheless, the complaint serves a number of valid and important purposes. It permits the Regional Office of the Department of Labor to investigate whether there is a prima facie case; it permits the Respondent to reply and to know what precisely it is charged with; and it encourages and permits the parties to consider settling the matter prior to the hearing. In the instant case it is concluded that the "unilateral change" allegation is so far removed from the allegations contained in the complaint that the complaint did not advise the Activity of this alleged violation of the Order. Therefore, to permit a finding with respect to it would totally frustrate the purposes of requiring a complaint and would make any complaint virtually meaningless. Therefore it is concluded that this "unilateral change" allegation is outside at the scope of the complaint and cannot be considered in this case.

However, even if this alleged violation were to be considered, ^{20/} the record establishes that the requirement concerning the administrative permit was a long standing Activity policy, at least in Mr. Bailey's Branch, including both Mr. Morgan's and Mr. Nole's sections. ^{21/} Further, although Ms. Louer did not routinely require that she issue a written ad-

^{20/} This matter was litigated fully at the hearing.


^{21/} Although Mr. Collins testified that he had in the past been in Mr. Morgan's section to speak to employees on union matters, and no permit was required, he testified that he did not recall Mr. Morgan's being aware of his presence. Further on one occasion when Mr. Collins met with Mr. Morgan and no permit was requested, Mr. Collins was there with another Union Shop Steward and a few other employees to discuss possible grievances with Mr. Morgan and the appointment and arrangements for the meeting had been in advance by telephone. Mr. Morgan was expecting them and had been advised in advance as to the reason for the meeting.

ministrative permit when an employee wished to leave the work area, when not in the performance of his routine job duties, she did issue them on occasion. Further Ms. Louer always required that she be asked for and give oral permission when an employee wished to leave the work area. As discussed above the granting of the administrative permit by the supervisor was a routine and quick procedure and was not substantially different or more onerous than the securing of oral permission from a supervisor. In these circumstances the record establishes that there was no unilateral change of working condition concerning the requirement of an administrative permit. ^{22/} Moreover the Union submitted no evidence to show that even if there had been a change of working conditions that the Activity had not notified the Union in advance of such alleged change or had refused to bargain with the Union about such change.

Therefore it is concluded that the record fails to establish that the Activity engaged in any conduct that constituted a violation of Sections 19(a)(1) and (6) of the Order.

Recommendation

In view of the findings and conclusions made above, it is recommended that the Assistant Secretary of Labor for Labor Management Relations dismiss the complaint.


Samuel A. Chaitovitz
Administrative Law Judge

^{22/} In February 1973, the administrative permit requirement was done away with, so to that extent that it is alleged to be a continuing violation, the matter is moot.

Dated: February 4, 1974

Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PUGET SOUND SHIPYARD EMPLOYEES SERVICE COMMITTEE,
 PUGET SOUND NAVAL SHIPYARD,
 DEPARTMENT OF NAVY,
 BREMERTON, WASHINGTON
 A/SLMR No. 375

The Petitioner, Teamsters, Chauffeurs and Helpers, Local 672, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, (IBT), sought to represent a unit of all mechanic-routemen and warehousemen employed by the Activity at the Puget Sound Naval Shipyard, Bremerton, Washington. The Activity contended that the employees in the unit sought did not possess a clear and identifiable community of interest apart from other non-appropriated fund (NAF) employees of the Puget Sound Shipyard Employees Service Committee (Committee) and that such a unit would not promote effective dealings or efficiency of agency operations.

The Committee is one of five NAF activities at the Puget Sound Naval Shipyard, Bremerton, Washington (Shipyard). The Committee is divided into five sections, one of which (the Vending section) contains the four employees named by the IBT as within its claimed unit.

The Assistant Secretary concluded that the claimed unit was not appropriate for the purpose of exclusive recognition under the Order. In this connection, it was noted that there are other employees of the Committee, in addition to those the IBT seeks to represent, who perform similar work as that performed by the claimed employees; that all employees of the Committee, including those in the claimed unit, are under the same supervision; and that all employees of the Committee are covered by the same personnel policies and practices and share the same terms and conditions of employment. Moreover, the Assistant Secretary found evidence of numerous work contacts between the employees sought and other employees of the Committee. Under these circumstances, the Assistant Secretary concluded that the claimed employees do not possess a clear and identifiable community of interest and that to separate the claimed employees from other NAF employees with whom they share a community of interest would effectuate an artificial division among the employees, resulting in a fragmented unit which would not promote effective dealings or efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND SHIPYARD EMPLOYEES SERVICE COMMITTEE,
 PUGET SOUND NAVAL SHIPYARD,
 DEPARTMENT OF NAVY,
 BREMERTON, WASHINGTON

Activity

and

Case No. 71-2838(RO)

TEAMSTERS, CHAUFFEURS AND HELPERS,
 LOCAL 672, AFFILIATED WITH THE
 INTERNATIONAL BROTHERHOOD OF
 TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
 AND HELPERS OF AMERICA, INDEPENDENT 1/

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Pat Hunt. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, Teamsters, Chauffeurs and Helpers, Local 672, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, herein called IBT, seeks an election in a unit of all mechanic-routemen and warehousemen employed by the Activity. The Activity contends that the employees in the unit sought have no clear and identifiable community of interest apart from other non-appropriated fund (NAF) employees of the Puget Sound Shipyard Employees Service Committee (Committee) and that such a

1/ The name of the Petitioner appears as amended at the hearing.

unit would not promote effective dealings or efficiency of agency operations. The Activity also would exclude one of the four claimed employees as being a supervisor within the meaning of the Order.

The record reveals that, in addition to the alleged supervisor, there are three employees who the IBT named as being included within the claimed unit. These employees are organizationally within the Vending section of the Committee. ^{2/} The Committee is one of five NAF activities at the Puget Sound Naval Shipyard, Bremerton, Washington (Shipyard). In addition to the Committee, the other NAF activities are: the Navy Exchange; the Commissioned Officers Mess; the Administrative Department Civilian Non-Appropriated Fund Employees; and the Transient Family Housing Activity. ^{3/} All NAF employees at the Shipyard are governed by the same Naval regulations which provide for uniform personnel policies and procedures, promotion plans, annual and sick leave criteria, a standard wage system, and the same grievance procedures. Final authority over all employees in the various NAF activities, including employees of the Committee, rests with the Base Commander and there are centralized bookkeeping and accounting services for all of the NAF activities at the Shipyard.

The record reveals that the Committee is headed by an Employee Services Committee Manager and is divided into five sections: Bookkeeping; Vending; Recreation; Food Preparation; and Food Services. The Committee has as its mission the providing of food and other related services, and recreation and welfare services, designed to contribute to the morale and efficiency of the employees of the Shipyard. Immediately below the Employee Services Committee Manager is the Manager of Vending Route Managers who assigns work to the employees in the petitioned for unit. However, the evidence establishes that the Employee Services Committee Manager has the overall day-to-day supervision authority over all of the employees within the Committee, including those in the Vending section. Thus, the record indicates that the Employees Service Committee Manager is responsible for the hiring, firing and direction of all of the employees within the Committee. Moreover, he has the authority to discipline employees; has the final authority with respect to the approval of job performance evaluations; and approves sick and annual leave, as well as any transfers, whether they be permanent or temporary. Although the Manager of Vending Route Managers pur-

portedly is directly responsible for the petitioned for employees, the record reveals that the individuals involved know their jobs, need no direction in fulfilling their duties, and that the Manager of Vending Route Managers, in fact, spends the majority of his time engaged in the same work as is performed by those in the claimed unit, as distinguished from performing supervisory functions.

The evidence establishes that the claimed employees perform the function of supplying the vending machines at various locations in the Shipyard with materials such as sandwiches, cigarettes, soft drinks, cookies, etc. They also are called upon to make minor repairs and to collect the money from the vending machines. In this regard, they are responsible for making decisions as to what items will sell better depending upon the time of the year. The record reveals that the job functions of the employees in the claimed unit require little formal training and that any training involved is obtained on the job. Further, the evidence establishes that the claimed employees could be interchanged readily with other employees of the Committee at the Shipyard, and that they have numerous work contacts with other employees of the Committee. Moreover, all employees of the Committee work similar hours, wear uniforms while working, and take coffee breaks, lunches and other breaks at similar times under centrally prescribed rules.

The record reveals that, in addition to the employees of the Vending section specifically named by the IBT as within the claimed unit, this section employs a bookkeeper who devotes some 65 percent of her time to the vending operation. Further, there are other personnel employed by the Committee who perform work in connection with the vending operation and who are in frequent contact with the claimed employees.

Based on the foregoing, I find that the claimed unit is not appropriate for the purpose of exclusive recognition under Executive Order 11491. Thus, the record reflects there are other employees of the Committee, in addition to those the IBT seeks to represent, who perform similar work as that performed by the claimed employees; that all employees of the Committee, including those in the claimed unit, are under the same supervision; and that all employees of the Committee are covered by the same personnel policies and practices and share the same terms and conditions of employment. Moreover, there is evidence of numerous work contacts between the employees sought and other employees of the Committee. Under these circumstances, I find that the claimed employees do not possess a clear and identifiable community of interest and that to separate the claimed employees from other NAF employees with whom they share a community of interest would effectuate an artificial division among the employees, resulting in a fragmented unit which would not promote effective dealings or efficiency of agency operations. Accordingly, I shall order that the IBT's petition herein be dismissed. ^{4/}

^{2/} Although the employees named by the IBT are all mechanic-routemen within the Vending section, the IBT, while not specifically naming the individual as within the claimed unit, expressed "an interest" in representing a warehouseman who is employed by the Food Services section of the Committee.

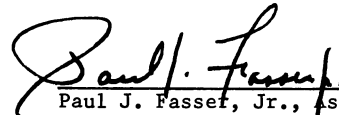
^{3/} The Navy Exchange is the only NAF activity of the Shipyard whose employees are represented exclusively by a labor organization.

^{4/} In view of the disposition herein, it was considered unnecessary to determine the supervisory status of the Manager of Vending Route Managers.

April 10, 1974

IT IS HEREBY ORDERED that the petition in Case No. 71-2838(RO), be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 4, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

PENNSYLVANIA NATIONAL GUARD,
DEPARTMENT OF MILITARY AFFAIRS
A/SLMR No. 376

This case involved a petition for clarification of unit (CU) filed by the Activity seeking clarification of the status of certain employee job classifications in the existing exclusively recognized unit, namely: Secretary (typing), GS-5; Personnel Clerk (typing), GS-5; Personnel Assistant, GS-7; Personnel Assistant (typing), GS-6; Aircraft Mechanic Leader, WL-10; Warehouse Leader, WL-7; Payroll Clerk, GS-6; Military Personnel Technician, GS-7; and Supply Technician, GS-7. The Activity contended that the employees in the first four classifications were confidential employees, and that the employees in the last five classifications were supervisors within the meaning of Section 2(c) of the Order. The exclusive representative, the Association of Civilian Technicians, Inc., Pennsylvania State Council (ACT), contended that the employees in these job classifications should be included in the unit.

The Assistant Secretary found that the Secretary (typing), GS-5, served in a confidential capacity to the Personnel Officer who is responsible for formulating and effectuating management policy in the field of labor relations, but that the Personnel Clerk (typing), GS-5, was not a confidential employee. The Assistant Secretary further concluded that the employees in the positions of Personnel Assistant, GS-7 and Personnel Assistant (typing), GS-6, were engaged in Federal personnel work in other than a purely clerical capacity, who should be excluded from the unit in accordance with the requirements of Section 10 (b)(2) of the Order, and, therefore, it was unnecessary to consider whether they were confidential employees. With regard to the employees in the last five positions, the Assistant Secretary found that they were not supervisors within the meaning of Section 2(c) of the Order.

Accordingly, the Assistant Secretary clarified the exclusively recognized unit by excluding from the unit the positions of Secretary (typing), GS-5; Personnel Assistant, GS-7; and, Personnel Assistant (typing), GS-6. In addition, the Assistant Secretary decided that the positions of Personnel Clerk (typing), GS-5; Aircraft Mechanic Leader, WL-10; Warehouse Leader, WL-7; Payroll Clerk, GS-6; Military Personnel Technician, GS-7; and Supply Technician, GS-7, should be included in the exclusively recognized unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA NATIONAL GUARD,
DEPARTMENT OF MILITARY AFFAIRS

Activity-Petitioner

and

Case No. 20-4115(CU)

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,
PENNSYLVANIA STATE COUNCIL

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Richard C. Grant. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Activity-Petitioner filed a petition for clarification of an existing unit of all Wage Board and General Schedule Army National Guard technicians in Pennsylvania, which unit is represented exclusively by the Pennsylvania State Council of the Association of Civilian Technicians, Inc., herein called ACT. Specifically, the Activity seeks to clarify the status of the following employee job classifications, whose incumbents the Activity asserts are confidential or supervisory employees and, therefore, should be excluded from the unit: Secretary (typing), GS-5; Personnel Clerk (typing), GS-5; Personnel Assistant, GS-7; Personnel Assistant (typing), GS-6; Aircraft Mechanic Leader, WL-10; Supply Technician, GS-6 (31-876-31); Warehouse Leader, WL-7; Payroll Clerk, GS-6; Military Personnel Technician, GS-7; and Supply Technician, GS-7 (61-871-46). 1/

1/ At the hearing, the parties, by stipulation, amended the subject petition to delete nine additional employee job classifications. Further, during the hearing, the parties stipulated that an exhibit placed into evidence correctly described the supervisory duties of an employee classified as Supply Technician, GS-6 (31-876-31), in the Property and Fiscal Office, and there is no record evidence to the contrary. Under these circumstances, I shall treat the parties' stipulation as a request to withdraw the subject petition insofar as it applies to the latter employee job classification. Thus, I find

(continued)

The record reflects that on March 15, 1971, the ACT was certified as the exclusive representative for the above described unit. The record does not reflect whether the parties have entered into a negotiated agreement. The Pennsylvania Army National Guard technician program presently consists of some 1,142 employees and is administered by the Adjutant General of Pennsylvania who receives guidance from the National Guard Bureau in Washington, D.C.

DISPUTED JOB CLASSIFICATIONS

Secretary (typing), GS-5; Personnel Clerk (typing), GS-5; Personnel Assistant, GS-7; Personnel Assistant (typing), GS-6.

The four job classifications listed above all are located in the Technician Personnel Office of the Pennsylvania National Guard. The Activity asserts that the employees in these job classifications are confidential employees who should be excluded from the unit.

The evidence established that the Secretary (typing), GS-5, is the personal secretary of the Personnel Officer of the Pennsylvania National Guard, and that the Personnel Officer is responsible for formulating and effectuating labor relations policy for all employees in the exclusively recognized unit. In this connection, the incumbent in the disputed job classification handles labor relations reports, the minutes of meetings dealing with labor relations strategy, and is responsible for maintaining files and records of such material. Moreover, in the performance of these duties, the incumbent is required to have regular access to confidential labor relations files. Based on the foregoing, I find that the employee in question serves in a confidential capacity to a person involved in the formulation and effectuation of management policies in the field of labor relations. 2/ Accordingly, I shall exclude the Secretary (typing), GS-5, from the unit.

The Activity also contends that the Personnel Clerk (typing), GS-5, should be excluded from the unit as a confidential employee. The record reveals that, although in the past the Personnel Clerk (typing), GS-5, had performed services for a former Assistant Personnel Officer who had been delegated much of the responsibility for the Activity's labor relations, under the current organizational structure of the Activity's Personnel Office the incumbent is, in fact, responsible to the Personnel Management Specialist and not to the Assistant Personnel Officer. I find that there

1/ it unnecessary to make an eligibility determination with respect to such job classification. Cf. Illinois Army National Guard, 1st Battalion, 202nd Air Defense Artillery, Arlington Heights, Illinois, A/SLMR No. 370 and New Jersey Department of Defense, A/SLMR No. 121.

2/ See The Department of the Treasury, U.S. Savings Bonds Division, A/SLMR No. 185 and Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

is no evidence establishing that the Personnel Clerk (typing), GS-5, serves currently in a confidential capacity to a person involved in the formulation and effectuation of labor relations policy. Moreover, even though the incumbent may have access to files which include labor relations materials, the mere access to such materials does not warrant the exclusion of an employee from the appropriate unit as a confidential employee. ^{3/} Nor is the evidence sufficient to establish that the employee in this job classification is engaged in Federal personnel work in other than a purely clerical capacity and, thus, warrants exclusion from the unit on this basis. Therefore, based on the foregoing, I find that the employees in the classification of Personnel Clerk (typing), GS-5, should not be excluded from the unit.

The employee designated as Personnel Assistant, GS-7, and the two employees designated as Personnel Assistant (typing), GS-6, report to the Supervisory Personnel Management Specialist, who is under the Personnel Officer. The Activity contends that, because of occasional projects in the area of labor relations performed for the Personnel Officer by these employees, they act in a confidential capacity to an employee who is responsible for formulating and effectuating labor relations policy. However, under the circumstances discussed below, I find it unnecessary to determine whether the Personnel Assistant, GS-7, and the Personnel Assistants (typing), GS-6, are, in fact, confidential employees. Thus, while these employees are involved in a certain amount of clerical activities, the record reveals that they spend the majority of their time engaged in the preparation and processing of personnel actions, such as accession actions, promotions, reassignments, demotions, pay increases, suspensions, transfers, adverse actions, and separations, for the some 1,142 technicians in the Pennsylvania Army National Guard and that the performance of these administrative duties is not of a routine clerical nature. Under these circumstances, it was concluded that the employees in the job classifications of Personnel Assistant, GS-7, and Personnel Assistant (typing), GS-6, are employees engaged in Federal personnel work in other than a purely clerical capacity, and I shall, therefore, exclude them from the unit as required by Section 10(b)(2) of the Order.

Aircraft Mechanic Leader, WL-10

There are three employees designated as Aircraft Mechanic Leader, WL-10, in the Logistical Support Maintenance Branch of the Activity. Each of the three Aircraft Mechanic Leaders, WL-10, works with a crew of eight Aircraft Mechanics, WG-IO, and is responsible for the routine maintenance of the nine aircraft regularly assigned to a particular crew. In this connection, the record reveals that although an Aircraft Mechanic Leader, WL-10, is responsible for inspecting routine maintenance work, nonroutine maintenance work must be authorized by the Aircraft Maintenance Officer and is checked by an aircraft inspector. The record,

^{3/} See Department of the Navy, United States Naval Station, Adak, Alaska, A/SLMR No. 321 and Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, cited above.

including the Aircraft Mechanic Leader's, WL-10, job description, also reflects that the Aircraft Mechanic Leader, WL-10, does not have the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, reward, or discipline other employees. ^{4/} While he may assign crew members to do certain work and direct other crew members in carrying out their assigned tasks, the evidence establishes that the assignment and direction of work is of a routine nature within established work procedures and does not require the use of independent judgement. Moreover, although the record indicates that the incumbents may handle minor problems arising within his crew, there is no evidence that such handling requires the use of independent judgement or that it would extend to other than routine matters.

Under all of these circumstances, I find that the evidence is insufficient to establish that the authority vested in the Aircraft Mechanic Leaders, WL-10, or actions taken by them, are other than routine in nature and dictated by established procedures. Accordingly, I conclude that the Aircraft Mechanic Leaders, WL-10, are not supervisors within the meaning of Section 2(c) of the Order and, therefore, should be included in the unit.

Warehouse Leader, WL-7, and Payroll Clerk, GS-6

The employees in these two classifications are in the Property and Fiscal Office which is under the direct authority of the Adjutant General of the Pennsylvania National Guard. They are alleged to be supervisors by the Activity.

^{4/} In support of its contention that the Aircraft Mechanic Leaders, WL-10, are supervisors, the Activity submitted an undated "certification," signed by the Support Facility Commander, which purported to reflect these employees' supervisory duties. Included in the "certification" were certain general statements with respect to the alleged responsibilities of the incumbents in the disputed classification, as well as a statement indicating that, in the future, such employees would perform job evaluations. The only testimony in support of this "certification" was offered by the Support Facility Commander who is not the immediate supervisor of the employees involved and who acknowledged that the "certification" was prepared to support the subject petition. The record reflects that the actual job description for the disputed classification is in many respects in direct contradiction to the "certification." None of the incumbent employees in the disputed job classification testified, nor did any immediate supervisor.

In these circumstances, I find a document such as the "certification" herein, and the testimony offered in support thereof, to be of limited probative value, when in conflict with testimony of persons having actual knowledge of the work performed by the incumbents in the disputed classification or with the official job description.

There are three employees with the designation of Warehouse Leader, WL-7, who work directly under the Warehouse Officer and his assistant in the Warehouse Branch of the Property and Fiscal Office. Each of the Warehouse Leaders works with a crew of some six Storekeepers, WG-7, and is responsible for one of the three functional sections of the Warehouse Branch: Shipping and Receiving, Issues, and Utility. The record reveals that the work performed by the Warehouse Leaders and the crews, which consists, for the most part, of loading, unloading, storage, and inventory, is of a routine nature performed within well established guidelines and that such direction of the work as the Warehouse Leader engages in is dictated by the nature of the work involved.

The record, including the incumbents' job description, indicates that the responsibility for hiring, transferring, suspending, laying-off, recalling, promoting, discharging, assigning, rewarding, and disciplining in the Warehouse Branch rests with the Warehouse Officer and not with the Warehouse Leader. 5/ Moreover, the evidence establishes that the Warehouse Leader does not have the authority to grant leave. While there is evidence that the Warehouse Leader provides certain input into the solving of employee problems and in the preparing of performance evaluations with respect to the employees in his crew, the record does not establish that such matters require the use of independent judgement or that any recommendations made in this connection are effective.

Under all of these circumstances, and noting that the record does not establish that any authority resting with the Warehouse Leader is other than of a routine nature or that his job performance requires the exercise of independent judgement, I find that the Warehouse Leader, WL-7, is not a supervisor within the meaning of Section 2(c) of the Order. Accordingly, the employees in this classification should be included in the unit.

The position of Payroll Clerk, GS-6, is located in the Payroll Branch of the Property and Fiscal Office. The Payroll Branch consists of a Time, Leave, and Payroll Clerk, GS-7; the employee in question; two Payroll Clerks, GS-5; and a Clerk-Typist, GS-3. The Payroll Clerk, GS-7, also known as the Payroll Supervisor, is the supervisor of the incumbent. The Payroll Supervisor is responsible for assuring that the some 1,142 technicians of the Pennsylvania Army National Guard are paid on time. The record reflects that each of the employees under the Payroll Supervisor, including the incumbent, is responsible for specific duties which

5/ The Activity submitted a "certification" which was purported to be a list of the incumbents' supervisory duties. In addition, the Activity submitted alleged "certifications" for the three job classifications to be discussed below: Payroll Clerk, GS-6; Military Personnel Technician, GS-7; and Supply Technician, GS-7. Further, the official job descriptions of these positions were entered in the record. As stated in footnote 4 above, the Activity's "certifications" were considered to have limited probative value where they are in conflict with testimony of persons having direct knowledge of the work performed or with the official job description.

are of a routine nature and are dictated by established policies. Further, the evidence, including the incumbent's job description, establishes that the Payroll Clerk, GS-6, does not have the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, and that such authority, in fact, rests with the Payroll Supervisor. When the Payroll Supervisor is absent, which is approximately 20 percent of the time, the Payroll Clerk, GS-6, fills in for the former and, on such occasions, has limited authority to direct the other employees of the Payroll Branch and approve such things as annual leave. While the Payroll Clerk, GS-6, provides certain input into the GS-5 Payroll Clerks' and the GS-3 Clerk Typist's performance ratings, the evidence does not establish that any recommendations in this regard have been effective or require the use of independent judgement.

Under all of the circumstances, I find that the evidence is insufficient to establish that the authority vested in the Payroll Clerk, GS-6, or actions taken by him, are of other than routine in nature and dictated by established procedures. Moreover, I find that because the Payroll Clerk, GS-6, substitutes for the Payroll Supervisor on a sporadic and limited basis, such a job function is insufficient to establish the indicia of supervisory authority within the meaning of Section 2(c) of the Order. Accordingly, I conclude that the Payroll Clerk, GS-6, is not a supervisor within the meaning of the Order and, therefore, should be included in the unit.

Military Personnel Technician, GS-7 and Supply Technician, GS-7

The record reveals that the three employees in these two classifications are located in the Military Personnel Office. This office is responsible for all record keeping and related matters with regard to employees in their military capacity.

There are two employees in the classification of Military Personnel Technician, GS-7, who the Activity claims are supervisory employees. The record reflects that the individuals who the Military Personnel Technicians are alleged to supervise are not Federal employees but, rather, are employees of the State of Pennsylvania. Each Military Personnel Technician heads a section consisting of six or seven State employees, and each section is divided into teams which handle specific tasks. The Military Personnel Technicians do not rate the performance of any of the employees under them. Moreover, the record reveals they do not approve annual leave for the State employees. The evidence, including the incumbents' job descriptions, indicates that the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, reward, and discipline the State employees under them rests with the State employee in charge of the Military Personnel Office and not with the incumbents. While the Technicians have some limited authority to direct the State employees in their particular sections, the evidence does not establish that this authority requires the use of independent judgement or that the work performed is other than of a routine nature.

Under all of the circumstances, I find that the employees designated as Military Personnel Technician, GS-7, are not supervisors within the meaning of Section 2(c) of the Order. Thus, the evidence does not establish that any authority vested in them or actions taken by them are of other than of a routine nature, dictated by established procedures. Moreover, while the record indicates that the employees in the disputed classification may perform personnel work of other than a clerical nature, it was noted that the personnel work involved relates to persons outside the unit and, indeed, outside the Federal Service. Under these circumstances I find that Section 10(b)(2) of the Order is inapplicable in this situation. ^{6/} Accordingly, I conclude that the employees in the classification of Military Personnel Technician, GS-7, should be included in the unit.

With respect to the Supply Technician, GS-7, who the Activity contends is a supervisor, the record reveals that the employee in this job classification is in charge of the storing and distribution of the military publications required by the Army National Guard throughout Pennsylvania. Other than the employee in question, there are three State employees and one unfilled GS-5 Federal position located in the Publications section of the Military Personnel Office. Although the record indicates the incumbent may approve leave and provide certain input into the personnel evaluation of the one Federal employee who is scheduled to be placed under him, the evidence does not indicate that such responsibility would be other than routinely exercised. Nor does the evidence establish that independent judgement would be utilized. In addition, the evidence, including the incumbent's job description, indicates that the Supply Technician, GS-7, does not have the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees.

Under all of these circumstances, and noting that the evidence does not establish that the authority vested in the Supply Technician, GS-7, is other than of a routine nature and does not require the use of independent judgement, I conclude that the Supply Technician, GS-7, is not a supervisor within the meaning of Section 2(c) of the Order, and, therefore, should be included in the unit.

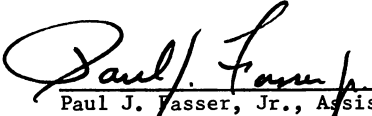
ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which certification as the exclusive representative was granted to the Pennsylvania State Council of the Association of Civilian Technicians, Inc., on March 15, 1971, for all Army National Guard Technicians in the State of Pennsylvania, be, and hereby is clarified by excluding from said unit the positions classified as: Secretary (typing), GS-5 to the Personnel Officer; Personnel Assistant, GS-7; and Personnel Assistant (typing),

^{6/} See St. Louis Region, United States Civil Service Commission, St. Louis, Missouri, A/SLMR No. 162.

GS-6, all in the Technician Personnel Office of the Pennsylvania National Guard; and by including within the said unit the positions classified as: Personnel Clerk (typing), GS-5; Aircraft Mechanic Leader, WL-10; Warehouse Leader, WL-7; Payroll Clerk, GS-6; Military Personnel Technician, GS-7; and Supply Technician, GS-7 (61-871-46).

Dated, Washington, D.C.
April 10, 1974


Paul J. Yasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

April 10, 1974

A/SLMR No. 377

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
CAMP McCoy,
SPARTA, WISCONSIN
A/SLMR No. 377

DEPARTMENT OF THE ARMY,
CAMP McCoy,
SPARTA, WISCONSIN

Activity

and

Case No. 51-2589

This case involves a petition for clarification of unit filed by Local 1358, American Federation of Government Employees, AFL-CIO (Petitioner) in which it seeks to include all appropriated fund employees of the Fifth U. S. Army located at Camp McCoy, Wisconsin. Specifically, the Petitioner, the incumbent labor organization which represents an Activity-wide unit at Camp McCoy, contends that employees of Area Maintenance Support Activity No. 67 (AMSA 67), 86th Army Reserve Command (ARCOM), located at Camp McCoy remain and are included in the existing unit. The Activity contends that to include employees of AMSA 67 in the existing unit of Camp McCoy employees would fragmentize the 86th ARCOM, in which the employees of AMSA 67 share a community of interest with employees of all AMSA's in the 86th ARCOM.

LOCAL 1358, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO 1/

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Philip Julian. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief submitted by the Activity, the Assistant Secretary finds:

The existing unit at Camp McCoy represented by the Petitioner includes employees in the Consolidated Maintenance Division (CMD) which provides direct support and general support maintenance for all United States Army Reserve (USAR) units in Minnesota, Iowa, and Wisconsin. Prior to March 1972, an Annual Training Equipment Pool (ATEP) within the CMD had the responsibility for storage and organizational maintenance (minor repair and maintenance) of vehicles and equipment of USAR units. In March 1972, the Fifth U. S. Army established USAR ATEP's at certain U. S. Army installations, including Camp McCoy, and the ATEP, then in the CMD at Camp McCoy, was transferred from Camp McCoy to the 86th ARCOM and assigned to AMSA 67.

The Petitioner, the recognized exclusive representative of all nonsupervisory appropriated fund employees of Camp McCoy, Wisconsin, filed a petition for clarification of unit (CU) seeking clarification of an existing bargaining unit to include all appropriated fund employees of the Fifth U. S. Army located at Camp McCoy, Wisconsin. Specifically, in this proceeding, the Petitioner contends that employees of Area Maintenance Support Activity No. 67 (AMSA 67), 86th Army Reserve Command (ARCOM), located at Camp McCoy remain and are included in the existing unit at Camp McCoy.

The Assistant Secretary found that the employees of the AMSA 67 continue, following the transfer, to share a community of interest with the other employees of the existing unit at Camp McCoy. He noted that a substantial number of employees in AMSA 67 previously were assigned to the CMD, within the established bargaining unit and that these employees currently are performing job functions similar to those they previously performed in the CMD and under similar working conditions at Camp McCoy. Also, he noted the employees of AMSA 67 continue to have daily contact with the existing unit employees and that the Civilian Personnel Officer of Camp McCoy retains responsibility for all labor-management relations and personnel matters for both groups. Accordingly, and noting that under the circumstances the continued inclusion of the AMSA 67 employees in the existing unit would, in his view, promote effective dealings and efficiency of agency operations, the Assistant Secretary ordered that the existing unit be clarified to include all eligible employees of the AMSA 67.

The Activity asserts that to include employees of AMSA 67 in the existing unit of Camp McCoy employees would fragmentize the 86th ARCOM, and, as a consequence, would not promote effective dealings and efficiency of agency operations. Further, the Activity contends there is no clear and identifiable community of interest among employees of AMSA 67 and

1/ The name of the Petitioner appears as amended at the hearing.

employees of Camp McCoy, but, rather, employees of AMSA 67 share a community of interest with employees of all AMSA's in the 86th ARCOM. Moreover, the Activity contends that prior decisions of the Assistant Secretary have found units appropriate on a command rather than on a geographic basis.

On August 31, 1966, the Petitioner was granted recognition as the exclusive representative of the Activity's appropriated fund employees. 2/ The existing unit at Camp McCoy exclusively represented by the Petitioner includes employees in the Consolidated Maintenance Division (CMD) of Camp McCoy. The CMD provides direct support and general support maintenance (major overhaul and maintenance) for all United States Army Reserve (USAR) units in Minnesota, Iowa, and Wisconsin. Prior to March 1972, an Annual Training Equipment Pool (ATEP), which was located within the CMD, had the responsibility for storage and organizational maintenance (minor repair and maintenance) of vehicles and equipment of USAR units within the CMD's area of support responsibility. The organizational maintenance was performed by seasonal employees of the CMD within the bargaining unit.

In March 1972, the Fifth U. S. Army established USAR ATEP's at certain U. S. Army installations, including Camp McCoy. Pursuant to this action, in March 1972 the ATEP, then in the CMD at Camp McCoy, was transferred from Camp McCoy to the 86th ARCOM and, in turn, assigned to AMSA 67. Initially, command and control of the ATEP at Camp McCoy rested with the Commander at Camp McCoy, and it was his responsibility to provide sufficient personnel and adequate facilities by March 31, 1972, for the ATEP to receive and maintain equipment. The ATEP was to be staffed with personnel having "dual status" as active members of the USAR. The 86th ARCOM assumed control of the ATEP on September 15, 1972, at which time it became a tenant activity at Camp McCoy.

AMSA 67 is one of 12 AMSA's in the 86th ARCOM, six of which are located in Illinois and six in Wisconsin. Their overall function is to assure mobilization readiness of USAR units. All of the AMSA's are under the supervision of the Assistant Chief of Staff, G-4 Supply and Maintenance, 86th ARCOM, headquartered in Chicago, Illinois. The record reveals that the specific mission of AMSA 67 is to provide storage and organizational maintenance and limited major overhaul and maintenance for combat and tactical vehicles and equipment of 86th ARCOM units which have been directed to contribute to the ATEP. 3/ Parts and supplies necessary

2/ A current negotiated agreement executed by the parties in November 1971, with a terminal date of November 11, 1973, provides for automatic renewal for a term of two years.

3/ The vehicles and equipment, consisting of engineering heavy equipment, tactical and support vehicles, and combat and artillery vehicles, are stored and maintained at three locations at Camp McCoy.

for repair and maintenance are requisitioned from the CMD, Camp McCoy, on a reimbursable basis by the 86th ARCOM. Thus, employees of AMSA 67 perform organizational maintenance on certain vehicles and equipment of the ARCOM and, if major overhaul and maintenance is deemed necessary, such work is performed by the CMD.

As a result of the transfer of the ATEP from Camp McCoy to the 86th ARCOM, the staffing for the U. S. Army Garrison, Camp McCoy, was adjusted by eliminating 55 positions in the CMD, and 52 positions 4/ were established for AMSA 67. Initial staffing of AMSA 67 was accomplished by recruiting from the Camp McCoy workforce, including the transfer of 33 seasonal employees from the seasonal organizational maintenance shop of the CMD. Following the reorganization, these same employees performed essentially the same organizational maintenance and job duties which they had performed while working for the seasonal organizational maintenance shop of the CMD.

A substantial number of employees in the CMD and a majority of the employees in AMSA 67 are Wage Grade (WG) employees. Employees in AMSA 67 and employees in the Camp McCoy workforce have the same working hours and conditions and some daily work contact when parts and supplies are requisitioned. The record reveals that the Civilian Personnel Officer (CPO) of Camp McCoy is responsible for all labor-management relations and personnel matters for AMSA 67 and the Camp McCoy workforce, including the processing of promotions and reduction in force actions even though different competitive areas are involved. 5/ Also, the CPO maintains the personnel records for AMSA 67 and the Camp McCoy workforce, and processes grievances for the respective commands when they reach the third level of the grievance procedure. Payroll and time and attendance records for employees of AMSA 67 are maintained by the 86th ARCOM at Fort Sheridan, Illinois.

Based on all of the foregoing circumstances, I find that AMSA 67 employees do not have a community of interest that is separate and distinct from the employees of Camp McCoy. Thus, it appears that a substantial number of employees in AMSA 67 previously were assigned to the CMD, and, as such, were in the established bargaining unit at Camp McCoy. Further, these AMSA 67 employees currently are performing job functions similar to those they previously performed in the CMD, and under similar working conditions at Camp McCoy. Employees of AMSA 67 are in daily contact with employees of the CMD in connection with the requisitioning of necessary parts and supplies for repair and maintenance

4/ The Activity introduced evidence that the complement of AMSA 67 as of November 1, 1973, was 79 employees.

5/ The competitive area for employment in AMSA 67 is within the ARCOM's serviced by the CPO, Camp McCoy, while the competitive area for employment by Camp McCoy is within the Camp McCoy workforce.

April 10, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

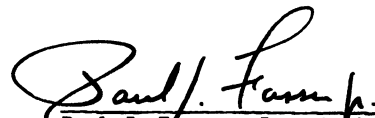
DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT
A/SLMR No. 378

of vehicles and equipment. Moreover, the CPO at Camp McCoy retains responsibility for all labor-management relations and personnel matters for both groups. Although AMSA 67 is under another command, which is separated geographically from Camp McCoy, and whose Commander participates at the third step of the grievance procedure, I find that, on balance, these factors are not sufficient to establish that AMSA 67 employees enjoy a community of interest separate and distinct from the employees in the existing unit. 6/ Further, I find that their continued inclusion in the existing unit will promote effective dealings and efficiency of agency operations. Accordingly, having found that employees in AMSA 67 share a community of interest with employees of Camp McCoy and have, in effect, remained in the existing exclusively recognized unit, I shall order that the existing unit of nonsupervisory appropriated fund employees of Camp McCoy be clarified to include all eligible employees of the AMSA 67.

ORDER

IT IS HEREBY ORDERED that the unit of all appropriated fund employees of Camp McCoy, Wisconsin, for which exclusive recognition was granted to Local 1358, American Federation of Government Employees, AFL-CIO, on August 31, 1966, be, and it hereby is, clarified to include in said unit all eligible employees of Area Maintenance Support Activity No. 67.

Dated, Washington, D.C.
April 10, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

The Petitioner, Columbia Lodge 174, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), sought an election in a unit of all nonsupervisory Wage Grade employees in the Bureau of the Public Debt in the Washington, D.C. metropolitan area. The Activity contended that the petitioned for unit was not appropriate because the claimed Wage Grade employees had a clear and identifiable community of interest with the General Schedule employees of the Activity and could not be separated. The Activity further contended that the petitioned for unit would constitute a fragmented unit and would interfere with effective dealings and would disrupt the efficiency of its operations.

The Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition because the claimed employees lack a clear and identifiable community of interest separate and distinct from other employees of the Activity. In this regard, he took particular note of the interdependent nature of the Activity's operation, the day-to-day work contacts of the Wage Grade employees and the General Schedule employees and the fact that, in general, they work side by side in the same work areas, often performing related and overlapping job functions under common supervision and having frequent interchange. Moreover, he noted that both General Schedule and Wage Grade employees at the Activity enjoy the same working conditions, personnel policies and procedures, and administrative services.

As the employees in the claimed unit did not share a clear and identifiable community of interest separate and distinct from other employees of the Activity and as such a fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations, the Assistant Secretary ordered that the petition be dismissed.

6/ Cf. Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona, A/SLMR No. 351; Department of Army Headquarters, U. S. Army Training Center Engineers and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 328; and AMC Communications Center, Savanna, Illinois, A/SLMR No. 291.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT

Activity

and

Case No. 22-4018(RO)

COLUMBIA LODGE 174,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO 1/

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Nancy Anderson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs of the Activity and Columbia Lodge 174, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called IAM, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The IAM seeks to represent a unit of all Wage Grade employees in the Bureau of the Public Debt in the Washington, D.C. metropolitan area, excluding all management officials, supervisors, professionals, guards, and Federal personnel workers in other than a purely clerical capacity. It contends that the claimed unit is a functional unit and, as such, is appropriate because the Wage Grade employees have a community of interest which is different from the General Schedule employees employed by the Activity. On the other hand, the Activity takes the position that the petitioned for unit is not appropriate because the claimed Wage Grade

1/ The name of the Petitioner appears as amended at the hearing.

employees have a clear and identifiable community of interest with the General Schedule employees of the Activity and cannot be separated. The Activity further contends that the petitioned for unit would constitute a fragmented unit, would interfere with effective dealings, and would disrupt the efficiency of Activity operations.

The Activity is a component of the Department of the Treasury and is located in Washington, D.C. It is responsible for, among other things, the preparation of the Department of the Treasury circulars offering public debt securities, the direction or handling of subscriptions and the making of allotments, the formulation of instructions and regulations pertaining to each security issue, and the issuance of the securities. The Activity also is responsible for the final audit and custody of retiring securities, the maintenance of the control accounts covering all public debt issues, the keeping of individual accounts with owners of registered securities and authorizing the issuance of checks in payment of interest thereon, and the handling of claims on account of lost, stolen, destroyed or mutilated securities.

There are five operational divisions within the Activity, each of which is headed by a Director. All of the Directors report to the Assistant Deputy Commissioner who is responsible for the planning, organization, budgeting and the operation of the five operational divisions. The five operational divisions are: the Division of Securities Operations, which is responsible for receiving, storing and maintaining stocks of securities, delivering them to Federal Reserve Banks and issuing agents, processing claims relating to these securities, and receiving them back for retirement and destruction; the Division of Public Debt Accounts, which is responsible for maintaining accounting controls of debt activities, securities sales, cash and interest, maintaining individual accounts for registered securities and authorizing the issuance of interest checks; the Division of Automated Data Processing Services, which is a computer service operation processing data for the other Divisions; the Division of Management Services, which performs various "housekeeping" services; and the Division of Management Analysis, which prepares project studies and manuals concerning management improvement programs. There are 607 employees employed by the Activity of whom approximately 581 are General Schedule employees and 26 are Wage Grade employees. 2/

The employees sought by the instant petition are employed in two of the five operational divisions of the Activity -- the Division of Securities Operations and the Division of Management Services. The record

2/ The parties stipulated that four of the Wage Grade employees were supervisors within the meaning of the Order.

establishes that within the Division of Securities Operations, Wage Grade employees are assigned to either the Shipping Section, the Vault Section of the Unissued Branch or the Vault Section of the Retired Securities Branch. The Wage Grade employees assigned to these sections are classified as laborers and are responsible for the movement of stock within the vault, the moving of inventory for shipment, and the placing of incoming shipments in their proper places. The record reveals that these Wage Grade employees work closely with the General Schedule Vault Custodians and Vault Clerks in the vault. Thus, while the laborers perform the bulk of the physical movement of stock within the vault, during periods of heavy workload, when there is absenteeism among the laborers, or when the efficiency of operations dictates, General Schedule employees, such as Vault Clerks or Vault Custodians, may actually move stock. Moreover, because of a shortage of General Schedule employees in the Vault Section of the Retired Securities Branch, the evidence establishes that laborers have been performing the work of the General Schedule Vault Clerks and Vault Custodians on a daily basis. Although there is a Laborer Foreman in the Vault Section of the Unissued Securities Branch, he receives his instructions from either a General Schedule employee or General Schedule supervisor. The laborers in the other Vault Section are supervised by a General Schedule supervisor. The Wage Grade laborers in the Shipping Section are responsible for packaging and labeling the securities for shipment. The evidence establishes that these laborers work closely with their General Schedule supervisor and the General Schedule clerk-typist to insure that all packages coming from the Vault Section and being shipped out contain the proper securities and are properly packaged.

The record indicates that within the Division of Management Services, Wage Grade employees are assigned to the Building Services Section where they perform functions involving office appliance repair, warehousing, vehicle operations, and manual labor. The office appliance repairmen are responsible for the repair and maintenance of the Activity's typewriters, adding machines and calculators. Because much of their repair work is done at the site of the equipment, the record reveals that these Wage Grade employees spend a great deal of time working with or for General Schedule employees throughout the Activity.

The record discloses that the Warehousemen within the Activity's warehousing operation are responsible for receiving, storing and dispensing forms and supplies. They receive requisitions from employees within the various Divisions and either deliver the forms and supplies in person to the employees in the Divisions, or deliver them to the employees over the counter at the warehouse. The laborers within the warehousing operation are responsible for moving or rearranging office furniture, moving heavy equipment and assisting the Destruction Committee in moving packages from the vault to the furnaces. Their work takes them into the various offices within the Activity and, in the normal course of their duties, the evidence establishes that they come into direct contact with other General Schedule and Wage Grade employees of the Activity.

The evidence establishes that working conditions are essentially the same for all Activity employees and that the Division of Personnel provides personnel services for all such employees. While different pay systems apply to General Schedule and Wage Grade employees, the record discloses that grievance and adverse action appeal procedures are common to all. Similarly, the same fringe benefits, Merit Promotion Program, Incentive Awards Program, and Civil Service Commission reduction-in-force regulations apply to all employees of the Activity.

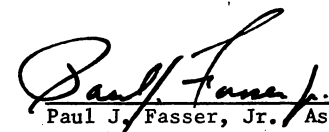
Based on all of the foregoing circumstances, I find that a unit limited to Wage Grade employees is not appropriate for the purpose of exclusive recognition. In this regard, particular note was taken of the interdependent nature of the Activity's operations, the day-to-day work contacts of Wage Grade employees and the General Schedule employees, and the fact that, in general, they work side by side in the same work areas, often performing related job functions under common supervision and having frequent interchange. Moreover, note was taken of the fact that both General Schedule and Wage Grade employees of the Activity enjoy the same working conditions, personnel policies and procedures, and administrative services.

Accordingly, I find that the petitioned for Wage Grade employees do not have a clear and identifiable community of interest separate and distinct from the General Schedule employees of the Activity. Further, in my view, such a fragmented unit would not promote effective dealings and efficiency of agency operations. Therefore, I shall order that the petition herein be dismissed. 3/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-4018(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 10, 1974


Paul J. Fasser, Jr. Assistant Secretary of
Labor for Labor-Management Relations

3/ Cf. Housing Division, Directorate of Industrial Operations, Headquarters
9th Infantry Division and Fort Lewis, Fort Lewis, Washington, A/SLMR
No. 209; United States Department of Agriculture, Richard B. Russell
Research Center, A/SLMR No. 189; and Department of the Army, Military
Ocean Terminal, Bayonne, New Jersey, A/SLMR No. 77.

April 30, 1974

Noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AIR TRAFFIC CONTROL,
FEDERAL AVIATION ADMINISTRATION,
ANCHORAGE, ALASKA
A/SLMR No. 379

This proceeding arose upon the filing of an unfair labor practice complaint by the National Association of Air Traffic Specialists, Alaska Region, Anchorage, Alaska (Complainant) alleging that the Respondent Activity violated Section 19(a)(1) and (6) of the Order by its assignment, without consultation with the Complainant, of a GS-5 Air Traffic Control trainee to fill temporarily a GS-9 journeyman position at Farewell Flight Service Station, Farewell, Alaska. The Complainant alleged that it should have received notification at the regional level of the decision to make such an assignment and should have been afforded the opportunity to consult with the Respondent at that level. The Respondent asserted that it had no obligation to meet and confer on the assignment itself, and that, in any event, it fulfilled any duty owed in this regard because the Facility Supervisor at McGrath Flight Service Station, which services the Farewell facility, discussed the temporary assignment of the GS-5 trainee to the Farewell post with the McGrath facility representative of the Complainant prior to making the assignment.

The Administrative Law Judge recommended that the complaint be dismissed. In this connection, he concluded that the decision to make the temporary assignment fell within the reserved rights of management and that under Section 11(b) and Section 12 of the Order the Respondent was not obligated to confer or consult with the Complainant about such a decision, although there was an obligation on the part of the Respondent to meet and confer regarding the procedures used in temporarily filling the post and regarding the impact of the temporary assignment. The Administrative Law Judge found that no refusal to meet and confer regarding the impact of the temporary staffing assignment had been established because the Complainant, through its facility representative, was timely notified of the staffing plan. Moreover, he noted that the Complainant had never requested bargaining on impact until after the staffing had been accomplished and that the evidence did not establish there was a refusal to meet and confer on impact at a meeting held at the regional level subsequent to the staffing of the Farewell post. The Administrative Law Judge concluded, also, that the Respondent was relieved of its obligation to meet and confer on the procedures used in temporarily filling the Farewell post because of the Complainant's failure to request bargaining in this regard after being timely notified through its facility representative of the proposed action. Further, he found that even if the Respondent was not relieved of its obligation to meet and confer on the procedures, it did, in fact, meet at the regional level with the Complainant.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS



AIR TRAFFIC CONTROL,
FEDERAL AVIATION ADMINISTRATION,
ANCHORAGE, ALASKA

Respondent

and

Case No. 71-2818

NATIONAL ASSOCIATION OF AIR
TRAFFIC SPECIALISTS,
ALASKA REGION, ANCHORAGE, ALASKA

Complainant

DECISION AND ORDER

On February 28, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-2818 be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 30, 1974

Paul J. Kasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

.....
In the Matter of :
: AIR TRAFFIC CONTROL :
: FEDERAL AVIATION ADMINISTRATION :
: ANCHORAGE, ALASKA, :
: Respondent :
: and :
: NATIONAL ASSOCIATION OF AIR :
: TRAFFIC SPECIALISTS, ALASKA REGION :
: ANCHORAGE, ALASKA, :
: Complainant :
.....

Case No. 71-2818

George G. Wilson
Air Traffic Control
Federal Aviation Administration
632 - 6th Avenue
Anchorage, Alaska 99502

For the Respondent

Richard P. Kauffman
Box 4101, Star Route A
Anchorage, Alaska 99502

and

Marshall E. Danby
Box 433
Soldotna, Alaska 99669

For the Complainant

Before: RHEA M. BURROW
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This proceeding arose upon the timely filing of an unfair labor practice complaint that was amended on November 29, 1973, by the National Association of Air Traffic Specialists, Alaska Region, Anchorage, Alaska (hereinafter referred to as Complainant and/or Union) against Air Traffic Control, Federal Aviation Administration (hereinafter referred to as the Respondent) alleging that the Respondent engaged in certain conduct violative of Sections 19(a)(1) and (6) of the Executive Order 11491 (hereinafter called the Order). Essentially the complaint, as amended, charges that Respondent failed to consult with Complainant in compliance with Section 10, subsection (e) of the Order when on or about July 9, 1973, it detailed Steve Phillips, a GS-5 Air Traffic Control trainee into an Air Traffic control position at Farewell Flight Service Station, Farewell, Alaska, that was approved and staffed as a GS-9 2152 Air Traffic Control Specialist, and that such failure and refusal to consult additionally violated Complainant's rights under Section 19(a)(1) of the Order. It was also alleged that Respondent did not provide Complainant an opportunity to comment on the proposed substantive changes in personnel policies affecting its employees before they were put into effect.

A hearing was held in the above-captioned matter on January 15 and 16, 1974, in Anchorage, Alaska. All parties were represented and through their representatives were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues herein. Oral argument was heard and briefs submitted for consideration of the undersigned.

Upon the entire record herein, including my observation of the witnesses and their demeanor and upon the relevant evidence adduced at the hearing, I make the following findings, conclusion and recommendation:

I

Facts and Events Leading to Complaint

Prior to May 2, 1973, Keith Caldwell was a GS-9 Air Traffic Control Specialist employed by Respondent at its one-man Farewell, Alaska Flight Service Station. The principal function of Flight Service Stations is to provide flight assistance to carrier, general aviation, student and military pilots. Stations are located along the airways, at airports or landing areas and at other locations necessary to provide assistance to pilots in flight. The Farewell station is one of three one-man stations in Alaska where there is an Air Traffic Control Specialist to provide such information

or assistance. Farewell is staffed and operated by the McGrath Flight Service Station.

On May 2, 1973, Caldwell was selected for promotion for the Anchorage, Alaska, Flight Service Station as a GS-10. His transfer was delayed until July 9, 1973, to permit recruitment for his replacement at Farewell without jeopardizing his promotion.

Richard E. Forsgren, Respondent's Facility Chief for the McGrath and Farewell Flight Service Stations testified in substance that within two or three days after May 2, 1973, he transmitted a region-wide message requesting in-grade/downgrade candidates to fill the Flight Service Station GS-9 vacancy at Farewell. A tentative closure of June 2, 1973, was set. When no response was received, a nation-wide FAA blanket bid to fill the vacancy was immediately made. The Anchorage Flight Service Station was contacted to ascertain if it had any Air Traffic Control Specialists that it could detail for temporary duty at Farewell but none were reported available. Also during May and early June 1973, the five Air Traffic Control Specialists and a GS-5 trainee at McGrath were individually contacted to ascertain if any of them would volunteer for the assignment at Farewell. One of the specialists contacted at McGrath was David A. Brown, the Facility Representative of Complainant Union. GS-Trainee Steve Phillips was the only one who indicated a willingness to go to Farewell. While awaiting the outcome of recruitment advertising to fill the vacancy, trainee Phillips on or about May 20, 1973, was permitted to begin standing a pre-flight watch at McGrath. He did the duties that he would later do at Farewell in the event a GS-9 replacement could not be secured to fill the position. The temporary position was redesigned to omit certain functions including the omission of Airport Advisory Service for the in-flight portion of the watch.

The Respondent's Facility Chief for McGrath and Farewell Flight Service Stations stated:

"Farewell,...is a little bit non-essential to the total air traffic network because it just isn't used that much for air traffic. But it is very essential to us from a weather observation standpoint. I believe it is our second most important weather observation point."

Recruitment efforts to fill the vacancy created by Caldwell's impending promotion and transfer were made more difficult due to a rather tight austerity program occasioned by: (1) past closing of the Training Academy for training specialists; (2) hiring was frozen; (3) attrition was taking its toll and there was a shortage of qualified people region-wide

and nation-wide; (4) there were no overtime funds available for staffing; and, (5) staffing of the one-man stations such as Farewell was on a voluntary basis and there were no GS-9 volunteers for this remote station. Too, it was the beginning of the summer months when the stations began getting about fifty percent of their yearly traffic during a four-month period. The recruitment efforts were unsuccessful and in early July GS-5 trainee Steve Phillips was orally briefed on his duties and directed to report for duty at Farewell on July 9, 1973. The letter issued July 10, 1973 ^{1/} by Respondent's Facility Chief Forsgren, confirming Phillips relief assignment at Farewell Flight Service Station stated:

"You are directed to proceed to Farewell FSS on or about July 9, 1973, via charter aircraft.

"We will keep your time at McGrath....

"Your assignment will consist of the following:

You will stand a regular watch 0745-1545 Monday thru Friday. You are certified to observe the weather and make pilot weather briefings.

"You are not certified to stand the in-flight portion of the watch and will not provide Airport Advisory service. In-flight contacts can be advised to use frequency 122.2MHz so McGrath can service the flight.

"You can process the mail, do routine filing, and maintain the activity record.

"The FACF will be available for consultation on the interphone should any problem arise. I plan on making a short visit in a couple of weeks to provide assistance in any area not already covered.

"The duration of this assignment is thirty days."

The time was later extended but the GS-9 position and grade was reported vacant for all intents and purposes until the agency was able to fill it during the latter part of November 1973. Respondent Forsgren also testified that he initially talked to Complainant's facility representative David A. Brown about the possible use of Steve Phillips at Farewell in late May or early June 1973 and later had two more talks or discussions with him when the plan became more

^{1/} Respondent Exhibit No. 1.

firmly cemented. He stated that he knew that Brown was the Union representative when he talked to him between May 2 and the last of June 1973 about the relief assignment during lull or rest periods while they were at work. Complainant's facility representative Brown admits that Respondent Forsgren did talk to him about getting a replacement and of Steve Phillips possible assignment to Farewell but he did not regard the talks as being official consultations. It is noteworthy that the McGrath station had a complement of only six Aircraft Control Specialists at that time and that Farewell was staffed and operated by the McGrath station.

Daryl Logan, an employee training officer and former regional coordinator for the Union stated that he learned the details of the matter from discussion with Keith Caldwell and David Brown on July 12, 1973. He and Brown decided the matter was one considered appropriate for regional or facility consultation. They contacted the Complainant's Regional Director, Richard Kauffman and then sought a meeting with management. The meeting was arranged and the following morning, July 13, 1973, Kauffman and Logan met with John Costello who was then a Staff Specialist in the Airspace and Procedure Branch of the Air Traffic Division, and Mr. Hummel. At that meeting Mr. Costello reported in answer to a question that was raised that the Agency had considered its action with regard to detailing Steve Phillips to temporary duty at Farewell and felt that it was valid; also that the FAA had no obligation to consult with the Union in the matter.

At the subsequent hearing, Logan referred to one impact of the Activity's decision as being fear by other Air Traffic Control Specialists that they would lose the grade structure for the position; another was that the Union should have an opportunity to express its ideas before a change in procedure is implemented, otherwise, its right of consultation is placed in jeopardy.

II

At the hearing in January 1974 the Complainant and Respondent agreed that National Association of Air Traffic Specialists held exclusive recognition to represent all Air Traffic Control Specialists GS-2152 Series, ^{2/} employed at Flight Service Stations and International Flight Service Stations for the Alaska Region, including the McGrath and Farewell stations.

The testimony and documentary evidence or record reveals that the controversy herein arose from the incident occasioned

^{2/} Transcript, hereinafter referred to as Tr, pp 14 and 17.

by Respondent's relief assignment of GS-5 trainee Steve Phillips to fill temporarily, the vacancy created by the promotion and transfer on July 8, 1974 of journeyman GS-9 Keith Caldwell to the Anchorage Flight Service Station.

In a statement as to its position the Complainant urged that since the GS-9 journeyman status of the one-man flight service station at Farewell, Alaska was changed by Respondent to a non-journeyman status without consulting or conferring with the Complainant such constituted a change in personnel policy or practice and the impact resulting from such assignment had an effect on Complainant's bargaining unit employees. It was felt that the Complainant should have been consulted on the regional level before the job being considered was implemented.

The Respondent in its position statement and argument opined that the decision to redesign and temporarily staff the journeyman position at Farewell, Alaska was made by the Facility Chief at McGrath; that the issues presented in general do not require negotiation or consultation under Sections 11(b) and 12(a) of the Order; even if required, the Facility Chief did consult with the Union Facility Representative concerning the proposed action; and that staffing and consultation at the regional level was not necessary or proper and the Respondent committed no unfair labor practice. Also, that pursuant to request it did meet with representatives of the Complainant Union on July 13, 1973.

III

Section 11(a) of the Order imposes a requirement that an agency and a labor organization, which is accorded exclusive recognition, meet at reasonable times and confer in good faith with respect to personnel policies and practices, as well as matters affecting working conditions of unit employees. This duty is expected of the parties to the extent that it is appropriate under applicable laws and regulations, policies set forth in the Federal Personnel Manual, agency policies and regulations, a national agreement at a higher level, and the Order itself. It is a two way obligation because Sections 19(a) (6) and 19(b) (6) direct that agency management and a labor organization shall not refuse to consult, confer, or negotiate with the other as required by the Order.

There are certain limitations upon the obligation of an agency to consult with a bargaining representative. Not every matter is bargainable or negotiable on the part of the employer, and even when it is so determined, there may be instances where an activity has been relieved of the duty to bargain as prescribed by the Order. In the instant case, Respondent admits that beginning on July 9, 1973, it detailed GS-5 trainee Steve Phillips for temporary assignment and duty at Farewell, Alaska, to fill the vacancy created by the promotion and transfer of one of its journeymen Aircraft

Control Specialists. Regardless of whether there was in fact consultation with the Union regarding the temporary duty assignment, the employer asserts that it has been excused from doing so by the Order and its established procedures.

A. Respondent's Obligation to Consult

Regarding the relief assignment of a trainee to the Farewell Post.

Section 11(b) of the Order provides that the obligation to meet and confer does not include matters in regard to the organization of an agency, the number of employees, and the numbers, types and grades of positions or employees assigned to a unit work project, or tour of duty, the technology of performing its work, or its internal security practices. Further, management is accorded the right under Section 12(b) (2) of the Order, to transfer and assign employees to positions within the agency; under Section 12(b) (5) it has the right to determine the methods, means, and personnel by which such operations are to be conducted; and, under (12(b) (6) to take whatever actions may be necessary to carry out the mission of the agency in an emergency.

The relief assignment by the agency in sending employee Phillips to Farewell, Alaska, fell within the reserved rights of management under the Order. Staffing is a matter within the discretion of the employer. I conclude that under Section 11(b) and 12 of the Order, the Agency was not obliged to consult or confer with the Union in regard to the relief assignment of employee Phillips to Farewell, Alaska. Accordingly, I make no findings or conclusions as to whether Respondent's manner of dealing with the Union on the assignment would if not privileged, have constituted a violation of Section 19(a) (6) of the Order.

B. Obligation of Respondent to Consult Regarding Impact of Relief Assignment

The language in the Order and case law make it clear that an agency is obliged to bargain as to the impact flowing from an assignment or reassignment of employees. Section 11(b) of the Order provides that the parties are not precluded from

"...negotiating agreements providing appropriate arrangements for employees adversely affected by the impact or realignment of work forces or technological change."

The Federal Labor Council also recognized this obligation on the part of management, asserting in Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC

No. 71A-11 that while the Agency did not have to consult on the establishment of tours of duty for employees, it would be required to bargain regarding the impact of such action on the employees involved. 3/ While recognizing that management must consult as to the impact of privileged decisions, the Assistant Secretary found no violation for failure to so consult where the Union had not requested that the Activity meet and confer on the impact of such decision. Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289.

In the instant matter the Respondent, in early May 1973, began advertising FAA region-wide for a GS-9 Aircraft Control Specialist as a replacement for the Farewell post and when no response was received, it advertised FAA nation-wide in early June 1973. Meanwhile beginning May 20, 1973, GS-5 trainee Phillips was authorized to begin a pre-flight watch at McGrath to perform the duties he might later be required to do at Farewell. This was a measure designed to assure proper manning of the post at Farewell in the event recruiting efforts to secure a GS-9 replacement were unsuccessful. The one-man Farewell station is operated and manned with personnel from McGrath Flight Service Station. On at least three occasions between May 2, 1973, and the staffing of the Farewell Post on July 9, 1973, the Union's facility representative at McGrath was contacted by Respondent's facility representative and advised as to the recruiting efforts, the difficulty in securing a replacement and the probability of having to staff the Farewell Post temporarily with a GS-5 trainee. 4/

The Respondent urged that evidence presented by Complainant as to impact resulting from staffing the post at Farewell with a trainee was conjectural; that actually, Phillips was satisfied and benefited by the assignment and no other employees were affected as they remained on their same jobs, doing the same work without any change of conditions. While there is some merit to the contention in this particular

3/ See also Naval Public Works Center, FLRC No. 71A-56.

4/ David Brown was evasive in his answers to questions on cross-examination and as to never having discussed with Respondent's Facility Chief the matter of Farewell or trainee Phillips going to Farewell. It was unconvincing and is discredited. The matter was posted on bulletin boards, was publicized region and nation-wide, was the subject of at least three discussions with him by the Facility Chief and he had been invited with others to volunteer for the assignment. He admitted the talks but passed them off as discussions between a supervisor and employee. Since McGrath then had only 6 aircraft control specialists, all were well known to each other; it is apparent that Brown's characterization of the discussions and remarks were an afterthought to support a position taken after the temporary staffing was accomplished.

situation that the matters presented by Complainant were conjectural, it should be emphasized that just because impact may be beneficial to a party does not lessen the obligation to consult, confer, and negotiate in an appropriate situation. I find that the Respondent was under an obligation to meet, negotiate, consult, or confer over the impact of its decision to temporarily staff the Farewell post with a trainee. However, I also find that the Union, through its facility representative, was timely notified of Respondent's plans to staff the Farewell Post with a trainee and that it never requested to bargain on the impact in any manner until after the staffing of the post was accomplished. Even after the post was staffed, a meeting was held pursuant to Complainant's request on July 13, 1973 to discuss the Farewell flight service station assignment. This meeting was at the regional level and testimony from both parties refer to it having lasted for at least one and one-half hours. The Activity was requested to state its position and answered that it was not obligated to consult regarding the relief assignment of trainee Phillips. Apart from concern expressed as to whether the general public's rights were being safeguarded the record is not clear as to an issue being raised as to whether there were any employees adversely affected by the impact, realignment of work forces, or technological change caused by the Farewell assignment. Even assuming the matter of impact was inferentially raised, I find that in this case, no refusal to bargain has been established. 5/

C. Obligation of Respondent to Bargain Regarding Procedure in Staffing the Farewell Post

While the Respondent has previously been found to have been privileged to make the relief assignment of the trainee to the journeyman post at Farewell, there is also for consideration under the Order the procedure involved in effecting the assignment.

The Federal Labor Council stated in Veterans Administration Research Hospital, Chicago, Illinois, 71A-31, that the reservation of decision-making and action authority is not intended to bar negotiation of procedure to the extent consonant with law and regulations. 6/ The Assistant Secretary enunciated and applied this principle in Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289; more recently he adopted a decision with findings that the Respondent Activity failed to meet and

5/ See Plum Island Animal Disease Laboratory and Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, supra.

6/ See also Naval Public Works Center, FLRC No. 71A-56.

confer with the Complainant concerning procedures to be followed in selecting employees for reassignment. Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329.

The facts in this proceeding are distinguishable from those hereinabove cited. Apart from the widespread FAA advertising to secure a journeyman Aircraft Control Specialist replacement for the Farewell, Alaska post the Complainant Union's facility representative was seen on at least three separate occasions between May 2 and the last of June 1973 and advised of the situation including the necessity of using trainee Steve Phillips as a relief replacement in the event a journeyman could not be recruited. I find that the Complainant Union was notified of the intended action by the Respondent before it made the relief assignment of Steve Phillips to the Farewell Post on July 9, 1973. Further, Phillips was being trained for his duties at the same Flight Service Station as the Union facility representative David Brown who was fully aware of his intended relief as a replacement for journeyman Caldwell by reason of repeated personal contact and discussions with Respondent facility chief; also, there was no request to meet and confer regarding replacement of Caldwell by the Union prior to July 9, 1973, when trainee Phillips was detailed to relief duty at the Farewell post.

In view of the foregoing, it is evident under the Federal Labor Relations Council and Assistant Secretary's decisions 7/ that generally there is an obligation to consult, confer and negotiate regarding the procedures and impact resulting from elimination of a work shift, reductions in force and transfers and assignments made unilaterally by an Activity unless the union involved was notified of the intended Act before the planned action was taken. I find that the failure by the Complainant to request the Respondent to meet and confer in this regard after having been timely notified of the intended action was such as to relieve the employer of its obligation. 8/

7/ See also Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington, A/SLMR No. 332.

8/ In making this finding, I did not subscribe to the Union's position that trainee Steve Phillips performed the same duties previously performed by Keith Caldwell because the evidence shows certain functions including airport advisory service for the in-flight portion of the watch were omitted. Too, what constitutes consultation and at which level it is to be conducted depends on the circumstances of the individual case and the negotiated agreement between the parties. Nothing was presented at the hearing regarding the collective bargaining agreement to establish that consultation was required at

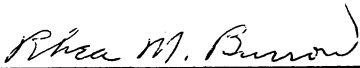
Even if not relieved, the Respondent, pursuant to request, met with the Complainant at the regional level on July 13, 1973. It was not required to agree with the Union's position or demands.

Conclusion

In view of the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(1) and (6) of the Order. 9/

Recommendation

Upon the basis of the above findings, conclusion and the entire record, I recommend that the Assistant Secretary dismiss the complaint.


RHEA M. BURROW
Administrative Law Judge

DATED: February 28, 1974
Washington, D. C.

8/ (continued) the regional level. The one-man Farewell station was staffed and operated by the McGrath Flight Service Station which was comprised of six Aircraft Control Specialists and one activity facility chief. Notice was given to the Union representative at the facility level where both the trainee, the agency, the facility chief, and Union representative were then located. The important matter considered herein, in the absence of any collective bargaining provisions to the contrary, was whether the Union, through its representative, had been provided sufficient advance information by the Activity to apprise it of the intended Act and procedure by which it was to be accomplished. In the instant matter the information and formality are deemed to have been adequate. There was no timely request by the Union to confer or consult on a facility or regional level prior to post staffing on July 9, 1973.

9/ Section 203.14 of the Regulations of the Assistant Secretary for Labor Management Relations provides that:

"A Complainant in asserting a violation of the Order shall have the burden of proving the allegation of the complaint by a preponderance of the evidence."

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BUREAU OF RECLAMATION,
BOULDER CANYON PROJECT OFFICE,
BOULDER CITY, NEVADA
A/SLMR No. 380

BUREAU OF RECLAMATION,
BOULDER CANYON PROJECT OFFICE,
BOULDER CITY, NEVADA

Respondent

and

Case No. 72-4202

This unfair labor practice proceeding involved a complaint filed by Steve Sylvania, an individual, (Complainant), alleging that the Bureau of Reclamation, Boulder Canyon Project Office, Boulder City, Nevada (Respondent) violated Section 19(a)(1) and (2) of the Order based on its discriminatory discharge of the Complainant, a probationary employee.

STEVE SYLVANIE,
AN INDIVIDUAL,
BOULDER CITY, NEVADA

Complainant

At the outset of the hearing, the Respondent moved to dismiss the complaint on the ground that it was filed untimely under the requirements of Section 203.2(b)(2) of the Assistant Secretary's Regulations. The Respondent contended that the Complainant was attempting to refile, on his own behalf, the same unfair labor practice charge which Local 1978, American Federation of Government Employees, AFL-CIO (AFGE), the exclusive representative of the Respondent's employees, had previously filed on the Complainant's behalf, but had failed to act upon within the prescribed 60 day period, after receiving the Respondent's final decision on the charge. The Complainant took the position at the hearing and in its supporting brief that an unfair labor practice charge which has been allowed to remain dormant for more than 60 days after a final decision without the filing of a complaint may be refiled by another party and that a subsequent complaint is timely if filed within 60 days following the final decision on the refiled charge.

DECISION AND ORDER

On January 25, 1974, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding, finding that the complaint herein was untimely filed and recommending that it be dismissed. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the AFGE acted as the agent for the Complainant when it filed the earlier charge on behalf of the latter. Thus, it was concluded that when the AFGE filed the charge on November 22, 1972, it was acting as agent for the Complainant, and that charge was, in effect, the Complainant's charge. And when the AFGE failed to file a complaint within the prescribed 60 day period, subsequent to the service of the Respondent's final decision of December 15, 1972, in accordance with the requirements of Section 203.2(b)(2) of the Assistant Secretary's Regulations, the Complainant, in effect, failed to file his complaint in a timely fashion.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

The instant complaint alleges that the Respondent violated Section 19(a)(1) and (2) of the Order based on its discriminatory discharge of the Complainant, a probationary employee.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

At the outset of the hearing, the Respondent moved to dismiss the complaint on the ground that it was filed untimely under the requirements of Section 203.2(b)(2) of the Assistant Secretary's Regulations. ^{1/} The

^{1/} Section 203.2(b)(2) provides, "If a written decision expressly designated as a final decision on the charge is served by the respondent on the charging party, that party may file the complaint immediately but in no event later than sixty (60) days from the date of such service."

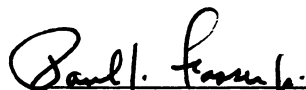
Respondent contended that the Complainant was attempting to refile, on his own behalf, the same unfair labor practice charge which Local 1978, American Federation of Government Employees, AFL-CIO, (AFGE), the exclusive representative of the Respondent's employees, had previously filed on the Complainant's behalf, but had failed to act upon within the prescribed 60 day period after receiving the Respondent's final decision on the charge. The Complainant took the position at the hearing and in its supporting brief that an unfair labor practice charge which has been allowed to remain dormant for more than 60 days without the filing of a complaint after a final decision may be refiled by another party and that a subsequent complaint is timely if filed within 60 days following the final decision on the refiled charge.

The Administrative Law Judge recommended that the Respondent's Motion to Dismiss be granted. 2/ In adopting the Administrative Law Judge's recommendation, I note particularly his conclusions that the AFGE acted as the agent for the Complainant when it filed a charge on behalf of the Complainant on November 22, 1972, and that, by virtue of the Complainant's designation of the AFGE as his agent, the Complainant, in legal effect, was the charging party. 3/ In my view, the law of agency is well settled that an agent, acting within the scope of his authority, binds his principal. Thus, when the AFGE filed the charge on November 22, 1972, it was acting as agent for the Complainant, and that charge was, in effect, the Complainant's charge. And when the AFGE failed to file a complaint within the prescribed 60 day period, subsequent to the service of the Respondent's final decision of December 15, 1972, in accordance with the requirements of Section 203.2(b)(2) of the Assistant Secretary's Regulations, the Complainant, in effect, failed to file his complaint in a timely fashion. Accordingly, in agreement with the Administrative Law Judge, I find the complaint herein to be filed untimely.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-4202 be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

2/ Contrary to the argument advanced by the Complainant in his brief, I find that the Administrative Law Judge did not exceed his authority by dismissing the complaint. As evidenced by the issuance of the instant Report and Recommendation, he merely recommended dismissal as prescribed by Section 203.22 of the Assistant Secretary's Regulations.

3/ In this regard, it was noted additionally that the record establishes that the Complainant executed a power of attorney authorizing the AFGE to act on his behalf in all matters coincident to his claim.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



.....
In the Matter of :
:
BUREAU OF RECLAMATION :
BOULDER CANYON PROJECT OFFICE :
BOULDER CITY, NEVADA, :
:
Respondent, :
: Case No. 72-4202
:
and :
:
STEVE SYLVANIE, :
AN INDIVIDUAL, :
BOULDER CITY, NEVADA, :
:
Complainant. :
.....

Robert D. Conover, Esquire
Office of the Field Solicitor
U.S. Department of the Interior
3610 Central Avenue
Suite 104
Riverside, California 92506
For Respondent

Dolph David Sand, Esquire
Staff Counsel
American Federation of Government Employees
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
For Complainant

Before: WILLIAM B. DEVANEY
Administrative Law Judge

REPORT AND RECOMMENDATION THAT
MOTION TO DISMISS BE GRANTED

Statement of the Case

This case arises under Executive Order 11491. At the commencement of the hearing, Respondent moved that the Complaint be dismissed. The issue presented was narrow and the facts are not in dispute. The sole issue, as framed by

Respondent and agreed to by Complainant, is whether the complaint herein was timely where a charge was filed on behalf of present Complainant by Local 1978, American Federation of Government Employees (hereinafter AFGE) on November 22, 1972; a final decision on the charge was issued on December 15, 1972; no complaint was filed within 60 days from the date of service of the final decision; and some 96 days after the date of service of the final decision, Complainant filed, in his own name, the same charge, upon which the complaint herein was filed on, or about, May 16, 1973 (Ass't. Sec. Exh. 1(a)) and an amended complaint was filed on, or about, September 27, 1973 (Ass't. Sec. Exh. 1(b)).

Statement of Facts

Complainant was employed on, or about, January 4, 1972, as an exempt Janitor I, subject to completion of a one year probationary period (Tr. 6), and, effective June 11, 1972, was given a conversion to career conditional appointment as a janitor (Tr. 7). On October 27, 1972, as part of its evaluation process, Respondent advised Complainant that his work performance was unsatisfactory and because of his unsatisfactory work performance he would not be retained after November 3, 1972 (Tr. 8-9).

On November 22, 1972, AFGE filed an unfair labor practice charge on behalf of Complainant (Tr. 8, 11) alleging that Respondent had violated Section 19(a)(1) and (2) of Executive Order 11491. Accompanying the charge was a power of attorney signed by Complainant and dated November 15, 1972 (Tr. 8). It was conceded that AFGE was authorized to represent Complainant; and that AFGE filed the charge on his behalf alleging discrimination in his discharge (Tr. 11). On December 15, 1972, Respondent issued its final decision. AFGE did not file a complaint within 60 days from the service of Respondent's final decision (Tr. 8, 10, 11, 12, 15) for "matters known to the Local" (Tr. 10) did not wish to pursue the matter (Tr. 11); but did not refuse to file a complaint on behalf of Complainant (Tr. 11-12). AFGE also stated that it could have withdrawn but did not elect to do so and asserted that it was not required to do so.

On or about March 27, 1973, Complainant, in his own name, filed a charge alleging the same grounds for the same asserted discrimination and asserting violation by

Respondent of same provisions of Executive Order 11491 ^{1/} as set forth in the charge filed on Complainant's behalf by AFGE on November 22, 1972. It was stipulated by the parties that the two charges were identical in substance (Tr. 16). The Complaint (Ass't. Sec. Exh. 1(a)) and an amended complaint (Ass't. Sec. Exh. 1(b)) were signed by Mr. Gerald W. May, President of AFGE Local 1978 - not by Complainant - and Complainant was represented at the hearing by Dolph David Sand, Esquire, Staff Counsel, AFGE.

Conclusions

Pursuant to the stipulation of the parties, the same unfair labor practice charge was filed by AFGE on behalf of Complainant, on November 22, 1972, as was filed by Complainant on March 27, 1973. A final decision was issued by Respondent on the AFGE charge on December 15, 1972, and no complaint was filed within 60 days after service thereof as provided in §203.2(2) and (3) of the Regulations. Complainant's position, quite simply, is that the same unfair labor practice charge may be refiled after a final decision and a complaint is timely if filed within 60 days after the last final decision. Stated otherwise, Complainant asserts that each time the same unfair labor practice charge is filed by a different party, that party has 60 days after final decision to file a complaint (Tr. 10,11,15) and that the only limitation in §203.2 on the successive filing of the same unfair labor practice charge in the name of different persons is the limitation set forth in §203.2(2) which imposes a six month time limitation on the filing of a charge from the date of occurrence of the alleged unfair labor practice.

^{1/} It is true that a Section 19(a)(4) violation was asserted in the charge of March 27, 1973, and in the complaint filed on or about May 16, 1973 (Ass't. Sec. Exh. 1(a)); however, the 19(a)(4) allegation was deleted in the amended complaint filed on or about September 27, 1973 (Ass't. Sec. Exh. 1(b)) and under the admitted facts no basis for a 19(a)(4) violation existed which was conceded by Complainant by stipulation (Tr. 16).

Complainant's position is untenable. At the outset, AFGE acted as agent for Complainant and filed a charge on Complainant's behalf on November 22, 1972. Consequently, Complainant was, in legal effect, the charging party, by virtue of his designation of AFGE as his agent; and AFGE by filing a charge on behalf of Complainant acted vicariously in Complainant's stead as his authorized agent. Moreover, §203.2, by its terms, governs each "unfair labor practice". For example, §203.2(a)(3) specifically refers, to:

"...the facts constituting the unfair labor practice..." (Emphasis supplied).

§203.2(a)(4), likewise, refers to:

"...the alleged unfair labor practice..." (Emphasis supplied).

Where, as here, there is a single alleged unfair labor practice, as the parties have stipulated, the provisions of §203.2(b)(2) and (3) control the timeliness of a complaint and the period allowed runs from the date of service of the first final decision on the unfair labor practice charge. In this case the period ran from the date of service of the final decision of Respondent of December 15, 1972. The re-filing of the same charge, on or about March 27, 1973, in the name of Complainant rather than in the name of AFGE, was without effect as to avoidance of the limitation set forth in §203.2(b)(2) and (3). As the Regulations require:

"...a complaint...in no event later than sixty (60) days from the date of such service." (§203.2(b)(2)).

"A complaint must be filed within nine (9) months of the occurrence of the alleged unfair labor practice or within sixty (60) days of the service of a respondent's written final decision on the charging party, whichever is the shorter period of time." (Emphasis supplied) §203.2(b)(3)

and no complaint was filed within 60 days from the date of service of Respondent's written final decision of December 15, 1973, the complaint filed on May 16, 1973, and amended on

September 27, 1973, was not timely. 2/ The decision of Respondent on the alleged unfair labor practice charge became final when no complaint was filed within 60 days after service thereof and the decision on the charge of November 27, 1972, is res adjudicata as to the charge of March 27, 1973, which, as stipulated, involved the same cause of action.

Recommendation

That Respondent's Motion to Dismiss the Complaint herein as untimely filed be granted.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated January 25, 1974
Washington, D.C.

2/ The complete anomaly of the result urged by Complainant is further evident from the facts here involved. AFGE filed a charge on November 22, 1972, on behalf of Complainant. Respondent's final decision on the alleged unfair labor practice issued December 15, 1972. By deliberate action no complaint was filed within 60 days after service of the final decision. On March 27, 1973, the same unfair labor practice charge was filed in the name of Complainant and Respondent on April 2, 1973, responded that the charge was the same as made by AFGE on behalf of Complainant on November 22, 1972, and enclosed a copy of its final decision of December 15, 1972. On May 16, 1973, a complaint was filed. Significantly, the complaint was signed by Mr. Gerald W. May, President of AFGE Local 1978, and at the hearing, staff counsel of AFGE appeared on behalf of Complainant. If Complainant's position were correct, AFGE would accomplish by indirection what it concedes it could not do directly, namely to file a complaint after expiration of the time allowed by §203.2(b)(2) and (3).

It must be emphasized that this case involves a single unfair labor practice; not different unfair labor practices arising out of the same factual allegations.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY NATICK LABORATORIES,
NATICK, MASSACHUSETTS
A/SLMR No. 381

U.S. ARMY NATICK LABORATORIES,
NATICK, MASSACHUSETTS

Respondent

and

Case No. 31-6129(CA)

LOCAL R1-34,
NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed against U.S. Army Natick Laboratories, Natick, Massachusetts (Respondent), by Local R1-34, National Association of Government Employees (Complainant), alleging that the Respondent violated Section 19(a)(1) of Executive Order 11491, as amended, by certain conduct of its Acting Civilian Personnel Officer (CPO). Essentially, the complaint alleged that during a conversation between the Respondent's CPO and the president and vice-president of the Complainant, the CPO improperly threatened the Complainant's president with cancellation of his scheduled vacation and with the termination of the dues withholding agreement then in effect between the Respondent and the Complainant.

On February 27, 1974, Administrative Law Judge John H. Fenton issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent, U.S. Army Natick Laboratories, Natick, Massachusetts, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation.

Based upon his resolution of the credibility issues, the Administrative Law Judge found that, in fact, the Respondent's CPO threatened to recommend to the Commanding Officer of the Respondent that he discontinue the dues withholding agreement then in effect between Respondent and Complainant, and that such threat constituted a violation of Section 19(a)(1) of the Order. In addition, the Administrative Law Judge found the Respondent's CPO threatened to cancel the Complainant's president's vacation, but recommended that no violation of Section 19(a)(1) be found because the evidence disclosed that the CPO immediately withdrew his threat and, thereafter, the president of the Complainant was allowed to take his vacation as scheduled.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings 1/, conclusions and recommendation of the Administrative Law Judge.

Noting that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative and take certain affirmative actions to remedy such conduct.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Army Natick Laboratories, Natick, Massachusetts, shall:

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180, at footnote 1.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT threaten Local R1-34, National Association of Government Employees, or any of its officers or members, with unilateral termination of the dues withholding agreement between the U.S. Army Natick Laboratories and Local R1-34, National Association of Government Employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Executive Order.

1. Cease and desist from:

(a) Threatening to terminate unilaterally the dues withholding agreement between the U.S. Army Natick Laboratories, Natick, Massachusetts and Local R1-34, National Association of Government Employees.

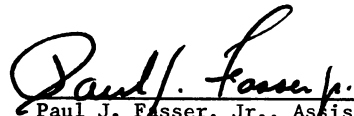
(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by the Executive Order.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at the U.S. Army Natick Laboratories, Natick, Massachusetts, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the U.S. Army Natick Laboratories and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
April 30, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 3515, 1515 Broadway, New York, New York 10036.



REPORT AND RECOMMENDATION

Statement of the Case

This proceeding was initiated upon the filing of a complaint alleging a violation of §19(a)(1) of Executive Order 11491, as amended, by the National Association of Government Employees, Local R1-34 (hereinafter referred to as Local R1-34 or the Union) against the U. S. Army Natick Laboratories, Natick, Massachusetts (hereinafter referred to as the Activity) on October 5, 1972. The Complaint charges that on August 10, 1972, Mr. Nicholas Morana, then Acting Civilian Personnel Officer at the Activity, threatened to cancel the vacation of Mr. George Horner, Security Guard employee and President of Local R1-34, and threatened to discontinue the plan in effect at the Activity for deduction of union dues from the pay checks of consenting employees.

A Notice of Hearing on the Complaint was issued on January 24, 1973, by the Labor-Management Services Administration Regional Administrator, New York Region. Pursuant thereto, a hearing was held on March 27, 1973, at the Activity in Natick, Massachusetts. Both parties were present and represented by counsel and were afforded full opportunity to call and examine witnesses and to adduce relevant evidence. Briefs filed by both parties have been carefully considered.

Upon the entire record in this case and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusion of law and recommendation.

Finding of Fact

Local R1-34 has been the recognized bargaining representative of a unit of approximately 950 employees at the Activity since 1965. On August 10, 1972,^{1/} the date of the alleged unfair labor practice, there was no collective

^{1/} Unless otherwise indicated all dates mentioned hereinafter refer to calendar year 1972.

In the Matter of :

U. S. ARMY NATICK LABORATORIES
NATICK, MASSACHUSETTS :

Respondent : CASE NO. 31-6129 (CA)

and :

LOCAL R1-34
NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES :

Complainant :

John P. Mulvihill, Esquire
Arthur J. O'Keefe, Esquire
U. S. Army Natick Laboratories
Kansas Street
Natick, Massachusetts 01760
For Respondent

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Employees
285 Dorchester Avenue
Boston, Massachusetts 02127
For the Complainant

BEFORE: JOHN H. FENTON
Administrative Law Judge

bargaining agreement in force at the Activity, the last such agreement having expired in November of 1971. The parties stipulate, however, that on the date in question there was in effect at the Activity an agreement under which dues were withheld from the pay checks of consenting employees. This agreement was not produced at the hearing or introduced into evidence.

Several days prior to August 10, a registered letter from the Regional Administrator of the Department of Labor, Labor-Management Services Administration, addressed to George F. Horner, President of Local R1-34, was delivered to the Activity mailroom. This correspondence concerned a then active dispute between the Activity and the Union unrelated to the present case. Although it is not clear from the evidence under what authority the mailroom personnel were acting, this certified letter was opened before Mr. Horner learned of its receipt. When Mr. Horner discovered that his letter was opened he registered a complaint with the postmaster at the Activity, Mr. Lou Sage. Seeking guidance as to additional action he would be advised to take in response to the mailroom incident, Mr. Horner telephoned Mr. Charles E. Hickey at the National Association of Government Employees (NAGE) National Headquarters and related the incident to him. Sometime after this conversation the details of the incident were related to Mr. John Cramer, a reporter for the Washington Star-News newspaper who authors a column of interest to federal employees.

Between 9:00 a.m., and 9:30 a.m., on August 10, Mr. Morana received a telephone call from Mr. Cramer who repeated to him the information regarding the mailroom incident he had received. Mr. Morana was told only that this report had come from someone in NAGE, and he was informed that the source of such information stated that mailroom personnel at the Activity were instructed by Mr. Morana to open all mail addressed to the Union.

It is against this backdrop that Mr. Horner and Mr. Gregory L. Chiriaco, Vice President of Local R1-34,

both newly elected to their Union offices, met with Mr. Morana on August 10. The testimony of Messrs. Horner and Chiriaco regarding what occurred at the meeting differs significantly from the version offered in the testimony of Mr. Morana. The essential issue in contest in this proceeding being one of fact, the resolution of the instant complaint turns on the credibility accorded to the testimony of the participants to the August 10 meeting. It is therefore necessary to review that testimony in some detail.

Mr. Horner testified that in the early morning of August 10 while on duty in the service gate guardhouse at the Activity, he contacted Mr. Chiriaco at another location within the Activity and asked him to come to the gate house to discuss Union business. Mr. Horner was planning to be away from the Activity for several weeks on vacation and wanted to brief Mr. Chiriaco on up-coming Union activities. After Mr. Chiriaco arrived at the gate house, and while he was talking with Mr. Horner, Mr. Morana appeared at the gate house door and, according to Mr. Horner, the following exchange ensued:

Morana: What is this a private meeting or can anyone get in?

Horner: Hi Nick, come on in and meet the acting president for the next two weeks.

Morana: Where are you going?

Horner: I am going on vacation.

Morana: Don't count on it.

Horner: I am counting on it, it has been planned, scheduled and approved.

Morana: I wouldn't bank on it.

Horner: I am banking on it, I am going.

Morana: Okay, go ahead on your vacation. There may not be a Union when you come back, I will go to the old man (General McWhorter, Commanding Officer at the Activity) and have him stop payroll deductions (for Union dues).

Mr. Horner testified that Morana then turned to him and accused him of "screwing up" and writing the letter to Mr. Cramer which was the subject of Mr. Morana's earlier conversation. Mr. Morana then allegedly accused Mr. Horner of breaking the "gentlemen's agreement" Activity management had with past Union President, Thomas Miles, to the effect that all efforts would be made to resolve any differences within the Activity before either party went outside. Mr. Horner disavowed knowledge of the purported agreement and announced that he did not consider himself bound thereby. He then told Mr. Morana that he did not know Mr. Cramer and had never corresponded with him. According to Horner, Mr. Morana then became very agitated and verbally abused him before leaving the guard shack.

Mr. Chiriaco, who is employed at the Activity as a mechanical engineer, was present at the gate house during the exchange between Horner and Morana. He testified that shortly after he had arrived at the gate house in response to Mr. Horner's early morning call, he saw Mr. Morana approach the house "in a very determined fashion." When Morana asked if he could enter the house, Horner invited him in and said, referring to Chiriaco, "I want you to meet the acting president for the next two weeks, while I am on vacation." Chiriaco testified that Morana replied, "Don't bank on it," and when Horner repeated that he intended to take his scheduled vacation, Morana again replied, "Don't bank on it, George."

Chiriaco testified that Mr. Morana then turned to Mr. Horner and said, "You know George, I think more about Union members than you do. You know this is no way to run a Union. You know we can stop payroll deductions if we want to, and I might just ask the Old Man." Then followed the exchange over the "gentlemen's agreement" Mr. Morana

purportedly had with Mr. Miles and a discussion concerning the Cramer telephone call. According to Mr. Chiriaco, Mr. Morana then accused Mr. Horner of having "got[ten] things screwed up as usual," and with that Morana left the gate house.

Mr. Morana's recollection of the August 10 meeting in the gate house differs significantly from that offered by Messrs. Horner and Chiriaco. Morana testified that he received a telephone call from Mr. Cramer of the Washington Star-News newspaper at 9:00 or 9:30 a.m., on the morning of August 10. Mr. Cramer read to him portions of a letter from someone in NAGE stating that he had ordered the opening of classified mail addressed to the Union at Natick Laboratories. Mr. Morana testified that he had made no such order and felt that the mailroom incident of which Mr. Horner had complained was deplorable. He stated further that the regulations governing mail handling have since been clarified to prevent any similar breach.

Mr. Morana further testified that at approximately 10:00 a.m., after his conversation with Mr. Cramer, he went to the gate house to talk to Mr. Horner concerning what he considered to be the false account given to Mr. Cramer. When Horner told him that he was briefing Mr. Chiriaco on Union business because of his up-coming vacation, Mr. Morana recalls having said, "George, why don't you stick around and clear up the grievances, we have 19 of them pending." Mr. Horner then said, "I can't, I have my vacation planned and I am going," and Morana replied, "Go ahead."

Mr. Morana then recalls having brought up the Cramer telephone call and stating that he could not understand how such misinformation was directed to Mr. Cramer. When Mr. Horner explained that he had called Mr. Hickey at NAGE headquarters to ask his advice regarding the mailroom incident, Mr. Morana asked him if he knew of the unwritten agreement management had with Mr. Miles. When both Horner and Chiriaco professed ignorance of the agreement, Mr. Morana explained it to them. According to Mr. Morana's testimony

he then asked Mr. Horner and Mr. Chiriaco if they knew of the bargaining agreement which had recently expired and of the agreement between the Union and the Activity concerning dues withholding. He explained to them that in certain circumstances dues withholding could be discontinued by the Activity, giving as examples proof of communist infiltration within the Union or encouragement of work stoppages by the Union. The purpose of this discourse was, according to Morana, merely to familiarize the new Union officers with various aspects of labor-management relations at the Activity.

Mr. Morana testified that while he was upset about the letter to Mr. Cramer when he originally arrived at the gate house, he was "very cool" as he discussed the matter later with Mr. Horner. He further testified that he had not threatened to cancel Mr. Horner's vacation, that he had not used the expression "screwed up" to describe Mr. Horner's conduct of Union affairs and that he had never referred to General McWhorter as the "Old Man," although he had often used that term while on duty as a Lieutenant Colonel in the U. S. Army Reserve to refer to a Company or Battalion Commander.

At the hearing of this matter the Activity sought to introduce into evidence two arbitration decisions for the purpose of impeaching the credibility of Messrs. Horner and Chiriaco. Each decision dealt with a grievance appeal taken from an adverse management action. In each decision the arbitrator questioned the credibility of the testimony offered by the grievant.

In the decision dealing with Mr. Horner, ^{2/} the arbitrator found ground to seriously question Horner's testimony regarding his alleged need for emergency annual leave. On the basis of all the evidence the arbitrator affirmed the grievance examiner's findings that the Activity properly disallowed the leave requested.

^{2/} Marked for identification as Respondent's Exhibit No. 3.

In the decision concerning Mr. Chiriaco, ^{3/} the arbitrator denied the grievance appeal, finding that the testimony of the grievant lacked acceptability for several stated reasons. Ruling on the admissibility of the proffered exhibits was reserved for fuller consideration.

Hearings held on complaints filed under the Executive Order are not governed by technical rules of evidence. Any evidence may be received except that which is found to be immaterial, irrelevant, repetitious, or privileged, 29 CFR 203.13. The credibility of a witness is always a material issue in proceedings under the Order. I am unconvinced, however, that the proffer of the Activity is at all relevant to the present inquiry. In a matter arising under the National Labor Relations Act, 29 U.S.C. 151, et seq., the Fifth Circuit ruled as follows on similar evidence considered by the NLRB in its determination of an unfair labor practice charge:

* * * Credibility of a witness is a matter which is to be determined by the trier of facts in the particular case. 58 Am. Jur. 487, Witnesses §860. The disbelief by the examiner in the former case of the testimony there given by [the witness] is not entitled to consideration, by a different Examiner in a different case, as to whether he should credit or discredit the testimony given in the latter case by the witness * * *. NLRB v. Walton Manufacturing Company, 286 F.2d 26, 29 (1961).

The evidence is therefore excluded.

Complainant sought to admit into evidence a document containing a summary of complaints in the form of grievances, appeals, unfair labor practice charges, and EEO complaints filed by employees of the Activity. ^{4/} Included in this summary are statistics reflecting the success or lack of success enjoyed by employees in the prosecution of their complaints. This summary was offered to prove antiunion

^{3/} Marked for identification as Respondent's Exhibit No. 4.
^{4/} Marked for identification as Claimant's Exhibit No. 1.

animus on the part of the Activity. While I feel constrained to allow the admission of the exhibit, I cannot infer from its publication an intent on the part of Mr. Morana or other management officials to intimidate employees or to dissuade them from availing themselves of existing procedures to air and seek adjustment of grievances and complaints. Therefore, I cannot find from the evidence the antiunion animus Complainant sought to prove with its admission.

Concluding Findings

The evidence taken as a whole establishes that on the morning of August 10 Mr. Morana received a telephone call from Mr. Cramer of the Washington Star-News. Mr. Cramer related to him a charge made in a letter from someone in NAGE that the Activity mailroom had improperly handled a certified letter addressed to Mr. Horner in his capacity as Union President. It is apparent that Mr. Morana believed that Mr. Horner himself was the source of this report, although this later proved to be untrue. Mr. Morana described himself as "upset" after his conversation with Mr. Cramer because of what he considered to be the false nature of the report made to him. It also appears likely that Mr. Morana was irritated by what he conceived to be a breach by Mr. Horner of the "gentlemen's agreement" the Activity had had with Mr. Miles, Mr. Horner's predecessor in office. Shortly after his conversation with Mr. Cramer, Mr. Morana went to the service guard house where he knew Mr. Horner was stationed. There followed the meeting from which the present Complaint flowed.

It has not been easy for me to resolve the credibility of the witnesses. It is apparent to me that Mr. Morana was stung by the telephone call from Mr. Cramer, and that he was angered by what he regarded to be the relaying of false information to a reporter covering the government scene, in violation of a gentlemen's agreement not to air such matters publicly before a genuine effort had been made to iron them out within the Laboratories. It is also clear that he attributed such unappreciated conduct to Mr. Horner.

As I have reviewed the conflicting testimony, I have been repeatedly struck, as I was at the hearing, by the incongruity of Mr. Morana's professed desire to instruct these two Union officers concerning aspects of the collective bargaining agreement which were in no way germane either to the mailroom incident or to the impending vacation of Mr. Horner. Rather, they strike me as an effort to innocently explain away, without altogether denying, remarks which were made in anger and which were intended as a threat to the Union. I find that Mr. Morana did, in anger, threaten to go to the Commanding Officer for purposes of seeking an end to the arrangement for a dues deduction, and that he was motivated in doing so by the factors noted above.

CONCLUSIONS OF LAW

Section 19(a)(1) of Executive Order 11491, under which the present Complaint is prosecuted, makes it unlawful for agency management to "interfere with, restrain, or coerce an employee in the exercise of the rights assured" by the Order. Among these protected rights is the right granted in §1(a) " * * * to form, join, and assist a labor organization * * *."

A labor organization holding exclusive recognition and the agency may agree in writing to a system of dues checkoff under §21(a) whereby regular and periodic dues are deducted from the pay of consenting members of the organization. It is undeniable that a dues checkoff program, in addition to being a convenience to those employees who wish to participate, is also advantageous to the security and welfare of the labor organization as a whole. The individual participation of employees in such a program thus provides support and assistance to the exclusive representative. Threatened Activity action to unilaterally terminate a legitimate dues withholding procedure thus not only threatens the well being of the labor organization but also interferes with the right of individual employees to assist and maintain their organization.

That the threatened action if carried out might also be an independent violation of the agreement under which

dues checkoff was established does not affect the character of the threat viewed through the Order. Likewise, Mr. Horner's alleged violation of the so-called "gentlemen's agreement" the Activity had with the past Union President offers no excuse or justification for Mr. Morana's actions.

Therefore, I find and conclude that Mr. Morana's actions at the August 10 meeting and the threat there made to unilaterally end dues checkoff were violative of §19(a)(1) of the Executive Order 11491. 5/

RECOMMENDATION

Having found that Respondent has engaged in conduct violative of §19(a)(1) of the Order, I recommend that the Assistant Secretary adopt the following Order to effectuate the purposes of Executive Order 11491.

Recommended Order

Pursuant to §6(b) of Executive Order 11491 and §203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that the United States Army Natick Laboratories, Natick, Massachusetts, shall:

1. Cease and desist from:

(a) Engaging in conduct which interferes with, restrains, or coerces employees in the exercise of rights assured by Executive Order 11491.

(b) Threatening Union members or officers with the loss of legitimately gained dues checkoff privileges.

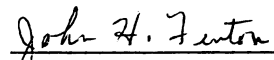
2. Take the following affirmative action:

(a) Post at the United States Army Natick Laboratories, Natick, Massachusetts, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for

5/ While I also find that Mr. Morana threatened to deny Mr. Horner his vacation, I find no violation because Mr. Morana so quickly reversed himself.

Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the United States Natick Laboratories and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(b) Pursuant to §203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply therewith.



JOHN H. FENTON
Administrative Law Judge

DATED: February 27, 1974
Washington, D. C.

N O T I C E T O A L L E M P L O Y E E S

Pursuant To

A Decision and Order of The

Assistant Secretary of Labor for Labor-Management
Relations

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce

employees in the exercise of rights assured by Executive
Order 11491, by threatening to terminate the agreement
for checkoff of union dues.Dated _____ By _____
TitleThis 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 question concerning this Notice
or compliance with its provisions, they may communicate
directly with the Regional Administrator for Labor-
Management Services Administration, United States
Department of Labor, whose address is 110 Tremont Street,
Boston, Massachusetts.UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDEDPHILADELPHIA NAVAL SHIPYARD
A/SLMR No. 382

This case involved a severance request by the Planners-Estimators-Progressmen Association, Local 2 (PEP), for a unit of ten Planners and Estimators and one Maintenance Scheduler in the Activity's Public Works Department. The PEP contended that these employees have not been adequately represented in their present unit, and that, therefore, unusual circumstances existed which would warrant a carve-out. The Activity and the incumbent exclusive representative, Philadelphia Metal Trades Council, AFL-CIO, (MTC), contested the appropriateness of the unit sought by the PEP, contending that these employees share a community of interest with the other employees in the existing Wage Grade unit at the Activity which consisted of approximately 5,178 employees.

The Assistant Secretary found that the petitioned for unit was not appropriate for the purpose of exclusive recognition. In reaching this determination, he noted that the employees in the claimed unit have been represented by the incumbent exclusive representative, MTC, for over ten years and that there was no evidence that, during that period, the employees sought had not been effectively and fairly represented. He noted also the absence of evidence to show any kind of changed circumstance which might have destroyed the community of interest between the employees sought and the remainder of the employees in the MTC unit. In this regard, he noted the claimed employees are part of an integrated work process, have substantial work contacts with certain other employees in the MTC unit, are under the same supervision as certain employees in the MTC's unit and have no substantial work contacts with employees in the existing PEP unit. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PHILADELPHIA NAVAL SHIPYARD

Activity

and

Case No. 20-4264(R0)

PLANNERS-ESTIMATORS-PROGRESSMEN ASSOCIATION,
LOCAL 2

Petitioner

and

PHILADELPHIA METAL TRADES COUNCIL, AFL-CIO

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Darwin L. Steelman. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Activity and the Intervenor, Philadelphia Metal Trades Council, AFL-CIO, herein called MTC, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, Planners-Estimators-Progressmen Association, Local 2, herein called PEP, seeks a unit composed of all nonsupervisory Wage Grade and General Schedule Planners and Estimators and Maintenance Schedulers in the Activity's Engineering and Maintenance Control Division of the Public Works Department, excluding supervisors, management officials, clerical employees, professional employees, guards and employees engaged in Federal personnel work in other than a purely clerical capacity. ^{1/} The

^{1/} The unit description appears essentially as amended at the hearing.

record reveals that the 11 employees sought by the instant petition are part of an existing Wage Grade unit represented by the MTC which is composed of approximately 5,178 employees. ^{2/} There is no current negotiated agreement covering the employees in the unit represented by the MTC.

The PEP contends that the unit sought is appropriate in that the MTC has failed to represent adequately the employees in the claimed unit and that, therefore, there are unusual circumstances which would warrant a carve-out from the existing unit represented by the MTC. On the other hand, the Activity and the MTC take the position that severance of the claimed employees from the existing unit is not justified because these employees share a community of interest with the other unit employees and the introduction of an additional bargaining unit will promote neither effective dealings nor efficiency of agency operations.

The Activity is one of ten Naval Shipyards under the jurisdiction of the Naval Ships System Command. Its mission is to perform authorized work in connection with the construction, conversion, overhaul, repair and outfitting of surface vessels and submarines. Organizationally, the Activity is composed of 13 departments and offices, most of which are subdivided into divisions and branches. The Public Works Department, where the employees in the claimed unit are located, is responsible for the maintenance and repair of the physical plant of the Shipyard.

The record reveals that the 11 claimed employees work in two of the three branches of the Public Works Department's Engineering and Maintenance Control Division. Thus, the unit sought encompasses eight Planners and Estimators and one Maintenance Scheduler in the Planning and Estimating Branch and two Planners and Estimators in the Facilities Inspection Branch. The Planners and Estimators in the Planning and Estimating Branch are responsible for preparing cost estimates and job order specifications for projects to be performed in the Shops Division of the Public Works Department. In the performance of their duties, the Planners and Estimators spend

^{2/} Currently, seven labor organizations represent the Activity's employees in eight units /unit size is indicated as of September 30, 1973/: (1) American Federation of Government Employees, Local 1487, AFL-CIO, /date of exclusive recognition/ January 14, 1966, 23 employees; (2)(a) International Federation of Professional and Technical Engineers, Local 3, December 2, 1963, 299 employees; (2)(b) International Federation of Professional and Technical Engineers, Local 3, December 30, 1969, 41 employees; (3) Fraternal Order of Police, Local 81, March 22, 1967, 86 employees; (4) International Association of Fire Fighters, Local F-61, March 27, 1968, 32 employees; (5) Patternmakers Association of Philadelphia and Vicinity, September 13, 1963, 15 employees; (6) Philadelphia Metal Trades Council, December 2, 1963, 5,178 employees; and (7) PEP, Local 2, June 13, 1967, 156 employees.

approximately 30 percent of their working time at job sites making estimates and consulting with foremen, shop planners and, occasionally, journeymen. The Planners and Estimators in the Facilities Inspection Branch perform a similar function to that performed by those in the Planning and Estimating Branch. While the former do not prepare job order specifications, they are involved in preparing feasibility studies, i.e., estimating the costs of certain alternatives such as repairing or replacing a facility or piece of equipment. The employees in the Planning and Estimating Branch have offices in a building at the Shipyard designated as Building #1, while the Planners and Estimators in the Facilities Inspection Branch work in Building #2. Both buildings also contain employees other than those in the claimed unit.

The evidence establishes that the work performed by the employees in the unit sought is part of an integrated work process which necessitates substantial work contacts with certain other employees in the MTC bargaining unit. Knowledge of a trade is a prerequisite to becoming a Planner and Estimator, and the record reveals that the employees in this category progressed to their present positions either directly or indirectly from journeyman positions at the Activity. Employees in the claimed unit and other employees in the Public Works Department share common facilities and fringe benefits. Further, the two Planners and Estimators in the Facilities Inspection Branch have the same first level supervision as certain other employees in that Branch, and all employees in the claimed unit share common Division level supervision with other employees in the existing MTC unit.

The PEP currently represents a unit of nonsupervisory production facilitating employees in the Planning Department and Production Department. While included in this unit are a number of Planners and Estimators who perform work that is similar in certain respects to the duties performed by the employees in the claimed unit, there is no evidence of any substantial work contacts between these Planners and Estimators and the employees in the petitioned for unit.

The PEP takes the position that the MTC has failed to represent adequately the employees in the claimed unit. Specifically, it asserts that the MTC failed to intervene when the Planners and Estimators had their parking privileges downgraded and when their positions were placed in a "set aside" category pending a survey by the Civil Service Commission to determine what category their positions would be placed in under the Coordinated Federal Wage System.

With respect to the MTC's alleged failure to intervene when the Planners and Estimators were adversely affected by a change in the Shipyard's parking regulations, the record reveals that in 1967 the Activity revised its parking space assignment priorities which resulted in Planners and Estimators receiving less desirable parking spaces than they had previously. However, no evidence was presented to show that the MTC failed or refused to represent the Planners and Estimators in this matter upon the latter's request. As to the PEP's contention that the MTC failed to intervene when the Planner and

Estimator positions were "set aside", the record discloses that in 1968 a number of job categories, including that of Planner and Estimator, were not included in the Coordinated Federal Wage System pending a survey by the Civil Service Commission. This apparently resulted in a wage increase being delayed for several years. The record reveals, in this regard, that a representative of the MTC has been meeting with representatives of the Civil Service Commission on a monthly, and more recently on a weekly, basis to try to secure back pay for employees in the disputed positions, including the Planners and Estimators.

The record reveals that none of the employees in the claimed unit have filed a grievance with the MTC and there is no evidence that the MTC shop steward for the Public Works Department has ever withheld representation from any bargaining unit employee, including those in the claimed unit. Further, the evidence establishes that the Activity and the MTC conduct monthly meetings at which personnel policies and practices affecting the working conditions of all unit employees are discussed.

Based on the foregoing, I find that it would not effectuate the policies of the Order to sever the requested unit from the unit currently represented by the MTC. Thus, the record reveals that the MTC has been the bargaining representative for the requested employees for over ten years, and that, during this period, there is no evidence that it has failed to afford these employees effective and fair representation. 3/ Moreover, there is no evidence to show any kind of changed circumstance which might have destroyed the community of interest between the employees sought and the remainder of the employees in the MTC's unit. As noted above, the employees in the petitioned for unit are part of an integrated work process, have substantial work contacts with certain other employees in the MTC's unit, are under the same supervision as certain employees in the MTC's unit, and do not have substantial work contacts with the employees in the existing PEP unit.

Under all of these circumstances, I find that the unit sought by the PEP is inappropriate for the purpose of exclusive recognition and, accordingly, shall order that the instant petition be dismissed. 4/

3/ Cf. United States Naval Construction Battalion Center, A/SLMR No. 8 and Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, FLRC No. 72A-24.

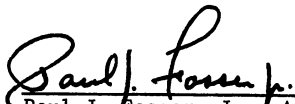
4/ The fact that there exist at the Activity several less comprehensive units than that represented by the MTC, which were established under Executive Order 10988, was not considered to require a contrary result. Cf. U.S. Naval Rework Facility, Quonset Point Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 215.

April 30, 1974

IT IS HEREBY ORDERED that the petition in Case No. 20-4264(RO) be, and it hereby is, dismissed.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Dated, Washington, D.C.
April 30, 1974


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

VANDENBERG AIR FORCE BASE,
4392 AEROSPACE SUPPORT GROUP,
VANDENBERG AFB, CALIFORNIA
A/SLMR No. 383

This proceeding arose upon the filing of an unfair labor practice complaint by Local 1001, National Federation of Federal Employees, Vandenberg AFB, California (Complainant), against the Vandenberg Air Force Base, 4392 Aerospace Support Group, Vandenberg AFB, California, (Respondent). The Complainant alleged essentially that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by certain antiunion statements made by a supervisor; by the harassment of employees because of their involvement in a grievance filed by a fellow employee; and by the refusal to meet with the president of the Complainant to resolve employees' grievances.

The Assistant Secretary adopted the Administrative Law Judge's finding that the various directives issued to an employee by her supervisor were not in retaliation against the employee's union activities or her association with the Complainant's president and, therefore, did not constitute a violation of Section 19(a)(1) or (2) of the Order. The Assistant Secretary also adopted the Administrative Law Judge's findings that the policy announcement by the Chief of the Base Procurement Division, under which an employee and his steward could discuss problems with the Chief, and the Respondent's initial refusal to meet with the Complainant's president, as an employee's chosen representative, instead of the designated steward, as required by the negotiated agreement, were not violative of Section 19(a)(1) or (6) of the Order. Lastly, the Assistant Secretary adopted the Administrative Law Judge's finding that a supervisor's interrogation of the employees in the Base Procurement Division with regard to their union affiliation, as well as his remarks reflecting disdain for and disparagement of the Complainant, constituted interference, restraint, or coercion in violation of Section 19(a)(1) of the Order.

The Assistant Secretary rejected the Administrative Law Judge's finding that the Respondent's reference to certain instructions contained in the Respondent's Supervisors' Labor Relations Handbook in connection with the discussion of an employee's complaints was violative of Section 19(a)(1) of the Order. The Assistant Secretary found that the record established that the Respondent did not resist the presence of the designated steward at the meeting held to discuss the employee's complaints, but referred to the Supervisors' Handbook only as a basis for explaining its objection to the representation of the employee by the Complainant's president rather than by the designated steward, as provided for in the parties' negotiated agreement. Accordingly, he concluded that the Respondent's conduct, in this regard, was not violative of Section 19(a)(1) of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VANDENBERG AIR FORCE BASE,
4392 AEROSPACE SUPPORT GROUP,
VANDENBERG AFB, CALIFORNIA

Respondent

and

Case No. 72-4140

LOCAL 1001, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES,
VANDENBERG AFB, CALIFORNIA

Complainant

DECISION AND ORDER

On January 14, 1974, Administrative Law Judge William Naimark issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had violated Section 19(a)(1) of Executive Order 11491, as amended, and recommending, among other things, that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. The Administrative Law Judge found other alleged conduct by the Respondent not to be violative of the Order. Thereafter, the Respondent filed exceptions and supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. ^{1/} Upon consideration of the

^{1/} At the hearing and in its exceptions, the Respondent contended that the Administrative Law Judge erred with regard to his rejection of the Respondent's offer into evidence of signed statements by Sergeant Philip Watry who was not present at the hearing. The Respondent also filed a motion with its exceptions in which it requested the Assistant Secretary to reopen the hearing for the purpose of taking the testimony of Watry and other witnesses having knowledge of the Complainant's allegations with respect to statements made by Watry, including his questioning of employees concerning their union affiliation. In my opinion, at the time of the hearing in this matter and prior thereto, the Respondent was on notice of the allegations contained in the instant complaint and had the responsibility to produce any witnesses, having direct knowledge of the events herein, who would be subject to appropriate examination and cross examination. Under these circumstances, the Respondent's motion is hereby denied and the Administrative Law Judge's ruling excluding from evidence Sergeant Watry's signed statements is hereby affirmed.

Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge to the extent consistent herewith.

The instant complaint alleged that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by virtue of: (a) certain antiunion statements made by Sergeant Watry, a supervisor, which tended to discourage employees from exercising their rights under the Order; (b) the harassment of employees, particularly Mrs. Willie Climer, because of their involvement in a grievance filed against Sergeant Watry by a fellow employee; and (c) the refusal to meet with Marie Brogan, the president of the Complainant, to resolve employee grievances.

In agreement with the Administrative Law Judge, I find that the evidence was insufficient to establish that Sergeant Watry's conduct with respect to employee Climer regarding the rearrangement of storage bins; the requirement that Climer receive and distribute forms when relieving the switchboard operator; the refusal by Watry to discuss a regulation with Climer; Watry's insistence that Climer obtain an unavailable form; and Watry's accusation that Climer was maintaining an obsolete form in her files -- was in retaliation against Climer because of her union activities or her association with the Complainant's president. Therefore, such conduct was not violative of Section 19(a)(1) or (2) of the Order. Additionally, under the circumstances, I agree with the Administrative Law Judge that the policy of Bethal Evans, Chief of the Base Procurement Division, regarding the handling of employee problems, did not constitute a violation of either Section 19(a)(1) or (6) of the Order. Further, I agree with the Administrative Law Judge that, under the circumstances herein, the Respondent's initial refusal to meet with Brogan as Climer's chosen representative did not constitute an improper denial of union representation or a failure to recognize the Complainant in violation of Section 19(a)(6) of the Order. Lastly, noting particularly the credibility resolutions by the Administrative Law Judge, I find that Watry's interrogation of the employees in the Base Procurement Division on or about August 31, 1972, with respect to their union affiliation was violative of Section 19(a)(1) and that his remarks to employees Climer, Cunningham and the office workers in early October 1972 reflecting disdain for and disparagement of the Complainant, constituted additional improper interference, restraint, or coercion in violation of Section 19(a)(1) of the Order.

With respect to the alleged violation of Section 19(a)(1) based on the Respondent's reference to certain instructions in its Supervisors' Labor Relations Handbook, when speaking to Climer and Brogan on or about October 3, 1972, concerning a complaint by the former, the Administrative Law Judge reasoned that while these instructions, standing alone, may not conflict with the Order, "when they are communicated by management to employees - - at a time when the employer is resisting a request by the employee to have her union representative present during discussion of her complaints - - such conduct is an improper infringement upon employees' rights under the Order." He concluded, therefore, that the Respondent's use of the Supervisors'

Handbook and its publication and communication to Climer and Brogan of "that portion permitting a supervisor to exclude a union steward from representing an employee during a discussion of the latter's complaint, constitute d/ interference, restraint or coercion under Section 19(a)(1) of the Order."

Under the particular circumstances of this case, I reject the foregoing conclusion of the Administrative Law Judge. The record reveals that Article VII, Section 4(C) of the parties' negotiated agreement provides in part, that, "An employee may, at his or her option, request the Steward designated for the particular work area or a Steward from another related work area... to represent the employee in presenting a complaint to his supervisor." The evidence establishes that the Respondent, at no time, resisted the presence of the union steward at the meeting in question. Rather, it temporarily resisted the presence of the union president at such meeting and, in this latter regard, referred to certain portions of the Supervisors' Handbook as the basis for explaining its objection to the representation of Climer by the Complainant's president, rather than by the union steward as provided for in the parties' negotiated agreement. Moreover, the record shows that the matters relating to Climer's complaint ultimately were discussed by the Respondent, Climer and the Complainant's president at the meeting involved. In these circumstances, I find, contrary to the Administrative Law Judge, that the Respondent's use of the Supervisors' Handbook did not improperly tend to interfere with, restrain, or coerce employees in the exercise of rights assured by the Order. Accordingly, I conclude that the Respondent's conduct in this regard was not violative of Section 19(a)(1).

THE REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order. Having found that the Respondent did not engage in certain other conduct prohibited by Section 19(a)(1), (2) and (6) of the Order, I shall order that portion of the complaint to be dismissed.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Vandenberg Air Force Base, 4392 Aerospace Support Group, Vandenberg AFB, California, shall:

1. Cease and desist from:

(a) Interrogating its employees as to their membership in, or activities on behalf of, Local 1001, National Federation of Federal Employees, Vandenberg AFB, California, or any other labor organization.

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(b) Interfering with, restraining, or coercing its employees by instructing or admonishing them to refrain from conferring with, or giving any information to, the President of Local 1001, National Federation of Federal Employees, Vandenberg AFB, California, or any other union representative, concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.


2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Vandenberg Air Force Base, 4392 Aerospace Support Group, Vandenberg AFB, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(1) and violations of Section 19(a)(2) and (6) be, and it here by is, dismissed.

Dated, Washington, D.C.
April 30, 1974


Paul J. asser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT interrogate our employees as to their membership in, or activities on behalf of, Local 1001, National Federation of Federal Employees, Vandenberg AFB, California, or any other labor organization.

WE WILL NOT instruct or admonish our employees to refrain from conferring with, or giving any information to, the President of Local 1001, National Federation of Federal Employees, Vandenberg AFB, California, or any other union representative, concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



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In the Matter of :
: VANDENBERG AIR FORCE BASE :
: 4392 AEROSPACE SUPPORT GROUP :
: VANDENBERG AFB, CALIFORNIA, :
: Respondent :
: and :
: LOCAL 1001, NATIONAL FEDERATION :
: OF FEDERAL EMPLOYEES, :
: VANDENBERG AFB, CALIFORNIA, :
: Complainant :
.....

Case No. 72-4140

Captain Charles L. Wiest, Jr.
Headquarters 15 AF/JA
March Air Force Base, California 92508

Frank Sprague, Esq.
4392d ASG (JA)
Vandenberg Air Force Base, California
For the Respondent

Mrs. Marie C. Brogan
P. O. Box 1935
Vandenberg Air Force Base, California 93437
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a Notice of Hearing on complaint issued on September 28, 1973 by the Assistant Regional Director for Labor-Management Services of the United States Department of Labor, San Francisco Region, a hearing was held in this matter before the undersigned on October 15, 1973 at Santa Maria, California.

This proceeding was initiated under Executive Order 11491 (herein called the Order) by the filing of a complaint on April 9, 1973 by Local 1001, National Federation of Federal Employees (herein called Complainant) against Vandenberg Air Force Base, 4392 Aerospace Support Group, Vandenberg Air Force Base, California (herein called Respondent) alleging violations of Sections 19(a)(1), (2), and (5) of the Order. A second amended complaint, upon which the Notice of Hearing was based, alleged violations by Respondent of Sections 19(a)(1), (2), and (6) of the Order by reason of (a) certain anti-union statements made by Sgt. Watry which tended to discourage employees from exercising their rights under the Order, (b) the harassment of employees, particularly Mrs. Willie Climer, because of their involvement in a grievance filed by a fellow employee with the agency, (c) the refusal to meet with Marie Brogan, president of Complainant, to resolve employees' grievances, and thus refusing to grant recognition to the union herein. The letter of transmittal from the Assistant Regional Director, which accompanied the Notice of Hearing, recited that evidence should be adduced as to whether Respondent violated Sections 19(a)(1) and (6) of the Order by, inter alia, (a) statements made by Sgt. Watry which may have interfered with employees' rights under the Order; (b) the supervisors' use of the Supervisor's Labor Relations Handbook so as to deny representation and/or recognition to the Complainant.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered by the undersigned.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At all times since about May 22, 1970, Complainant has been the exclusive bargaining representative of Respondent's non-professional employees at Vandenberg Air Force Base, California.

2. At all times material herein, and since about May 17, 1971, Complainant and Respondent have been parties to a collective bargaining agreement 1/ covering the aforesaid employees in respect to certain terms and conditions of employment. Pertinent and applicable provisions of the said agreement are as follows:

1/ Complainant's Exhibit 1.

VII. Stewards

1. ...management agrees to recognize stewards as representatives of the Union...
3. It is the purpose and intent of this Article to settle and resolve employee complaints promptly and equitably at the lowest supervisory level... Formal procedures should be resorted to only where other attempts at solution of the problem fail...
4. In order to accomplish the foregoing principles and policies, the following procedures are hereby agreed to by Union and Management to resolve Complaints,
 - a. A complaint is a matter of personal concern of an employee in the unit which he has unsuccessfully attempted to resolve with his immediate supervisor and which pertains to such matters as working conditions and environment and relationships with supervisors and with other employees and officials.
 - b. The right of an employee to present a complaint to his immediate supervisor without interference or threat of reprisal is recognized by Union and Management, as is the right of the employee to handle his own complaint in his own way.
 - c. An employee may, at his or her option, request the Steward designated for the particular work area... to represent the employee in presenting a complaint to his supervisor. 2/
3. On or about May 7, 1971, Respondent issued a Supervisors' Labor-Relations Handbook 3/ (Vandenberg Air Force Base-wide Unit), which was in effect at all times material herein, and

2/ Article VIII of the contract sets forth a negotiated grievance procedure which may be pursued if an employee's complaint is not settled to his satisfaction by a first level supervisor under Article VII. Such employee must elect whether to follow the regular Air Force grievance procedure or the negotiated grievance procedure under the contract. Grievances under this negotiated procedure must be in writing and presented to the second level supervisor. In presenting such grievances employees have the right to be represented by representatives of their own choosing. A union or designated representative may present a grievance on behalf of an employee when management has been notified in writing by the employee of the designation.

3/ Complainant's Exhibit 1.

the said Handbook contained the agreement between the parties herein, as well as comments regarding the provisions thereof and advice and instructions to supervisors in implementing said terms and provisions of the agreement. The Handbook contains a section designated as Part III, Supervisors and Stewards, B. Processing Complaints and Grievances and provides, inter alia, under the heading "Complaints" as follows:

"...Although the agreement protects your right to deal with dissatisfactions on a one-for-one basis (i.e., you and your employee), by defining a complaint as something which an employee has unsuccessfully attempted to resolve with you, you may find that the employee should have taken the matter to the steward first...If you feel that the only way that the complaint is to be resolved is through the steward's intercession, then by all means get him involved. However, if you feel that the steward is interceding where the one-for-one principle might result in simple resolution without a third party (i.e., between you and the employee), then stand on the right given to you in the agreement and insist that initially you talk to the employee alone." (underscoring supplied)

4. At all times material herein a regulation dated September 15, 1971, designated AF Regulation 40-771, was adopted and adhered to by Respondent which governed appeal and grievance procedures applicable to civilian employees at the Vandenberg Air Force Base. This regulation provides for informal presentation, oral or written, by an employee of a grievance regarding personal relief in a matter of "concern or dissatisfaction which is subject to the contract of Air Force Management." It also provides that an employee may be represented and accompanied by one representative of his choice at any stage of the proceeding, but the representative must be designated by the employee in writing when he presents his grievance. The regulation sets forth formal grievance procedures in the event no resolution is made at the informal stage. 4/

5. On or about August 31, 1972, employee June Pederson, who worked in the base procurement office filed a grievance against Sgt. Watry, supervisor of the employees in that department, based on her failure to obtain a promotion and being by-passed therefor. Several days later Marie Brogan, President of Complainant Union, asked employee Mrs. Willie E. Climer if she knew anything which would help Pederson in her case. Climer said she did, and Brogan asked her to be a

4/ Respondent's Exhibit 5, paragraphs 2(h), 5, 24, and 25.

witness at a forthcoming hearing concerning Pederson's grievance. Climer was reluctant to appear as a witness and Brogan stated she might have to subpoena her.

6. On the same day as she talked to Brogan, Climer told Dani Lucas, secretary of the branch, that she may have done something wrong because she "told Marie Brogan some information" and the President of the Union is going to subpoena her. Lucas replied Marie is all right, but Climer should not tell her anything because she is out to get information anyway possible.

7. A few days after her conversation with the Union president and the branch secretary, Climer overheard Sgt. Watry ask Carol Cunningham, an office employee, if she had bragged about being promised a job by him. Cunningham denied such conduct, whereupon Watry told her not to say anything to anyone, especially Brogan, because the latter would be returning to get information for Pederson's hearing.

8. Uncontradicted testimony by Climer reveals, and I find, that about the time Pederson filed her grievance, August 31, 1972, Watry spoke to several girls in the office. He asked how many of them were in the Union, and Climer recalls that she and Mrs. Speaks replied they were members. Watry said that anything talked about in that section was to be kept back there - not told all over the office or "to get back to Marie Brogan."

9. In early October, 1972, Climer was at her desk talking to Brogan. Upon approaching the desk Watry told Climer to keep her mouth shut and say nothing - that Brogan would be coming, or snooping, around for information, and he didn't want anyone in his section giving out information to the Union.

10. Climer has been employed by Respondent for over nine years, and at all times material herein she had been the publication clerk in the base procurement office. She takes care of the publication, ordering necessary forms and makes certain that copies are furnished to all employees. Shortly after her discussions with Brogan and Lucas re the Pederson grievance, Watry engaged in certain acts directed toward Climer which the latter considered to be harassment. Those were as follows: (a) The supervisor said she was keeping obsolete forms in the file, and he insisted she obtain a certain form which she claims he knew was not available; (b) Climer testified she attempted to talk to Watry regarding a supplemental regulation governing form reproductions. Despite the fact that the supervisor solicited her comments, he refused to sit down and talk to her; (c) Without an explanation as to the reason therefor, Watry insisted she remove forms from the bins and also directed her to rearrange the storage bins. She learned

later that the removal was to make space available for a small Xerox machine which was put in the office; (d) Climer was also directed by Watry to work as a relief operator at the switchboard on the front desk, which, Climer contends, required distributing orders as well as switchboard duties. She alleges this was work for which she was not trained, had not been assigned to do previously, and was not required of others.

11. On about October 3, 1972, Climer met with Mr. Prem, Deputy Chief, Procurement Division, regarding her difficulties with Watry. Initially, Prem said Climer would have to put her complaint in writing, but then agreed to talk on an informal basis. Respondent's official also refused at first to meet with Brogan present, although he agreed to confer with Climer and Arlene Johnson, Union steward, in the base procurement office. An hour later he relented and told Climer she could bring Brogan to the meeting. Climer sought out Brogan and brought the latter back into the office.

Prem stated the proper representative of Climer was the Union steward, and he believed it was illegal for Brogan to represent her. When the President of the Union asked him what prevented his dealing with her, Prem referred to page 133 of the Supervisors' Handbook which recited that the supervisor might deal with the employee alone when handling complaints. Brogan remarked that the supervisor was following the handbook information, but that under the contract Climer is entitled to have her representative - the Union herein - present to act for her; and further, the cited material in the handbook conflicted with Air Force Regulation 40-771. At Brogan's suggestion a telephone call was made to Mrs. Jeter, Respondent's employee relations specialist. After he spoke to Jeter, Prem agreed to discuss Climer's problems with Brogan. Each of Watry's alleged acts of harassment were reviewed by Prem in detail, including anti-union comments by Watry as well as his questioning of employees re their union membership. Prem agreed with Climer as to the use of a stamped form but said he saw nothing wrong with Watry's directives as to the moving of storage bins or the assignment to Climer of special switchboard duties. He also mentioned that Watry's comments were, as he believed, proper as free speech.

12. A letter 5/ dated October 11, 1972, was sent to Climer from Evans regarding her complaints against Watry. In respect to (a) the order by Watry to rearrange the bins, it was determined that since he is the Chief of Operations his views were to be respected and the order would not be countermanded; (b) the requirement that Climer distribute

5/ Respondent's Exhibit 1.

orders while at the switchboard - which she avers was not required of others - it was determined that all personnel working as relief switchboard operators would be required to distribute orders in the future.

13. In early October there was a general meeting of employees at which Colonel Bethel O. Evans, III, Chief of Procurement Division, stated, inter alia, that his door is always open to anyone who desires to come directly to him to discuss any problems. Colonel Evans testified, and I find, that he established an open door policy when he first took over as chief of this division in July 1970. He said then that he would talk to anybody at any time concerning any problem, and the employee could bring the Union steward, and anyone else, with him to the discussion.

14. Evans had also received a complaint regarding Watry's conduct from another employee, Lucille Dodson, switchboard operator. Dodson felt that Watry was issuing orders rather than requests and was abrupt with her. Evans explained that military supervisors might handle civilian employees too curtly. He suggested Dodson speak to Watry and then return if they could not resolve the problem.

15. On about October 12, Climer was at her desk when she and Watry engaged in an argument over Air Force Regulation 6-1. Upon her refusal to turn over the regulation to Watry, the supervisor said he wouldn't sign her time card. At this juncture Evans walked by, asked what was wrong, and Climer informed him of what occurred. After commenting that Climer did not have to give Watry the regulation, Evans asked them to come to the conference room. The Colonel inquired what was wrong, and Climer complained that Watry was harassing her. When Evans asked her to tell him the details, Climer suggested he obtain them from Watry. Evans stated he had a meeting to attend, instructed them to return after lunch, and remarked he might have the Union steward, Johnson, attend the session. Climer then asked, "How about my representative?" and she mentioned Brogan by name. Evans agreed, and said they would have someone from CPO also. 6/ Evans called Jeter, the employee relations specialist, to attend the conference, but it never was held since Brogan reduced the grievance to an unfair labor practice charge which Evans found on his desk upon returning from lunch. Evans contacted Jeter, informed her of what occurred and that the charge was on his desk. They discussed whether it would be worthwhile to hold the meeting. Jeter telephoned later on to inform Evans that Brogan refused to talk further on the matter.

6/ The transcript, at several places, recites "CPO 2" instead of "CPO also", based on the testimony of Evans and the record as a whole, the transcript is corrected to change "2" to "also" wherever "CPO 2" appears.

16. At all times mentioned herein Climer orally requested Brogan to be her representative during discussions with Watry and Evans, but such request was never reduced to writing.

Conclusions

A. Alleged Harassment of Climer
As Discrimination Under the Order

Complainant contends that Respondent, through Sgt. Watry, engaged in certain conduct toward Climer which constitutes discrimination under 19(a)(2) of the Order, as well as interference, restraint, and coercion under 19(a)(1) thereof.

It deems the various orders issued by Watry to Climer regarding her duties, as well as reassignment of tasks, to reflect harassment. Moreover, argues the Union, the actions taken by Climer's supervisor were as a result of her protected activities on behalf of her fellow employees and assistance rendered by her to the Union president.

The Order is designed, inter alia, to protect employees who form, join or assist labor organizations and engage in otherwise protected activities. Discriminatory treatment of employees for having engaged in such conduct will be viewed as an unfair labor practice under the Order. Applying these principles to the case at bar, I am not persuaded that the tasks assigned to Climer were either discriminatory in nature or motivated by her actions on behalf of the Union or her fellow employees.

(1) Watry's order or directive to Climer regarding the rearrangement of the storage bins was to accommodate the Xerox machine which was to be placed in the office. Since the agency had been having problems with the number of form reproductions, it attempted to cope with the matter by controlling the reproduced forms. Hence the decision was made to utilize the table model Xerox machine. As a result thereof, it was necessary to move some bins out of the office. Although Climer was not apprised of the reason prompting the rearrangement of the bins and the removal of forms, there is no evidence to establish that it was other than economic in nature. Further, no record of facts support a finding that the directive, in this respect, was issued to either embarrass Climer or harass her. On the basis of the record herein, I conclude that the assignment of this task to Climer was within the scope of her duties, and, further, it was in no way related to, or caused by, her union activities.

(2) Record facts show that Respondent required that the switchboard operator, Lucille Dodson, receive and distribute forms while sitting at the board. Climer, who ran the

switchboard as a relief operator, was likewise called upon to process forms and put them in envelopes for mailing. She contends that others who operated the switchboard were not obliged to make this distribution of forms. Climer insists it was thrust upon her as a reprisal for consorting with Brogan and agreeing to testify on behalf of Pederson.

Apart from the fact that all relief operators are required to handle the forms while at the switchboard, there is no support for this contention. I am not persuaded that Watry imposed this chore upon Climer as an additional and undue burden over and above duties expected of a switchboard operator. Further, I find no basis for concluding that such assignment was made in retaliation for Climer's union activities or to discourage her membership in the Union.

(3) Neither do I find that Watry's refusal to sit down and talk with Climer, or his insistence that she obtain a form which was allegedly obsolete, actions of a discriminatory nature. While the attitude of the supervisor may have left something to be desired insofar as employee relations were concerned, it does not reflect an attempt to punish Climer for her association with Brogan or the Union. Disagreements between supervisors and employees may occur, and the latter may well feel they are being imposed upon at times. In the case at bar, Watry was curt and brief with the office employees, and was not disposed to discuss matters with Climer or others--all of which may have constituted an annoyance to the employees. However, this falls short of constituting an unfair labor practice under the Order.

Accordingly, I find and conclude that the directives issued by Watry to Climer were not discriminatory under the Order, and that the Respondent did not violate Section 19(a)(2) or 19(a)(1) as a result thereof.

B. Statements By Watry to Employees as
Interference, Restraint or Coercion

Complainant contends that certain statements made by Sgt. Watry, including his questioning or employees, constituted an unfair labor practice and were violative of Section 19(a)(1) of the Order. Respondent denies that such remarks were made, and, further contends that the nature of the evidence adduced does not warrant an affirmative finding in this regard. 7/

7/ Respondent offered in evidence, as Exhibits 2 and 3, signed statements by Watry in an effort to refute the allegations herein. Notwithstanding Respondent's argument that the rules of evidence are not controlling, these exhibits were rejected. Apart from the fact that these comments were merely a denial of any anti-union remarks, they were rank hearsay and "the ends of justice" would not be served by according any weight to them. Moreover, Respondent made no request to take Watry's deposition which would have afforded Complainant an opportunity to also examine him.

In respect to Respondent's contention that Complainant's failure to produce other corroborative witnesses to Watry's utterances--besides Climer and Brogan--warrants an unfavorable inference against the Union's case, I reject this as untenable. Not only were these other witnesses not demonstrably within the control of Complainant, but I do not view the "adverse inference" rule as applicable to this situation. 8/ I do not agree with Respondent's assertion that the Union has failed to substantiate its allegations in this regard. There is no rule of law requiring a party to adduce evidence from multiple witnesses or suffer the discrediting of those it has produced. Further, I conclude the record does not reflect that Climer and Brogan should be discredited. I am persuaded that, as to the essential and relevant details, they testified in a straightforward and honest manner, and I credit them in accordance with the aforementioned findings.

(1) The private sector has had many occasions to consider the effect of an employer's questioning employees regarding their union affiliation or sympathies. Its law is well established that unless such interrogation is for the legitimate purpose of ascertaining employees' uncoerced views as to the union, or to resolve doubts of a union's majority status, it will constitute interference by the employer with the rights of employees. William H. Block Co., 150 NLRB 341. Further, inquiring of employees whether each is a union member constitutes an unfair labor practice, especially when no explanation was made as to the reason for the inquiry, and no assurance was given to the employee that no reprisals against him would be taken. Howard Johnson Co., 198 NLRB No. 98.

The language in Section 19(a)(1) of the Order is fashioned similarly to Section 8(a)(1) of the National Labor Relations Act. Both are designed to prevent employers from interfering with, restraining or coercing employees in the exercise of rights guaranteed them in each instance. One of these rights--the right to engage in union activities--would be seriously jeopardized if employees are queried regarding their unionism. See Coca Cola Bottling Co., 188 NLRB No. 91. If employees are to feel free to join and assist labor organizations then a fortiorari, they must not--except in unusual circumstances--be interrogated as to whether they are union members. Such interrogation must necessarily interfere with rights guaranteed under the Order.

8/ The rule could as easily be directed against the Respondent. During the hearing it learned the names of other witnesses to some of this conduct, and yet it made no attempt to produce them to rebut testimony previously adduced.

In the case at bar, Watry's questioning of the office girls as to which ones were union members is an infringement of such rights. It was conducted for no legitimate purpose (i.e., resolving doubts as to a union's majority), and no explanation accompanied the interrogation. Further, at the same time of its occurrence, Watry admonished the employees that anything discussed in the office was not to be related to the Union president. In this context, and in light of the other admonitions given employees by Watry, this "polling" of employees must have a coercive effect upon the workers. Accordingly, I find that this interrogation by Respondent's representative interfered with, restrained and coerced the employees and was a violation of Section 19(a)(1) of the Order.

(2) It is also essential that an employer refrain from disparagement of a union which is likely to have an effect upon unit employees. Thus, in U. S. Army Headquarters, Fort Jackson Laundry, A/SLMR No. 242, the laundry manager's admonishment to the union steward, in the presence of other employees, to shut her mouth was held to be violative of Section 19(a)(1) of the Order. Such a remark was deemed to be a disparagement of the union which would tend to restrain employees, such as the steward, from acting as the union representative. Further, employees would be discouraged from exercising their rights under Section 1(a) of the Order since they were aware of management's treating their exclusive representative with disdain.

In the instant case Watry admonished Climer to keep her mouth shut and not say anything to the Union president who would be coming around for information. Respondent's representative told Carol Cunningham to abstain from talking to Brogan should she attempt to obtain information for the Pederson hearing. While this statement to Climer was not made in the presence of other employees, as in the Ft. Jackson case, supra, it reflected nonetheless a disparagement of the Union herein. Moreover, it must tend to affect other unit employees since they would reasonably be expected to learn of management's views. It is also noted that the remark by Watry to secrete information from the Union official was not an isolated one. In addition to being uttered to Climer and Brogan, it was made to the office workers at the time Watry questioned them as to which ones were union members. Such remarks by Respondent's supervisor clearly restrain employees under the Order, and they also reflect a disdain for the exclusive representative of these employees. They are a direct attempt, albeit inchoate, to thwart the workers from exercising their accorded right to assist their representative.

As such, I find the aforesaid remarks by Watry to Climer, Cunningham, and the office workers to constitute interference, restraint and coercion under 19(a)(1) of the Order.

C. Alleged Denial of Representation or Recognition to Complainant

In asserting a violation of Section 19(a)(6) of the Order, Complainant maintains that Respondent attempted to resolve Climer's grievances without union intervention. Further, it contends that Prem and Evans, management's higher echelon representatives, attempted to avoid meeting with Brogan in respect to Climer's difficulties. The Union also claims that when Prem, on October 3, 1972, referred to the Supervisors' Handbook (page 133), as supporting his belief that he did not have to meet with Brogan, such use of the Handbook was, in effect, a denial of representation and recognition of the exclusive bargaining representative.

Respondent urges that it was not bound to meet with Brogan, the Union president. It argues that Climer's dispute was a complaint, and under the contract management was required to confer only with the steward if an employee wanted union representation. Respondent further contends that should the dispute be labeled a grievance, Climer was required by the contract and Air Force regulation to designate any representative, other than the steward, in writing. Having failed to do so, Climer could not obligate management to meet with Brogan as her representative. It is also contended that the contractual provisions govern in this regard, and any rights to representation bestowed by the Order have been waived by the contract.

(1) It is recognized that Section 10(e) of the Order confers on an exclusive bargaining representative the right to be represented at formal discussions. Further, it bestows a concomitant right upon all employees in a unit to be so represented at these discussions. Therefore, a refusal by an agency to allow the Union to be represented at such times would be a violation of Section 19(a)(6) of the Order. Cf. Ft. Jackson Laundry, supra. Further, denying to unit employees the right to be represented by their exclusive representative would be violative of Section 19(a)(1). Cf. U. S. Department of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR No. 278. However, I am persuaded that the facts herein are quite different from these in the cited cases and require an opposite determination.

Note is taken that on October 3, 1972, Deputy Chief Prem met with Climer and her representative, Brogan, in the base procurement office. Each act of Watry's alleged harassment toward Climer was discussed in detail, as well as the supervisor's anti-union comments. Brogan participated in these discussions on behalf of the Union and as Climer's representative. Prem agreed as to the futile usage of an obsolete form, but upheld Watry regarding his other directives.

When Climer became involved in a subsequent altercation with Watry on October 12, 1972, and brought the matter to the attention of Colonel Evans, the latter invited her to a conference to discuss the alleged acts of harassment. In discussing the meeting to be held when Evans returned from lunch, he mentioned that the Union steward and someone from CPO might be present. Climer asked about having Brogan there to represent her and Evans agreed. The conference never materialized since the Union preferred to pursue the matter via an unfair labor practice charge.

Thus, in the case at bar, Respondent overcame its initial reluctance to meet with the chosen Union representative. Although taking the position it was not obliged to do so, management did, in fact, confer with Brogan in respect to Climer's problems. Moreover, it stood ready, after the first meeting with her, to confer again in the presence of both the Union steward and the Union president. The record facts do not support a finding that Respondent refused to permit Climer to select the Union official as her representative. Moreover, they do not warrant the conclusion that the Union was prevented from representing a unit employee in its dealing with management. Accordingly, I find and conclude there was no actual denial of union representation herein, nor refusal of recognition to Complainant, in violation of Section 19(a)(6) of the Order. 9/

(2) An issue which does not lend itself to a ready and simple solution is whether management's use, on October 3, 1972, of its Supervisors' Labor-Relations Handbook was violative of the Order. Respondent maintains that Prem's referral to Part III, Section B (page 133), when speaking to Climer and Brogan, was consistent with Section VII of the contract. It considers that the instructions to supervisors were permissible under the agreement, and therefore no violation of the Order can exist.

The Handbook is designed to provide information to the supervisors regarding the contract, and to furnish advice to them as an aid in administering provisions of the articles contained therein. The pertinent language referred to by Prem instructs the supervisors that they are entitled to deal with an employee, who has a complaint, on a "one-for-one basis." Further, it advises them that if the Union steward is interceding where the "one-for-one" principle might result in a simple solution, the supervisors should stand on the right accorded them in the contract and insist upon speaking to the employee alone - without the intervention or presence of the steward.

9/ Further, I do not find the "open door" policy enumerated by Evans to constitute a violation of either 19(a)(1) or (6) of the Order. Employees were advised that the Union steward could come in with them if they ever wanted to discuss a complaint, and there is no showing the policy was enforced in a discriminatory manner or to deny representation to employees.

While the above instructions, standing alone, may not run afoul of the Order, I conclude that when they are communicated by management to employees - at a time when the employer is resisting a request by the employee to have her union representative present during a discussion of her complaints - such conduct is an improper infringement upon employees' rights under the Order. At the outset, I do not read Section VII of the agreement as permitting the supervisor to insist upon discussing a complaint with the employee without a Union steward being present when the employee desires the steward's presence. Paragraph 4(c) specifically provides that the employee may request a steward to represent him in presenting a complaint to his supervisor. Respondent would interpret the wording defining a complaint, under paragraph 4(a), as granting a supervisor the right to deal with an employee alone. It argues that since a complaint is something an employee has unsuccessfully attempted to resolve with the supervisor, such a right necessarily flows therefrom. I do not draw such a narrow inference from that definition and would reject the Respondent's contention that a supervisor may deprive an employee of his right to representation by the steward during a discussion regarding the employee's complaint. While the parties may, by contract, limit union representation to the Union steward at the informal complaint stage, the employee is not to be deprived of any representative at all. This is neither the express nor implied intent of the contract.

By Prem's insistence to employees Climer and Brogan that the workers in the unit could be so deprived of their union representation, as supervisors were so advised in the Handbook, Respondent has interfered with rights guaranteed employees under the Order. Management has, in effect, undertaken to advise its supervisory hierarchy to disregard unit employees' representation rights. When this is published or communicated to employees, it would tend to restrain the employees, as Brogan, from acting as a union representative. Moreover, such conduct is impliedly disdainful of the exclusive representative, and would tend to discourage employees from exercising their rights under the Order. I find and conclude the use by Prem of the Supervisors' Handbook, whereby he published or communicated to employees Climer and Brogan that portion permitting a supervisor to exclude a union steward from representing an employee during a discussion of the latter's complaint, constitutes interference, restraint or coercion under 19(a)(1) of the Order.

Recommendations

Having found that Respondent has engaged in conduct which is in violation of Section 19(a)(1) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purpose of Executive Order 11491. In respect

to conduct alleging (a) harassment by Respondent of employee Climer as discriminatory under Sections 19(a)(1) and (2) of the Order, (b) maintenance by Respondent of an "open door" policy in violation of Section 19(a)(1) of the Order, and (c) denial by Respondent of representation to employees, or recognition of Complainant in violation of Section 19(a)(6) of the Order, it is recommended that the complaint be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Vandenberg Air Force Base, 4392 Aerospace Support Group, Vandenberg AFB, California, shall:

1. Cease and desist from:


- (a) Interrogating its employees as to their membership in, or activities on behalf of, Local 1001, National Federation of Federal Employees, Vandenberg, AFB, California, or any other labor organization.
- (b) Interfering with, restraining, or coercing its employees by instructing or admonishing them to refrain from conferring with, or giving any information to, the president of Local 1001, National Federation of Federal Employees, Vandenberg AFB, California, or any other union representative, concerning grievances, personnel policies and practices, or other matters affecting general working conditions.
- (c) Using the Supervisors' Labor-Relations Handbook to inform and advise employees that a supervisor may insist upon excluding the union steward, as the employee's representative, during a discussion between a supervisor and an employee who has presented a complaint concerning matters affecting general working conditions.
- (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

- (a) Post at its facility at Vandenberg Air Force Base, 4392 Aerospace Support Group, Vandenberg AFB, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed

by the Commander, Vandenberg Air Force Base, California, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing, within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.


WILLIAM NAIMARK
Administrative Law Judge

DATED: January 14, 1974
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interrogate our employees as to their membership in, or activities on behalf of, Local 1001, National Federation of Federal Employees, Vandenberg Air Force Base, California, or any other labor organization.

WE WILL NOT instruct or admonish our employees to refrain from conferring with, or giving any information to, the president of Local 1001, National Federation of Federal Employees, Vandenberg Air Force Base, California, or any other union representative, concerning grievances, personnel policies and practices, or other matters affecting general working conditions.

WE WILL NOT use the Supervisors' Labor-Relations Handbook to inform and advise employees that a supervisor may insist upon excluding a union steward, as the employee's representative, during a discussion between a supervisor and an employee who has presented a complaint concerning matters affecting general working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of the Executive Order 11491, as amended.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS 438TH AIR BASE GROUP,
McGUIRE AIR FORCE BASE, NEW JERSEY
A/SLMR No. 384

(Agency or Activity)

Dated _____ By _____
Title

This unfair labor practice proceeding involved a complaint filed by American Federation of Government Employees, AFL-CIO, Local 1778 (Complainant), alleging that the Respondent Activity and the Complainant on December 7, 1971, agreed to full consultation on an environmental differential pay plan, and that since that date the Respondent refused to consult and confer in violation of Section 19(a)(6) of the Order.

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.

On August 5, 1970, the Civil Service Commission directed that a new Subchapter dealing with environmental pay differentials be included in the Federal Personnel Manual Supplement. An appendix of the Subchapter contained categories of work situations where differentials would be payable and the rates authorized for each such category. Commencing in June 1970, the Respondent and Complainant were engaged in collective bargaining negotiations for a new agreement. During their negotiations the parties discussed, among other things, the issue of environmental pay. In addition, the parties met on at least two occasions to discuss the new environmental differential regulations and they exchanged correspondence with regard to these regulations on one occasion prior to their publication on November 26, 1971.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, U. S. Department of Labor, whose address is Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

On December 7, 1971, the parties again met and agreed that they would meet further regarding the on-going differential payment plan. Subsequently, on March 20, 1972, Complainant's representatives met with officials of Respondent's Classification and Wage Department allegedly for the purpose of consultation on the differential pay issue. At this meeting, the Complainant requested access to the Respondent's collected materials and correspondence regarding environmental differential pay. The request was refused by Respondent as being too broad.

The Administrative Law Judge found that the Respondent was obligated to negotiate on differential pay where a determination was required concerning "the coverage of additional local situations under appropriate categories in Appendix J or for determining additional categories not included in Appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval." However, he found no evidence that Respondent refused to confer in good faith with regard to such negotiable items. Further, he found that Complainant demanded bargaining about many aspects of the plan which were non-negotiable directives from higher authority. With regard to the March 20, 1972, meeting, the Administrative Law Judge found that Respondent properly

refused to produce materials from its files without a particularized request and that there was no failure to produce information necessary for the Complainant to function intelligently.

Under the circumstances of the case, the Assistant Secretary agreed with the Administrative Law Judge's conclusion that the Respondent met its obligation to meet and confer in good faith on matters related to payment of environmental differentials. Further, the Assistant Secretary agreed with the Administrative Law Judge's conclusion that Respondent's refusal to grant Complainant access to materials and correspondence regarding environmental differentials was not violative of the Order, where the request was not particularized and the evidence did not establish that the information requested was necessary for the Complainant to function intelligently as the exclusive bargaining representative.

A/SLMR No. 384

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS 438TH AIR BASE GROUP,
McGUIRE AIR FORCE BASE, NEW JERSEY

Respondent

and

Case No. 32-2824(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1778

Complainant

DECISION AND ORDER

On December 19, 1973, Administrative Law Judge John H. Fenton issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in the subject case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

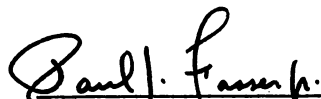
1/ The Respondent requested and was granted an extension of time, under Section 203.24(b) of the Assistant Secretary's Regulations, to file an answering brief in the subject case. However, the answering brief was untimely filed by the Respondent and, therefore, it has not been considered in reaching the decision in this case.

Under the circumstances of this case, I agree with the Administrative Law Judge's conclusion that the Respondent met its obligation to meet and confer in good faith on matters related to the payment of environmental differentials. Further, I agree with the Administrative Law Judge's conclusion that the Respondent's refusal to grant the Complainant access to the former's materials and correspondence regarding environmental differentials was not violative of the Order. Thus, as found by the Administrative Law Judge, the Complainant's request in this regard was not particularized and the evidence did not establish that the requested information was necessary for the Complainant to function intelligently as the exclusive bargaining representative.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 32-2824(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



In the Matter of

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 438TH AIR BASE GROUP
MCGUIRE AIR FORCE BASE, NEW JERSEY
Respondent

CASE NO. 32-2824 (CA)

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO
LOCAL 1778

Complainant

Captain Phillip England, USAF
Captain Joseph E. Orsini, USAF
P. O. Box 16109
Staff Judge Advocate's Office
McGuire Air Force Base, New Jersey
For the Respondent

Dolph D. Sand, Esquire
American Federation of Government Employees
400 First Street, N.W.
Washington, D. C. 20001
For the Complainant

Before: JOHN H. FENTON
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

A complaint alleging violations of Section 19(a) (6) of Executive Order 11491 was filed by the Complainant on May 30, 1972, and a Notice of Hearing on the complaint was issued by the Regional Administrator on February 22, 1973. The complaint alleged that Respondent and the Union, on December 7, 1971, agreed to full consultation on an environmental differential pay plan, and that since that date Respondent has refused to consult and confer. On March 15, 1973, a hearing was held in Newark, New Jersey, at which the parties were given full opportunity to adduce evidence and to call and examine witnesses. Unfortunately, neither party chose to file a post-hearing brief.

On the entire record in this case and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

Local 1778 is the exclusive bargaining representative for all civilian wage personnel employed at the McGuire Air Force Base. A collective bargaining agreement negotiated by the parties with an expiration date of July 2, 1970, has, by mutual consent, been extended while negotiations for a new agreement are proceeding.

On August 5, 1970, the Civil Service Commission issued FPM Letter No. 532-17 1/ directing inclusion of a new Subchapter S-8-7 in Federal Personnel Manual Supplement 532-1. The FPM letter set as the effective date for the new subchapter the first pay period on or after November 1, 1970.

Subchapter S-8-7, entitled Environmental Differentials Paid for Exposure to Various Degrees of Hazards, Physical

1/ Judge's Exhibit No. 2.

Hardships, and Working Conditions of an Unusual Nature, contained instructions and procedures for the payment of environmental differentials to wage employees. Appendix J of S-8-7 contains categories of work situations where differentials would be payable and the rates authorized for each such category. Many of the categories listed in Appendix J are followed by specific examples of the types of work which would fall within the category and merit differential pay. The examples are intended to be illustrative only and not exhaustive or exclusive of other work situations which could qualify under the category description.

Included in the explanatory material in S-8-7, at §e.(3) was a notice that amendments to categories in Appendix J, in the form of additions, changes, or deletions could be made by the Civil Service Commission on its own motion, at the request of an agency, or at the request of the national office of a labor organization.

At §g.(2) (a) of the Subchapter each individual agency was instructed to evaluate its own situation to determine whether work performed by employees of the agency was covered by one or more of the categories of Appendix J. Where the guidelines of a category of Appendix J were satisfied, environmental differentials were to be paid as of the effective date (at McGuire) of November 8, 1970. Where the agency determined that certain of its employees performed work so unusual in nature as to warrant payment of an environmental differential, but that the work did not fall within one of the listed categories of Appendix J, the agency was instructed in §g.(2) (b) to withhold payment of a differential, except as provided by §i (not here relevant) and to institute a request to the Commission for authorization. Section g.(3) provided further that:

(3) Nothing contained in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J

or for determining additional categories not included in Appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as per (2) above.

* * * *

Section i.(1) of Subchapter S-8-7, provided in pertinent part as follows:

i. Effective Date and Savings Provision

(1) The instructions in this section shall be effective at the beginning of the first pay period which begins on or after November 1, 1970. During this period each agency shall identify each hazard, physical hardship and working condition for which it is paying an environmental differential in any of its operations and which does not fall within the categories listed in Appendix J. Each one so identified shall be submitted to the Commission as soon as it is identified but not later than 60 days after the effective date of these instructions. Each submission shall contain all information on which the Commission may make a decision relative to the need for an additional category in Appendix J and should contain the recommendation of the agency. In those situations where a union holds exclusive recognition for the employees involved, the agency will consult with the union and [sic] include the views and recommendations of the union with the report by the agency.^{2/}

* * * *

^{2/} Although the Union argues that its right to consultation is acknowledged in this section, I do not, as noted above, regard it as relevant. Section i.(1) is an exception to the policy of withholding payment of a differential where work regarded as warranting such payment does not fall within one of the listed categories of Appendix J, pending authorization of such payment by the Civil Service Commission. It clearly is concerned with those situations where an agency is already paying a differential for work

Orlando Bergerson, the Labor-Management Relations Officer for the Activity, testified at the hearing that to the best of his recollection environmental differential pay was initiated by the Activity pursuant to FPM Letter 532-17 on December 24, 1970, with the intention to make retroactive adjustments should problems arise.

In early 1971, subsequent to the commencement of environmental differential payments, the Activity and the Union held two meetings to discuss and consult on the environmental differential regulations. One of the participants, William G. Baillie, President of Local 1778, testified that the second meeting ended when disagreement arose regarding interpretation and implementation of FPM Letter 532-17.

During collective bargaining meetings which had been held regularly since June of 1970, the Activity and the Union had discussed, among other topics, the issue of environmental differential pay. Although no final and complete collective bargaining agreement has yet been negotiated, the parties have discussed and tentatively agreed on an environmental pay provision for inclusion in the final contract. ^{3/} This provision, tentative though it is, evidences continued contact and exchange between the parties on the general topic of environmental differential pay.

On April 29, 1971, in the midst of the controversy over the Union's consultation rights under FPM Letter 532-17 and contract negotiations regarding environmental differential pay, Mr. Harry A. Rybock, Civilian Personnel

(Footnote 2 continued)
which does not fall within a category defined in Appendix J. Hence the time limitation of 60 days in which the Agency must submit a report to Civil Service Commission enabling the latter to decide upon the need for an additional category and the instruction to consult with, and forward the views of, the exclusive bargaining representative. This record contains no evidence that any such differential was being paid by the Activity. Thus, this Section was not operative, and no occasion arose to consult with the Union or to forward its views about such matters.
^{3/} Respondent's Exhibit No. 5.

Officer for the Activity, sent to Mr. Baillie proposed Base Regulation 40--, concerning the administration of the differential pay plan at McGuire. By cover letter Mr Rybock requested "review of the proposed regulation and constructive comments and recommendations." 4/ The proposed regulation incorporated without change Appendix J of Subchapter S-8-7.

The necessity or import of the proposed regulation is not clear from the face of the document or the testimony adduced at the hearing. Mr. Bergerson, testifying for the Respondent, suggested that while the authority for differential payments may be found in FPM Letter 532-17, a local regulation was necessary to adapt the Civil Service Commission directive to the special conditions found at McGuire and to serve as a guide to Activity supervisors. It was Mr. Baillie's belief that the proposed regulation was of little import aside from Air Force recordkeeping purpose, that FPM Letter 532-17 was self-executing, and that the regulation would have little or no effect on the ongoing payment plan.

By letter dated May 10, 1971, 5/ Mr. Baillie responded to the proposed base regulation offering criticism for the substance of the proposal and dissatisfaction with the Union's previous opportunities for consultation on environmental differential pay. It appears to accept Schedule J in its entirety, but is highly critical otherwise of the plan, notes that the Union's requests for consultation have been ignored, and calls upon the Activity "to sit down and properly consult" with the Local.

The Respondent/Activity introduced into evidence a photostatic copy of a letter over the signature of Mr. Rybock, dated September 7, 1971, addressed to Mr. Baillie at the Union office.6/ The letter made reference to the April 29 correspondence and advised that copies of the proposed base regulation and Mr. Baillie's May 10 letter had been sent to higher authorities at

Scott Air Force Base for review and comment. The September 7 letter had attached a revised draft of proposed Base Regulation 40--, upon which comment was solicited.

Mr. Baillie testified that he never received Mr. Rybock's letter of September 7, and thus, obviously, did not reply. A handwritten notation on the letter reads "No reply 10/22/71." The evidence is not of such character as to raise a presumption that the September 7 letter was received by Mr. Baillie. Mr. Rybock did not testify at the hearing and no attempt was made to introduce any evidence regarding the mailing of the letter in question or the Activity's usual mailing procedures. Only the copy of the letter itself introduced into evidence opposes Mr. Baillie's creditable testimony denying receipt, which was supported by the testimony of Mr. Herman Winters, Vice President of the Union. Mr. Baillie's prompt reply to the April 29 letter raises the inference that he would have replied had he received the letter dated September 7. On the basis of the evidence before me, I must conclude that the latter correspondence was not received by the Union.

The proposed regulation attached to the September 7, 1971 letter was issued by the Activity as Base Regulation 40-4 on November 26, 1971.7/

Dissatisfied with the consultations it had had with management in early 1971 regarding differential pay, the Union filed an unfair labor practice charge against the Activity on July 2, 1971, alleging violations of §19(a)(1) and (6) of the Order. As required by the Rules and Regulations issued under the Executive Order a prehearing conference on the Union's charges was held on November 9, 1971. Discussion at the conference concerned FPM Letter 532-17 and the Activity's obligations thereunder vis-a-vis the Union. Agreement was reached that the parties would meet again in December to attempt to resolve their difference regarding implementation of environmental differential pay.

4/ Respondent's Exhibit No. 2.
5/ Respondent's Exhibit No. 3.
6/ Respondent's Exhibit No. 4.

7/ Respondent's Exhibit No. 1.

A meeting was held between the parties on December 7, 1971, at which time the FPM letter was discussed again and it was agreed that the parties would meet further to consult regarding the ongoing differential payment plan. At this meeting Activity officials presented the Union with a counterproposal to its proposal for a contract clause covering environmental differential pay.

By letter to the Department of Labor dated December 13, 1971, the Union withdrew the unfair labor practice charges it had filed on July 2, 1971.

On March 20, 1972, Union representatives met with officials of the Classification and Wage Department who were responsible for implementation of the differential pay plan at the Activity. It was the testimony of Mr. Baillie that the meeting was called for the purpose of consultation on the differential pay issue, and that the meeting was different and apart from ongoing negotiations regarding the same subject for collective bargaining purposes. At the March 20 encounter the Union requested access to the Activity's collected materials and correspondence regarding environmental differential. This request was refused by the Activity's representative, Mr. Gerald Libby, Chief of the Classification and Wage Department, for the stated reason that the request was overbroad. Mr. Baillie testified that it was the Activity's position that it had fulfilled its obligation to consult and confer regarding differential pay at the December 7, 1971 meeting, and that no further consultation was required. The Union demanded additional discussion on the subject and the meeting was adjourned with the parties in fundamental disagreement over implementation procedures under the FPM letter and on the scope of the duty of the Activity to consult and confer.

By letter to the Activity dated April 21, 1972, the Union alleged that the actions of the Activity's representatives at the March 20, 1972 meeting constituted a refusal to consult and confer in violation of the Order.

Informal attempts by the parties to resolve the charges made in the April 21 letter failed to produce agreement. Thereafter, on April 28, 1972, by letter to the Union, Captain Phillip E. England stated the Activity's position regarding the charges.^{8/} He disputed the Union's declared interpretation of the consult and confer requirements of the Order and declared the Activity's position to be that:

Management's obligation to consult requires management to solicit the union's views of personnel policies and practices and matters affecting working conditions that fall within the scope of the Activity Commander's authority. Such matters must relate to policy determinations, not day-to-day operation. (AFR 40-702)

The letter concluded:

3. Since no resolution occurred concerning this charge, Mr. Hegyi [the union investigator] stated that it was his desire to submit a separate union report to the Base Commander.

Although the Union maintained at the hearing that its suggestions regarding the differential pay plan were never acted upon, Mr. Bergerson testified that a Union suggestion that supervisors be trained in environmental differential pay procedures was in fact sent to higher authorities and apparently was implemented.

CONCLUSIONS

Complainant carries the burden of proof, and an essential ingredient of that burden is an attempt, with clarity and precision, to describe that conduct of which it complains and to state why such conduct is viewed as

^{8/} Attachment to Assistant Secretary's Exhibit No. 1-A. Respondent moved at the hearing for dismissal of the complaint on the ground it was not filed within 30 days of receipt of this letter, contending it to be Respondent's "final decision" within the meaning of 29 CFR §203.2. That motion is denied on the ground that the letter does not adequately notify the Union that the views expressed therein are final and not subject to change as a result of further discussions.

a violation. The analysis below should, I think, be prefaced by a frank admission that in the absence of briefs it has been difficult for me to attempt to construct from the record a cogent and comprehensive statement of each party's theory of the case. I nevertheless feel constrained to make that effort so as to provide a perspective for the analysis which follows:

The complaint explicitly addresses itself to an alleged failure to consult and confer on and after the meeting of December 7, 1971. In his opening statement at the hearing, counsel for the Union contended that on December 7, 1971, there was an agreement to consult on environmental wage differentials, but that since that date management has refused to consult and has denied any such agreement was reached. In his closing statement counsel made further contentions respecting the Activity's alleged failure to consult before implementing FPM Letter 532-17, its failure to make certain information available, its failure to ensure that a copy of the September 7, 1971 letter was received by the Union and the apparent failure to forward the Union's views concerning environmental pay to higher headquarters (pursuant to §1(1)). At all times the Union insisted that the contemporaneous negotiations which culminated in tentative agreement to a contract clause dealing with differential pay could not serve to fulfill the obligation to consult about the implementation of the differential pay plan. (Transcript pp. 48-52.)

Respondent contends that the Order required consultation with the Union before implementation of the differential pay plan and negotiation thereafter. As I understand it, it acknowledges a duty to be receptive to the Union's arguments, views, or opinions before instituting the program for environmental differential pay, and asserts that after consultation occurs concerning the broad outlines of the program, negotiation should take place regarding any differences of opinion as to its actual application to particular job assignments on the base. In this connection it points to an award of Arbitrator Milton Friedman 9/ in which he held:

Consultation does not involve more than honest and sincere review and consideration of the Union's position prior to implementation. It does not involve Union participation in managerial thinking at the initial stages.

Respondent apparently relies on this in two respects: that it had no duty by way of consultation to invite the Union into the formative stages of its effort to fashion Base Regulation 40-4 from FPM Letter 532-17, and it had no duty later, by way of negotiation, to provide the Union with the content of all its files on environmental differential pay.

Respondent further argues that it did, in fact, meet its obligation to consult by meeting with the Union and providing it with the FPM Letter, and by soliciting its views about the proposed Base Regulation before it went into effect. It also argues that the duty to negotiate which arose after the plan became effective, with respect to the precise impact of the plan on particular work assignments at the base, has been discharged, and that the Special Pay clause negotiated by the parties is the result of such good faith bargaining. In effect, it asserts that the continuing duty to consult urged by the Union was inapplicable after the effective date of the plan, and that it was in any event fulfilled by its discharge of the broader duty to negotiate.

After FPM Letter 532-17 was issued, several apparently unproductive meetings took place with the Union. Thereafter, on April 29, 1971, the Activity requested the Union's views on a proposed base regulation which would implement the Civil Service Commission directive on the base (R-2). Attached to the proposed regulation was Appendix J which had not been changed. The Union's response (R-3) was highly critical of management's approach and called for face to face confrontation. On September 7, 1971, management again requested the Union's views of a proposed base regulation (R-4) in a letter which I have found was never delivered. On November 26, 1971, Base

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9/ See Assistant Secretary's Exhibit 1, attachment 3 to Respondent's Answer.

Regulation 40-4 became effective. Again Appendix J, describing the categories of work for which a differential was to be paid, was the same in content as the Appendix J attached to the FPM Letter.

Thus, it is clear on this record that the Activity tried to keep the Union informed and did seek its views on a proposed base regulation implementing the FPM Letter. Section 11(a) of the Order limits the scope of the bargaining obligation "so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual * * *." Thus, I view FPM Letter 532-17 as accurately stating the circumstances in which consultation or negotiation is to occur: (1) where a determination is required concerning "the coverage of additional local situations under appropriate categories in Appendix J or for determining additional categories not included in Appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval" before compensation commences, and (2) where differential pay existed prior to the effective date of the FPM Letter, and the agency was required to quickly identify and explain the local situation(s) to Civil Service Commission and to consult with, and forward the views of, the exclusive bargaining representative. As indicated earlier, there is no evidence that the latter situation obtained at McGuire. Hence the inquiry narrows down to whether the Activity fulfilled the obligation to confer, consult, or negotiate in the circumstances described in (1).

There is no indication in this record that the Activity was unwilling to discuss the question whether there existed local situations for which extra pay might be warranted but which were not clearly encompassed by any of the categories described in Appendix J. On the contrary, the contract clause negotiated by the parties provides a mechanism for referral of questions concerning whether particular work situations are encompassed by Civil Service Commission approved categories to the grievance machinery if not resolved by negotiation, and of questions concerning the need for additional categories

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to the Commission after consultation. Where, in the latter instance, consultation fails to produce agreement, the party desiring the change has the burden of initiating the request, submitting a report and forwarding the opposing party's views.

Thus, I conclude that Base Regulation 40-4 was but a restatement of FPM Letter 532-17 and that institution of that broad program was in the circumstances lawful. The Union was aware of the program and its content, and so far as this record indicates had an opportunity to make its views known to management.^{10/} The bargaining necessary to resolve, if possible, questions concerning the application of the categories established in Appendix J to particular work assignments was taking place at all material times, and culminated in R-5. While it is obvious that the parties' relationship foundered on disagreements regarding the meaning of "consultation," I find no evidence that Respondent refused to confer in good faith about negotiable items: namely, whether particular job assignments were clearly encompassed by an existing Appendix J category, or warranted referral to Civil Service Commission for the recognition of a new category. In this context I would not find the inadvertent failure to ensure receipt of Respondent's September 7, 1971 letter (R-4) a sufficient basis for finding a failure to consult. It appears to me that Complainant demanded bargaining (called consultation) about many aspects of the plan which were non-negotiable directives from higher authority, as well as for the purpose of resolving

^{10/} It appears from the Union's first written reaction to a formal request for its views, that it demanded negotiation -- that is to say face to face "consultation" concerning the plan -- before it was implemented, whereas Respondent believed written communication about the plan would suffice until after implementation, the duty to negotiate arose with respect to matters not explicitly covered by Appendix J.

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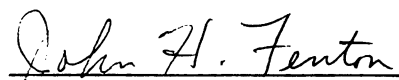
questions concerning the coverage of the plan before its effective date, whereas Respondent merely solicited its views about the plan as a package, and treated the bargainable table as the proper forum for negotiating any problems of coverage.

I fail to understand the Union's contention that the ongoing negotiations are irrelevant to the question whether appropriate consultation has taken place. I do not see how the two can be divorced. At the December 7, 1971 meeting, Respondent proffered a counterproposal to the Union's contract proposal on environmental pay. At the subsequent meeting in March 1972 it appears that Respondent properly refused to produce materials from its files without a particularized request. The Union apparently insisted upon its right to access to the files. I conclude that the Union had no right to see such files and had a duty to be particular about any material it desired. I therefor find no failure to produce information necessary for the Union to function intelligently.

In sum, I conclude that Respondent met its obligation to consult with the Union about the environmental differential pay program and that it has, indeed, conferred in good faith with respect to so much of the plan as was negotiable. I therefore find no violation of §19(a)(6) of the Order.

RECOMMENDATION

I recommend, in view of the findings and conclusions made above, that the Assistant Secretary dismiss the complaint.


 JOHN H. FENTON
 Administrative Law Judge

Dated: December 19, 1973
 Washington, D. C.

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UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
 VETERANS ADMINISTRATION CENTER,
 HAMPTON, VIRGINIA
 A/SLMR No. 385

This case involves an unfair labor practice complaint filed by Local R4-17, National Association of Government Employees (Complainant), against the Veterans Administration, Veterans Administration Center, Hampton, Virginia, (Respondent) alleging that the latter had violated Section 19(a)(6) of Executive Order 11491 by failing to notify the Complainant of a change in the promotion policy extant at the Center.

On November 14, 1971, the Respondent adopted a policy of suspending the promotions of all General Schedule (GS) employees so as to reduce the average grade of such GS employees. This policy was instituted in accordance with Office of Management and Budget and Veterans Administration directives requiring reductions in the average grade of GS employees on a Federal Government and an agency wide scale. On June 12, 1972, the Veterans Administration modified its policy by directing its facilities to promote all employees in Category One, i.e. employees in training positions whose promotions had been suspended during the freeze. The Complainant was afforded prior notification of this modification in the Respondent's promotion policy. Further, representatives of the Respondent left the Complainant with the impression, which the latter communicated to certain unit employees, that further promotions were unlikely within the near future. On June 23, 1972, the Veterans Administration directed its facilities to promote, by June 30, 1972, those employees listed in Category Two, i.e., those "deserving of promotion." The Respondent, without notifying the Complainant of this further modification in the promotion policy, implemented the second group of promotions. The Complainant learned of the June 23, 1972, modification only after those promotions were implemented.

Contrary to the Administrative Law Judge, the Assistant Secretary found that the Respondent's failure to notify the Complainant of its change in policy with respect to the promotion of Category Two employees constituted a violation of Section 19(a)(6). In this regard, he concluded that the Respondent's failure to inform the Complainant of the decision to promote Category Two employees and its action in promoting such employees without advising the Complainant until after the promotions had, in fact, occurred undermined the Complainant and served to disparage it in the eyes of the unit employees. Under these circumstances, the Assistant Secretary concluded that this disregard and by-pass of the Complainant was in derogation of its exclusive representative status and thereby violated Section 19(a)(6) of the Order.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Executive Order and that it take certain affirmative actions consistent with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION CENTER,
HAMPTON, VIRGINIA

Respondent

and

Case No. 22-3808(CA)

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R4-17

Complainant

DECISION AND ORDER

On February 27, 1974, Administrative Law Judge John H. Fenton issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby confirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

The instant complaint alleges that the Respondent violated Section 19(a)(6) of the Order by failing and refusing to consult and confer with the Complainant regarding a change in the Respondent's promotion policy.

The essential facts are not in dispute and I shall repeat them only to the extent deemed necessary.

In the fall of 1971, the Office of Management and Budget instituted a program aimed at reducing the average grade of General Schedule (GS) employees of the Federal Government. Each agency, including the Veterans Administration, was given a target average grade which they were to reach. In turn, the Veterans Administration set average grade targets

for each of its facilities, but left the facilities certain flexibility in the means of reaching their particular targets. To meet its target, the Director of the Respondent facility suspended all GS promotions at the facility as of November 14, 1971.

In May 1972, the Central Office of the Veterans Administration directed each of its facilities, including the Respondent herein, to prepare and submit a report indicating the number of employees in two categories - i.e. Category One, employees who were in training positions and who, but for the freeze, would have been promoted at the completion of training; and Category Two, employees who were "deserving of promotion." On June 12, 1972, the Respondent was directed by the Central Office to promote Category One employees. That same date, at a meeting attended by, among others, some of the employees whose promotions were affected by the freeze and by the President of the Complainant, a representative of the Respondent explained why certain employees were being promoted at that time. Additionally, the Respondent's representative expressed doubt that any further lifting of the freeze would occur within the near future. Subsequently, the Complainant's President communicated this latter impression to Union officers and stewards, as well as inquiring members, and also communicated this understanding at the first general membership meeting of the Complainant in July 1972. Meanwhile, on June 23, 1972, the Respondent received a telegram from its Central Office directing it to promote, by the end of the fiscal year on June 30, 1972, all those employees listed in Category Two. The Respondent implemented this directive without informing the Complainant of the change in the promotion policy extant at the Center and the Complainant's President only became aware of these latter promotions about July 7 or 8, 1972, when he learned that such promotions had, in fact, occurred. By letter dated August 8, 1972, the Respondent formally informed the Complainant regarding all of the promotions made in June 1972.

In his Report and Recommendations, the Administrative Law Judge found, among other things, that the Respondent's failure to notify the Complainant of the promotion of the Category Two employees did not constitute a violation of Section 19(a)(6) of the Order, although this failure contributed to making the Complainant "appear inept and ineffective...served to disparage it...[and] undermine[d] its support among unit employees." In reaching his decision in this regard, he noted that the Respondent's relationship with the Complainant was amicable, that there was no indication of union animus, that the failure to make the notification was unintentional, and that management officials regretted it. Under these circumstances and noting also that the Category Two promotions were consistent with prior procedures and that the Complainant had not previously sought information or negotiation with respect to the character of the employees placed in Category Two, the Administrative Law Judge found that there was no duty to inform the Complainant that the freeze, with respect to the employees in Category Two, had been lifted.

Contrary to the Administrative Law Judge, I find that, under the circumstances of this case, the Respondent's failure to notify the

Complainant of the change of policy with respect to Category Two employees constituted a violation of Section 19(a)(6). Thus, it has been held previously that once a bargaining representative has been designated by a majority of the employees in an appropriate bargaining unit, the obligation to deal with such representative concerning grievances, personnel policies and practices or other matters affecting the working conditions of unit employees becomes exclusive and carries with it a correlative duty not to treat with others. 1/ Further, it has been found that to disregard the exclusive representative selected by a majority of employees and to deal with unit employees directly concerning grievances, personnel policies and practices, or other matters affecting the working conditions of unit employees improperly undermines the status of the employees' exclusive bargaining representative. In the instant case, as found by the Administrative Law Judge, the evidence establishes that the Respondent's failure to inform the Complainant of the decision to promote Category Two employees and its action in promoting such employees without advising the Complainant until after the promotions had, in fact, occurred, undermined the Complainant and served to disparage it in the eyes of the unit employees. Consistent with the principles set forth above, I find that this disregard and by-pass of the exclusive representative was in derogation of the exclusive representative's rights established under the Order and, thereby, constituted a violation of Section 19(a)(6) of the Order. 2/

REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(6) of Executive Order 11491, as amended, 3/ I shall order that the Respondent cease and desist therefrom and take certain affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor

- 1/ See Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301 and United States Army School/ Training Center, Fort McClellan, Alabama, A/SLMR No. 42.
- 2/ Under the circumstances of this case, I view it as immaterial, for the purpose of finding a violation of Section 19(a)(6) of the Order, that the Respondent's conduct herein was unintentional or devoid of union animus.
- 3/ In the circumstances of the case, I find it unnecessary to pass upon the Administrative Law Judge's implication, on page 9 of his Report and Recommendations, that a "decision" made at a headquarters and which applies uniformly to all subordinate facilities automatically removes such subject from local negotiations.

for Labor-Management Relations hereby orders that the Veterans Administration, Veterans Administration Center, Hampton, Virginia, shall:

1. Cease and desist from:

(a) Failing to notify Local R4-17, National Association of Government Employees, or any other exclusive representative, concerning changes in existing promotion policies and practices, or other matters affecting the working conditions of employees in the unit.

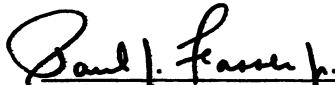
2. Take the following affirmative actions to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify Local R4-17, National Association of Government Employees, or any other exclusive representative, of any intended changes in existing promotion policies and practices, or other matters affecting the working conditions of employees in the unit.

(b) Post at the Veterans Administration Center, Hampton, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
April 30, 1974


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT implement changes in existing promotion policies and practices, or other matters affecting the working conditions of employees in the unit without affording Local R4-17, National Association of Government Employees, or any other exclusive representative, prior notification of such changes.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.



In the Matter of	:	
	:	
VETERANS ADMINISTRATION	:	
VETERANS ADMINISTRATION CENTER	:	
	:	
Respondent	:	CASE NO. 22-3808 (CA)
	:	
and	:	
	:	
NATIONAL ASSOCIATION OF GOVERNMENT	:	
EMPLOYEES, LOCAL R4-17	:	
	:	
Complainant	:	
	:	

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National Association of Government
Employees, Local R4-17
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For the Complainant

BEFORE: JOHN H. FENTON
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding under Executive Order 11491, as amended, was heard pursuant to a Notice of Hearing issued on May 4, 1973, by the Regional Administrator, U. S. Department of Labor, Labor-Management Services Administration, Philadelphia Region. The complaint here involved was filed on November 21, 1972, by the National Association of Government Employees, Local R4-17 (herein called the Union), against the Veterans Administration Center, Hampton, Virginia (herein called the Activity). The complaint charges that the Activity violated §19(a)(6) of the Order 1/ by failing and refusing to consult and confer with the Union regarding a change in the promotion policy in effect at the Activity. 2/

A hearing was held before me on July 10, 1973, at Norfolk, Virginia. Both parties were represented by counsel and were afforded full opportunity to adduce evidence and to examine and cross-examine witnesses; thereafter both parties filed briefs which have been duly considered.

Upon the entire record and my observation of the witnesses and their demeanor, I make the following Findings, Conclusions and Recommendations:

Findings of Fact

1. The Union is the exclusive bargaining representative of approximately 500 General Service (GS) employees at the Activity. At the time of the violation alleged

1/ Sec. 19. Unfair labor practices. (a) Agency management shall not --

* * *

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

2/ More specifically, the charge accuses the Agency of lifting a freeze on promotions and promoting 36 employees "without informing the union of the change in promotion policy."

in the Complaint employment relations between the parties were governed by a collective bargaining agreement which was approved on August 2, 1966. 3/ In January 1973 the parties entered into a new contract superseding the old.

2. In the fall of 1971 the Office of Management and Budget (OMB) instituted a program of grade de-escalation for all GS employees in the Federal Government. Pursuant to directions from OMB, the Central Office of the Veterans Administration (VA) established average grade targets for each VA installation to lower the average grade level in the Administration.

3. As part of the program of the VA to reduce grade levels, the Activity was instructed that it would have to effect a relatively large reduction in its average grade from 5.6044 to 5.3628. On November 2, 1971, Mr. A. W. Stratton, Director of the Activity, issued a memorandum 4/ wherein he advised supervisory personnel of the average grade goal set for the Activity and directed that certain procedures be adopted to effect the stated goal. Under the memorandum promotions would still be made, but with less frequency and only after thorough review and consideration.

4. On November 23, 1971, Mr. Stratton called a meeting of Division and Service Chiefs for the purpose of explaining to them the Activity's policy regarding the grade de-escalation goals. Mr. Merlia Davis, President of Local R4-17, was present at the meeting.

The minutes of the November 23 meeting, prepared by the Director's secretary, recorded the announcements regarding promotions as follows:

1. We have suspended all promotions (GS) that have an effective date subsequent to November 14.

3/ Joint Exhibit No. 5.

4/ Joint Exhibit No. 1.

2. There will be no promotion (GS) until further notice, and the only exception that the Director mentioned was possibly honoring legal commitments. 5/

* * *

5. On December 7, 1971, Mr. Stratton made available to all Division and Service Chiefs a verbatim copy of another circular from the Central Office. 6/ This circular established requirements regarding the grade de-escalation program to be applied at the Activity. As to promotions the circular authorized Mr. Stratton, as Station Director, to approve upward classifications to GS-5 and below, with certification that such upgrading was "essential." Other promotions had to be passed upon by higher authority. Total restrictions on promotions were advised where other practices aimed at average grade reduction would be unsuccessful. The circular had an expiration date of July 31, 1972.

6. Because of the large average grade reduction to be made at the Activity, management determined that a freeze on promotions was required and such policy was therefore instituted. 7/

7. The VA Central Office monitored the progress of each of its installations and of the entire agency by requiring each installation to furnish the number of employees at each GS grade level. On a weekly basis any accessions, separations or other changes were to be reported in the same way. This information was fed to computers so that, shortly after the end of each month,

5/ Joint Exhibit No. 2.

6/ Joint Exhibit No. 3.

7/ There is no evidence that the Union was consulted concerning this determination, nor that it ever protested, or sought discussion of the feasibility of alternative means, within the Director's discretion, for achieving the goal imposed upon him.

each installation was made aware of its current position vis-a-vis its goal.

According to the testimony of Mr. James Riesmeyer, 8/ Chief of the Personnel Division of the Activity, the Central Office in May of 1972 requested of the Activity that it prepare and submit a report supplying the numbers of employees assignable to either of two categories according to criteria provided. Category One employees were trainees who, but for the promotion freeze, would have been promoted upon completion of training. Category Two included other employees "deserving of promotion," which term was construed by Activity management to describe employees who had completed their time in grade and were found by their supervisors and the personnel office to be performing at a higher grade level. While the criteria for placement into Category One were quite strict, those of Category Two gave the Activity considerable discretion in determining who should be included.

The personnel division prepared and forwarded the required report to the Central Office. 9/ In addition to the two categories above described, the Activity established a third category to include employees whose performance needed additional investigation before a determination could be made as to whether to place them in Category Two. When assignments to the several categories

8/ I found the two principal witnesses, Mr. Davis for the Union and Mr. Riesmeyer for the Activity, to be candid and entirely credible. Where their versions of events conflict, I have credited the latter because his recollection and his grasp of the matters in issue seemed to be distinctly superior to that of Mr. Davis.

9/ The record does not disclose whether headquarters ever explained the purpose of reporting such categories. With respect to a request for a current list of Category Two positions made by the Central Office on June 19, Mr. Riesmeyer testified that local management was given no indication of what would happen to the "list" forwarded to headquarters.

were completed Category One held 25 employees, Category Two, 11, and Category Three, 8.

8. During the morning of June 12, 1972, the Activity received a wire from the Central Office ordering that all employees listed in Category One be promoted. The order came as a surprise to the Activity which had not yet achieved its average grade goal and which was anticipating an extended promotion freeze period. That wire is not in evidence. Mr. Riesmeyer testified that he thought it was addressed to all VA hospitals.

9. In order to announce and explain the promotion directive to supervisors and employees and to defuse possible resentment in employees other than those promoted, Mr. Riesmeyer called a hastily convened meeting of as many supervisors, Category Two, and Category Three employees as could be gathered together. Mr. Davis, representing the Union, was also in attendance. Mr. Riesmeyer informed the 25 or 30 people assembled that trainees, as Category One employees, were to be promoted effective June 11, 1972. He then told the group what criteria were employed to determine placement in Category One and explained the difference between Categories One and Two. Mr. Riesmeyer explained that it was "highly unlikely" that there would be any additional promotions during the remainder of that fiscal year. ^{10/} There is no evidence that the Union had previously been made aware of these Categories, or of the requirement that reports concerning them be forwarded to the Central Office. Nor is there any evidence that Mr. Davis, when informed on June 12 of the promotion of 25 trainees, registered any objection or sought any discussion concerning the priority accorded trainees in this partial lifting of the freeze.

^{10/} Mr. Davis' recollection of Mr. Riesmeyer's comments differs slightly. Mr. Davis recalled being told that with the exception of the promotion of Category One personnel the promotion freeze was to continue through the next fiscal year. Mr. Davis so informed the other Union officers and, at the full membership meeting in July 1972, told the members. These differing accounts of the June 12 meeting are not critical to the decision reached herein.

10. On June 23, 1972, the Activity received another unexpected wire from the VA Central Office. ^{11/} The wire, addressed to ten VA Centers including Hampton, directed Activity management to promote all personnel listed in Category Two.

It required that action to effectuate the order be completed on or before June 30, 1972, and directed that the previously established average grade goals be ignored for purposes of complying with the Order.

11. Upon receipt of the June 23 wire, Mr. Stratton, Mr. Riesmeyer, and other management officials at the Activity immediately took the necessary actions to promote the 11 employees listed in Category Two, acting with dispatch to comply with the time limitation. Neither Mr. Davis nor any other Union officer was informed of the receipt of the June 23 wire or the action taken thereunder.

12. Meanwhile, Union President Davis, relying on his understanding of Mr. Riesmeyer's remarks on June 12, had informed other Union officers and stewards, as well as inquiring members, that the freeze on promotions would continue into the following fiscal year. At the first general membership meeting in July, he so informed his constituency. He continued to set "rumors" to the contrary to rest until about July 7 or 8 when he learned that promotions of nontrainees had in fact occurred. He testified that the membership felt he had misled them, deceived them, even "sold them down the river." When officially informing him of the promotions, Mr. Riesmeyer admitted that the failure to advise him of the directive concerning promotion of the 11 employees in Category Two was an oversight. By letter of August 8, Mr. Riesmeyer formally advised Mr. Davis of the 36 employees in Categories One and Two who had been promoted in June 1972.

13. Feeling aggrieved by the failure of the Activity to consult with it prior to the promotion of Category Two employees, the Union filed a charge with

^{11/} Respondent's Exhibit No. 3.

the Activity alleging a violation of §19(a)(6) of the Order. In the period between the filing of the charge and the filing of the complaint on November 21, 1972, the parties attempted to informally resolve contested issues. To this end various offers of settlement and counter-offers were exchanged.

Prior to the hearing of the case the Activity made an additional offer of settlement, under the terms of which Mr. Stratton would send a letter to Mr. Davis with the understanding that it could be duplicated and displayed on any bulletin board in the Hampton facility. By this letter Mr. Stratton would state:

"We will not refuse to inform the National Association of Government Employees, Local R4-17, about changes in promotion policies. We will not refuse to meet and confer with the National Association of Government Employees, Local R4-17, in violation of Section 19-A-6 of Executive Order 11491, as amended, about changes in promotion policies within the authority of the center Director." (Tr. p. 7, lines 4-10.)

This offer was refused by the Union when made and later, at the hearing.

Concluding Findings

The scope of the obligation to consult, confer, or negotiate imposed by §19(a)(6) is described in §11(a), as follows:

An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order.

This language strongly suggests that the policies, practices or procedures by which an agency selects employees for promotion are subject to the duty to consult, confer or negotiate. Moreover, the collective bargaining agreement in force at relevant times in the instant case lists "promotion procedures" among the appropriate subjects for negotiation (Article VI). Thus, unless the limitation on the scope of bargaining set forth in the latter part of §11(a) applies here, 12/ I would conclude that any change in promotion procedures was subject to the obligation to consult, confer, or negotiate.

The Union did not protest and did not lodge its complaint against the Director's decision to impose a freeze on promotions, even though local management retained discretion concerning the methods to be used in accomplishing headquarter's grade de-escalation directive. The Union did not complain about management's failure to forewarn it about the apparent decision to lift the freeze first in favor of trainees. While this record suggests that the priority accorded trainees was a decision made by headquarters to apply uniformly to all subordinate facilities, thus removing the subject from local bargaining tables, 13/ it is not entirely clear that such was the case. Even if local management had a voice in setting such priorities, in which event a duty to consult would in my judgement exist, this record shows that the Union was advised of management's decision immediately upon receipt of the June 12 teletype from headquarters instructing it to promote all trainees. Again it registered no protest, nor did it seek to discuss the reasons for according priority to trainees

12/ I read the limitation concerning grades in §11(b) as clearly inapplicable.

13/ See United Federation of College Teachers, Local 1460 and the U. S. Merchant Marine Academy, FLRC No. 71A-15, and Department of Defense DLIEL, Lackland Air Force Base, Texas, A/SLMR No. 322.

over all others whose promotions were deferred. It was, at least at that time, made fully aware of Category Two, but it did not seek discussion concerning its exact nature, or to explore the question whether the criteria for inclusion in Category Two represented a departure from the pre-existing policy governing selection for promotion.

There is, in fact, no evidence on this record that the 11 individuals promoted as a consequence of the June 23 teletype were selected by reference to criteria any different from those that obtained prior to the freeze. That is to say, Complainant did not establish, nor did it attempt to establish, that the procedures employed for purposes of selecting the employees encompassed by Category Two differed in any respect from the merit promotion program which had been suspended by the freeze. Thus, I would conclude that, aside from the question of trainees, the impact of the grade de-escalation program was quite limited: it served to defer promotions but it did not change their order or alter the criteria applied in the selection process. Category Three, created by local management, embraced those employees who met the time-in-grade requirements, and had been recommended by their supervisors, but who had not completed the screening process by surviving a desk audit. ^{14/} Thus, by the end of the fiscal year all those employees who would already have been promoted, but for the freeze, were in fact promoted. In the circumstances I conclude that the Activity did not refuse to confer, consult, or negotiate in violation of §19(a)(6) respecting the promotions made in June.

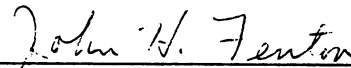
There remains for consideration the question whether the Activity violated the Order merely by failing to inform the Union of the decision to promote employees

^{14/} Even assuming the desk audit requirement was a change from the established promotion procedure, I would not find a violation. The Union had ample opportunity, as a result of the June 12 meeting, to request information, and if so disposed, bargaining, about the process used for selecting the employees listed in Category Two. It did not do so.

covered by Category Two. There can be no doubt on this record that the failure to do so, particularly in the light of the Union's misunderstanding of the duration of the freeze, made it appear inept and ineffective. The position it was put in clearly served to disparage it, and to undermine its support among unit employees. On the other hand, the Activity's relationship with the Union was amicable; it had been cooperative, meeting on a regular weekly basis. The record is devoid of any suggestion that it was motivated by Union animus. Rather it was clear that the oversight was unintentional, and that management officials regretted it. In view of my conclusion above that the Category Two promotions were consistent with prior promotion procedures, and that the Union in any event did not seek information or negotiation concerning the character of the Category, I conclude that there was in these circumstances no duty to inform the Union that the freeze had been lifted. It would clearly have been the better practice to inform the Union, but I cannot find that the Order required it in these circumstances.

RECOMMENDATION

In view of these findings and conclusion, I recommend that the Assistant Secretary dismiss the Complaint.


John H. Fenton
Administrative Law Judge

DATED: February 27, 1974
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE SUPPLY AGENCY,
 DEFENSE DEPOT TRACY,
 TRACY, CALIFORNIA
 A/SLMR No. 386

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2029, (AFGE), sought an election in a unit composed of all the unrepresented professional and nonprofessional General Schedule (GS) employees of the Defense Supply Agency, Defense Depot Tracy, Tracy, California. The Activity and the Intervenor, Laborers International Union, AFL-CIO, Local 1276 (LIU), agreed as to the appropriateness of the claimed unit. However, the AFGE and the LIU maintained, in disagreement with the Activity, that certain employees were ineligible for inclusion in the unit sought because they were either management officials or employees engaged in Federal personnel work in other than a purely clerical capacity.

Noting particularly the agreement of the parties with respect to the appropriateness of the claimed unit, the Assistant Secretary found that the claimed residual unit was appropriate for the purpose of exclusive recognition. In this regard, he found that the claimed unit would include all the remaining unrepresented employees of the Activity, that all of the employees in the petitioned for unit work under the overall supervision of the Activity's Commander, and that the personnel policies of the Activity are implemented through a Civilian Personnel Office which services all of the employees of the Depot.

The Assistant Secretary found also that under the criteria established in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135, the employees in the disputed classifications were not management officials. Moreover, he concluded that none of the disputed employees were engaged in Federal personnel work within the meaning of Section 10(b)(2) of the Order. In this latter regard, he noted that while some of these employees may, in connection with their duties, make staffing recommendations which could ultimately, after approval and implementation, affect the staffing of the Activity, they were not involved in the processing of individual personnel actions on a regular basis and as a part of their day-to-day responsibility. Under these circumstances, the Assistant Secretary concluded that all of the employees in the disputed classifications should be included in the unit found appropriate.

Accordingly, he directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
 DEFENSE DEPOT TRACY,
 TRACY, CALIFORNIA

	Activity	
and		Case No. 70-4020(RO)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2029 <u>1/</u>	Petitioner	
and		
LABORERS INTERNATIONAL UNION, AFL-CIO, LOCAL 1276 <u>2/</u>	Intervenor	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Marilyn Koslow. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the brief of the Petitioner, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2029, hereinafter called AFGE, seeks an election in a unit of all professional and nonprofessional General Schedule (GS) employees employed by the Defense Supply Agency, Defense Depot Tracy, Tracy, California, excluding management officials, employees engaged in Federal

1/ The name of the Petitioner appears as amended at the hearing.

2/ The name of the Intervenor appears as amended at the hearing.

personnel work in other than a purely clerical capacity, supervisors, guards as defined by the Order, and employees of the Activity who currently are represented in units of exclusive recognition.

The record indicates that the parties are in agreement as to the appropriateness of the claimed unit. The AFGE and the Intervenor, Laborers International Union, AFL-CIO, Local 1276, hereinafter called LIU, maintain, however, and the Activity disagrees, that certain employees are ineligible for inclusion in the unit sought because they either are management officials or employees engaged in Federal personnel work in other than a purely clerical capacity.

The Unit

The Activity, which is one of four Depots of the Defense Supply Agency, receives, stores and issues supplies and material that are common to two or more of the military services. It is headed by a Commander and is made up of seven principal organizational entities designated as directorates. The three largest of these directorates - Storage and Transportation, Industrial Plant Equipment, and Installation Services - are mission oriented; the four remaining directorates - Office of Data Systems, Office of Comptroller, Office of Planning and Management, and the Office of Civilian Personnel - perform staff functions.

The record reveals that currently there are seven exclusively recognized units at the Activity. Thus, the AFGE is the exclusive representative of a unit of all of the eligible GS and Wage Board (WB) employees of the Directorate of Industrial Plant Equipment, Stockton, California, and also is the exclusive representative of a unit of all GS employees in the Telephone Branch of the Directorate of Installation Services and of a unit of all WB employees of the Publications Branch of the Directorate of Installation Services. The International Brotherhood of Electrical Workers, Local 2209, AFL-CIO, is the exclusive representative of three separate units at the Activity: all GS employees of the Fire Protection and Prevention Branch, Directorate of Installation Services, all WB employees in the Facilities Engineering Division, Directorate of Installation Services, and all the employees, GS-9 and below, in the Office of Data Systems. In addition, the LIU is the exclusive representative of a unit of all the remaining WB employees not included in any of the above listed units.

The evidence establishes that the claimed unit includes all of the remaining unrepresented employees of the Activity. Further, all of the employees in the petitioned for unit work under the overall supervision of the Activity's Commander and the personnel policies of the Activity are implemented through a Civilian Personnel Office which services all of the Activity's employees.

Under these circumstances, and noting particularly the agreement of the parties with respect to the appropriateness of the claimed unit, I find that the claimed residual unit is appropriate for the purpose of exclusive recognition under the Order.

Eligibility Issues

As stated above, the AFGE and the LIU contend that certain employees should be excluded from the claimed unit because they are management officials and/or employees engaged in Federal personnel work in other than a purely clerical capacity. The employees at issue include an Administrative Officer, Safety Specialists, a Claims Officer ^{3/}, and certain Management Analysts, Systems Analysts, and Program Analysts.

Administrative Officer, GS-9, Office of the Chief, Civil Engineering Division, Directorate of Installation Services

The record reveals that this Administrative Officer performs work involving the collection of data and the preparation of reports therefrom, relating to the operation, maintenance and alteration of the Depot's present and future facilities, grounds, utilities, roads, etc. In this regard, he analyzes existing programs in terms of their cost and effectiveness and his reports include alternative approaches to the matters under study. He may or may not include his personal recommendation. In this latter regard, however, the record reflects that his reports are reviewed by the Division Chief, by the Directorate of Installation Services and, often, by the Office of Planning and Management before any final decision is made. The Administrative Officer also serves as a technical advisor to the supervisors within the organization regarding the interpretation of administrative regulations and, when requested, he may assist supervisors in preparing material such as job descriptions. His technical expertise, however, is one of many sources available to supervisors or management and they are responsible for making final decisions.

Safety Specialists, Office of Safety and Industrial Health, Directorate of Installation Services

The Safety Specialists investigate individual accidents and injuries and prepare reports which indicate, among other things, how such occurrences might have been prevented. They make continuing surveys of the Depot's operations to insure that the established safety program is being adhered to and they note how the program might be improved. Under unusual circumstances, given an immediate hazard, employees in this classification could order that a work line be stopped. Although they may participate in the meetings of the Depot's Safety Council, the record

^{3/} As there is no record evidence with respect to the Claims Officer, I make no finding with respect to the inclusion or exclusion in the unit found appropriate of the employee in this classification. At the hearing, the parties stipulated that the Distribution Facilities Specialists (Training) should be included in the unit found appropriate because they were not management officials, supervisors or employees engaged in Federal personnel work in other than a purely clerical capacity. As there is no record evidence to the contrary, I find that employees in this classification should be included in the unit found appropriate.

reveals that they do not establish or have final authority in determining the safety policy of the Activity. 4/

Management Analysts, Management Control Division, Office of Planning and Management

Management Analysts are assigned to two branches (the Method and Standards Branch and the Organization and Manpower Branch) of the Management Control Division of the Office of Planning and Management. The parties stipulated that there were three distinguishable categories of Management Analysts.

The first group of Management Analysts includes those employees assigned to the Methods and Standards Branch whose primary function is to perform Defense Integrated Management Engineering System (DIMES) studies. DIMES is a work management system that quantifies tasks at an organizational level for performance evaluation. The Analysts, based on prior experience and observations at the work site, prepare an analysis of an operation, organization or work function, and, thereafter, make recommendations regarding improvements in the functional work flow procedure, staffing patterns, manpower utilization and space layout. These recommendations then are reviewed by the Analyst's Branch and Division Chiefs. In the course of the preparation of their reports and recommendations, the record reveals that the Analysts discuss the matter with the operating people involved, usually with the Division Chiefs, and that such discussions may result in modifications or changes. A final report is submitted to the Director of the Office of Planning and Management. In this regard, the evidence establishes that the final decisions on accepting or rejecting the recommendations of an Analyst and on implementing such recommendations does not reside with the Analyst. The other Management Analysts in the Methods and Standards Branch, whose inclusion in the unit found appropriate is disputed, perform management studies which concern the role which various pieces of equipment might play in improving efficiency. As with the Management Analysts who perform DIMES studies, any recommendation these employees make are subject to extensive review before possible approval and implementation.

The Management Analysts in the Organization and Manpower Branch make studies which involve reviewing organizations, operations or work functions in terms of distribution of skills, distribution of positions and supervisory ratios. In some instances their recommendations are guided by published standards for certain operations, but in other studies they are required to create performance standards where none exist. Again, any recommendation they would make would be subject to extensive review before possible adoption and implementation.

4/ Although the individual who testified at the hearing as to the nature of this position was serving temporarily as Acting Chief of the Office of Safety and Industrial Health, and presently is the only Safety Specialist employed, the eligibility determination, set forth below, is based on the evidence adduced as to the normal responsibilities of the Safety Specialists.

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Systems Analysts, Systems and Procedures Branch, Management Control Division, Office of Planning and Management

These Systems Analysts are responsible for monitoring, developing and improving broad systems of operations within a particular area of responsibility. They relate the system to automatic data processing techniques and make recommendations for implementing mechanical operations or improving manual operations. Before a change is initiated as a result of their recommendations, it must be approved by their chain of command as well as by the particular operating directorate.

Program Analysts

The parties disputed whether four employees classified as Program Analysts should be included within the unit found appropriate. Three of these Analysts are assigned to the Plans, Programs and Analysis Division, Director of Office of Planning and Management.

Edward H. Pickering, GS-11, Plans, Programs and Analysis Division

After a regulation has been issued by a higher headquarters, or when there has been a determination that a local regulation is needed to implement local policy, Pickering determines what the area of primary interest within the Depot will be, guided primarily by the Organization Functional Manual. He then assists the office of primary interest in drafting the regulation, reviews it for contents, policy, and basic procedure, negotiates with the office of primary interest regarding disagreements, and forwards the regulation with his recommendations through his Directorate to the Command, which issues the regulations in final form. The record reveals that Pickering does not have the authority to issue regulations, only to prepare, coordinate and interpret them.

Richard Martin, GS-11, Plans, Programs and Analysis Division

Martin is a Program Analyst who primarily is involved with coordinating plans for emergency preparedness. Although he is responsible for coordinating emergency planning with all the Directorates of the Depot, the plans are reviewed by his supervisor, by the Director of the Office of Planning and Management, and by the Command.

Harold Wollenborg, GS-11, Plans, Programs and Analysis Division

Wollenborg prepares and presents command briefings to the Command and to visiting dignitaries. In this regard, he would, in preparation for the Inspector General's visit to the Depot, review any discrepancies noted on the last inspection and ascertain whether the recommendations made at that time had been adhered to or whether the Depot had returned to any patterns criticized by the inspectors.

-5-

Neusbaum furnishes management support to the Directorate by conducting staff studies, analyzing the Directorate's operations, coordinating the Directorate's operations with the various division chiefs and making recommendations for management actions. The record reveals that all of his recommendations are subject to the approval of the Director. He also reviews all requests for personnel actions within the Directorate for the purpose of determining whether a vacancy exists in that particular position, that the forms are properly executed and to assure that the Directorate is not exceeding its manpower authorization. However, he does not prepare personnel actions, nor does he have authority to approve personnel actions.

The Assistant Secretary has held that a management official is an employee "having authority to make, or to influence effectively the making of, policy necessary to the agency---with respect to personnel, procedures, or programs," and that in determining whether an individual meets this requirement consideration should be given to "whether his role is that of an expert or professional rendering resource information or recommendations---or whether his role extends beyond this to the point of active participation in the ultimate determination as to what that policy, in fact, will be." 5/ The evidence establishes that in the instant case none of the employees in the disputed classifications discussed above are management officials. Thus, the record reveals in each instance that the individuals involved serve as resource persons whose recommendations are subject to extensive review before either acceptance or implementation and that they are not officials who actively participate in the ultimate determination of what policy should be. Accordingly, I find that the employees in the aforementioned classifications should not be excluded from the unit found appropriate on the basis that they are management officials.

Nor does the record reflect that any of these employees are engaged in Federal personnel work in other than a purely clerical capacity. In this regard, the record indicates that, although in connection with their duties some of the employees in the disputed classifications may make staffing recommendations which could ultimately, after approval and implementation, affect the staffing of the Activity, they are not involved in the processing of individual personnel actions on a regular basis and as a part of their day-to-day job responsibility. Accordingly, I find that the employees in the aforementioned classifications are not engaged in Federal personnel work within the meaning of Section 10(b)(2) of the Order and, therefore, should not be excluded from the unit found appropriate on this basis.

Based on all the foregoing circumstances, I find that the following employees constitute a unit appropriate for the purpose of exclusive

5/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

All professional and nonprofessional General Schedule employees of the Defense Supply Agency, Defense Depot Tracy, Tracy, California; excluding General Schedule and Wage Board employees of the Directorate of Industrial Plant Equipment, Wage Board employees of the Publications Branch, General Schedule employees of the Telephone Branch, Wage Board employees of the Facilities Engineering Division, General Schedule employees of the Fire Protection and Prevention Branch, General Schedule employees (GS-9 and below) of the Office of Data Systems, all other Wage Board employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

It is noted that the unit found appropriate includes professional employees. The Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in the unit with employees who are not professionals, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with non-professional employees must be ascertained. I shall, therefore, direct separate elections in the following voting groups:

Voting Group (a): All professional General Schedule employees of the Defense Supply Agency, Defense Depot Tracy, California; excluding General Schedule and Wage Board employees of the Directorate of Industrial Plant Equipment, Wage Board employees of the Publications Branch, General Schedule employees of the Telephone Branch, Wage Board employees of the Facilities Engineering Division, General Schedule employees of the Fire Protection and Prevention Branch, General Schedule employees (GS-9 and below) of the Office of Data Systems, all other Wage Board employees, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All nonprofessional General Schedule employees of the Defense Supply Agency, Defense Depot Tracy, Tracy, California; excluding General Schedule and Wage Board employees of the Directorate of Industrial Plant Equipment, Wage Board employees of the Publications Branch, General Schedule employees of the Telephone Branch, Wage Board employees of the Facilities Engineering Division, General Schedule employees of the Fire Protection and Prevention Branch, General Schedule employees (GS-9 and below) of the Office of Data Systems, all other Wage Board employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether they desire to be represented by the American Federation of Government Employees, AFL-CIO, Local 2029; by the Laborers International Union, AFL-CIO, Local 1276; or by neither.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO; Local 2029, the Laborers International Union, AFL-CIO, Local 1276; or by neither. In the event that the majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as the non-professional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether the American Federation of Government Employees, AFL-CIO, Local 2029; the Laborers International Union, AFL-CIO, Local 1276; or neither was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional General Schedule employees of the Defense Supply Agency, Defense Depot Tracy, Tracy, California; excluding General Schedule and Wage Board employees of the Directorate of Industrial Plant Equipment, Wage Board employees of the Publications Branch, General Schedule employees of the Telephone Branch, Wage Board employees of the Facilities Engineering Division, General Schedule employees of the Fire Protection and Prevention Branch, General Schedule employees (GS-9 and below) of the Office of Data Systems, all other Wage Board employees, employees engaged in Federal personnel work in other than a purely clerical

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capacity, management officials, and supervisors and guards as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

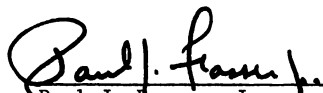
(a) All professional General Schedule employees of the Defense Supply Agency, Defense Depot Tracy, Tracy, California; excluding General Schedule and Wage Board employees of the Directorate of Industrial Plant Equipment, Wage Board employees of the Publications Branch, General Schedule employees of the Telephone Branch, Wage Board employees of the Facilities Engineering Division, General Schedule employees of the Fire Protection and Prevention Branch, General Schedule employees (GS-9 and below) of the Office of Data Systems, all other Wage Board employees, nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All nonprofessional General Schedule employees of the Defense Supply Agency, Defense Depot Tracy, Tracy, California; excluding General Schedule and Wage Board employees of the Directorate of Industrial Plant Equipment, Wage Board employees of the Publications Branch, General Schedule employees of the Telephone Branch, Wage Board employees of the Facilities Engineering Division, General Schedule employees of the Fire Protection and Prevention Branch, General Schedule employees (GS-9 and below) of the Office of Data Systems, all other Wage Board employees, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

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An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 2029; by the Laborers International Union, AFL-CIO, Local 1276; or by neither.

Dated, Washington, D.C.
April 30, 1974


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND REMAND OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF AGRICULTURE,
OFFICE OF INFORMATION SYSTEMS,
KANSAS CITY, MISSOURI
A/SLMR No. 387

The Petitioner, National Federation of Federal Employees, Local 1633, (NFFE) sought an election in a unit of all employees employed by the Department of Agriculture, Office of Information Systems at the Department of Agriculture, Kansas City, Missouri Center. The Activity contended that the smallest unit that could be considered appropriate for the purpose of exclusive recognition would be a unit including eligible employees of all of the Activity's computer centers.

The Assistant Secretary found that the evidence adduced during the hearing in this case did not provide a sufficient basis upon which a decision could be made regarding the appropriateness of the claimed unit. Although the record did contain certain facts concerning the overall nationwide operations of the Activity, the Assistant Secretary deemed it necessary to secure more information. With respect to the petitioned for unit, the Assistant Secretary noted that there was insufficient evidence with respect to the functions of the three branches within the Kansas City Center and their relationship with one another; the number of employees within each branch, their job titles and classifications; the type of work performed and skills involved; the supervision of the employees and their working conditions; the extent, if any, of interchange and transfer of employees; and the duties, responsibilities and authority of the Director of the Computer Center.

In these circumstances, the Assistant Secretary remanded the matter to the Assistant Regional Director for the purpose of securing additional evidence in accordance with his Decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF AGRICULTURE,
OFFICE OF INFORMATION SYSTEMS,
KANSAS CITY, MISSOURI

Activity

and

Case No. 60-3536(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1633

Petitioner

DECISION AND REMAND

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert E. Lackland. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The NFFE seeks an election in a unit of all employees employed by the Department of Agriculture, Office of Information Systems at the Department of Agriculture, Kansas City, Missouri Center. 2/ The Activity contends that the smallest unit that could be considered appropriate for the purpose of exclusive recognition would be a unit including eligible employees of all of the Activity's computer centers.

The Activity, the Office of Information Systems (OIS) of the Department of Agriculture, was established on March 30, 1972, for the purpose of providing a more efficient automated data processing system within the

1/ The Petitioner, the National Federation of Federal Employees, Local 1633, herein called NFFE, filed three post-hearing motions. Upon careful consideration of the motions, and noting the disposition of the subject case, the NFFE's motions are hereby denied.

2/ The unit appears essentially as amended at the hearing.

Department to meet management's informational needs. Toward this end, the data processing facilities at various Department of Agriculture offices throughout the country were consolidated into an integrated computer network comprised of computer centers under the direction of the newly created OIS. The consolidation involved the computer centers located at Washington, D.C.; New Orleans, Louisiana; Kansas City, Missouri; Minneapolis, Minnesota; and St. Louis, Missouri. 3/ The record indicates that currently the OIS operation is in a state of development and, as yet, the process of standardizing the Activity's operations has not been completed. The Activity contends that when the OIS operation is developed completely, there will be a network of computer centers which will allow for an even distribution of work among the centers and will assure sufficient backup support in the event of an equipment failure at any one of the centers.

The record is unclear as to the type and frequency of communication and other contacts with respect to the employees of the various centers. Thus, while the evidence discloses that the Activity uses a "team concept" when a new center is established, when an emergency arises, or when a difficult problem requires resolution at an existing center, it is unclear as to composition of the team and the frequency of team utilization. Also, there is a paucity of evidence as to interchange of employees and employee transfers, if any, among the various centers and the record is incomplete with respect to where meaningful authority lies for the implementing of the Activity's labor relations policies and where the authority and responsibility rest for handling negotiations and the settling of employee grievances. 4/

There also is ambiguity regarding the composition of the petitioned for unit. Thus, while there is evidence as to the framework of the organizational structure within the Kansas City Center, sufficient information upon which to make a decision is lacking with respect to the three operational branches within the Center and their relationship to one another. Nor is there any information with regard to the number of employees in each branch, their job titles and classifications, the type of work they perform and the skills involved, their supervision, the extent, if any, of interchange and transfers, their working conditions, and the areas of consideration for promotion and reduction-in-force purposes. In addition, record testimony is unclear and incomplete with respect to the duties, responsibilities and authority of the Kansas City Computer Center's Director

3/ The record indicates that the Activity is in the process of closing down the operation at its St. Louis Computer Center. An additional center at Fort Collins, Colorado was established where skeletal staffing had taken place at the time of the hearing in the instant case.

4/ Information submitted by the Activity subsequent to the hearing discloses that certain changes in this regard are continuing. It was noted that at the hearing the parties agreed that information, then unavailable to the Activity, could be submitted for the record at a later date. The information was received subsequently and is hereby incorporated in the record of these proceedings.

and the record is devoid of information concerning the status of the Minneapolis Center and its relationship, if any, to the Kansas City Center.

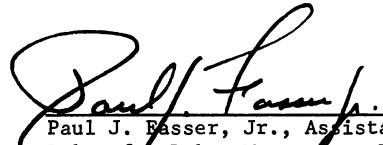
May 15, 1974

Under all of these circumstances, I find that the record does not provide an adequate basis upon which to determine the appropriateness of the unit being sought. Therefore, I shall remand the subject case to the appropriate Assistant Regional Director for the purpose of reopening the record in order to secure additional evidence as to the appropriateness of the claimed unit.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Assistant Regional Director

Dated, Washington, D.C.
May 10, 1974


Paul J. Esser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
WADSWORTH HOSPITAL CENTER,
LOS ANGELES, CALIFORNIA
A/SLMR No. 388

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1061 (Complainant), against the Veterans Administration, Wadsworth Hospital Center, Los Angeles, California (Respondent). The Complainant alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by determining to close down part of the Wadsworth Hospital Center without prior consultation with the Complainant and by failing to consult regarding the transfer of patients, employees, and hospital functions.

The Administrative Law Judge recommended dismissal of all the allegations against the Respondent. He found that certain decisions made by the Respondent without consultation with the Complainant prior to their public announcement were of the type that Sections 11(b) and 12(b) of the Order intended to exempt from the "meet and confer" requirements of Section 11(a). Further, with regard to those decisions publicly announced by the Respondent pertaining to implementation and impact, which the Administrative Law Judge found to require consultation or negotiation, the Administrative Law Judge concluded that no final steps had been taken which irrevocably committed the Respondent to such policies; their implementation and impact were discussed with the Complainant later on the day of announcement and, thereafter, during a series of weekly and twice-weekly meetings; and no evidence was introduced to establish that the Complainant objected to the Respondent's decisions.

With respect to the alleged issuance of a questionnaire to employees without prior consultation with the Complainant, the Administrative Law Judge found that such conduct was clearly inadvertent and "could hardly be concluded to be an attempt to bypass the Union and to avoid collective bargaining obligations" in violation of the Order. In this regard, he noted that the Complainant presumably had approved the issuance of a previous questionnaire which was issued to solicit information similar to that sought by the second questionnaire, had discussed and approved other communications which were issued directly to employees, and had never objected in principle to such communications. Moreover, the Administrative Law Judge found that the Complainant had not specifically contended that the second questionnaire was an attempt by the Respondent to bypass the exclusive representative and communicate directly with unit employees.

The Assistant Secretary adopted the Administrative Law Judge's recommendation that all of the allegations against the Respondent be dismissed except with regard to the Respondent's alleged improper failure to meet and confer with the employees' exclusive representative prior to the issuance of a second questionnaire to employees. In this latter regard, the Assistant Secretary found the record clear that the Complainant was not afforded an opportunity to comment on the form and content of the second questionnaire because, as testified to by the Personnel Officer of the Hospital Center, the Respondent "simply could not find the time to sit down and consult" with the Complainant regarding the second questionnaire prior to its issuance. Moreover, the Assistant Secretary found that the Respondent made no attempt either prior to the issuance of the second questionnaire or immediately thereafter to communicate with the Complainant concerning the alleged need for the issuance or presented any evidence of any overriding exigency which precluded the Respondent from affording the Complainant notice and an opportunity to meet and confer regarding the matters contained in the second questionnaire which, in his view, involved personnel policies and practices and concerned matters affecting working conditions within the meaning of Section 11(a) of the Order.

Under the circumstances, the Assistant Secretary concluded, contrary to the Administrative Law Judge, that the Respondent's unilateral conduct with respect to the second questionnaire constituted an improper bypass and undermining of the status of its employees' exclusive representative and, therefore, was violative of Section 19(a)(6) of the Order. Further, the Assistant Secretary found that such conduct by the Respondent was in violation of Section 19(a)(1) of the Order as it necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
WADSWORTH HOSPITAL CENTER,
LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 72-3811(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1061

Complainant

DECISION AND ORDER

On December 20, 1973, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation and the Respondent filed an answering brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, the exceptions and supporting brief filed by the Complainant, the answering brief filed by the Respondent, and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, except as modified below. 1/

1/ On page four of his Report and Recommendation, the Administrative Law Judge inadvertently noted that the January 14, 1972, announcement regarding the closing of portions of the Wadsworth Hospital Center was made simultaneously at 1:00 p.m. PST in California and 10:00 a.m. EST in Washington, D.C. rather than at 10:00 a.m. PST and 1:00 p.m. EST, respectively. This inadvertency is hereby corrected.

The subject complaint alleged, in substance, that the Veterans Administration, Wadsworth Hospital Center violated Section 19(a)(1) and (6) of the Order by determining to close down part of the Wadsworth Hospital Center without prior consultation with the Complainant and by failing to consult regarding the transfer of patients, employees, and hospital functions.

The evidence establishes that between January 14, 1972, 2/ and April 21, 1972, there were approximately 13 formal and numerous informal meetings between the Respondent and the Complainant concerning the effects on employees of the decision to close portions of the Center and the resulting necessity to relocate patients. In this regard, the record reveals that at a formal meeting held in the morning of January 18, 1972, the Respondent announced to the Complainant that questionnaires would be handed out to all personnel regarding their availability for transfer to other stations. Further, the record indicates that at another formal meeting held in the afternoon of January 18, 1972, a proposed questionnaire was shown to the Complainant and discussed. The purpose of the questionnaire was to solicit from employees whether or not they wished to continue their employment with the Veterans Administration, their job and location preferences, the lowest grade and salary they would consider, or whether they planned to retire. The Complainant made a suggestion concerning to whom this questionnaire should be sent, which was accepted, and it was issued accordingly. 3/

Shortly thereafter, a second questionnaire dated January 21, 1972, with the same return date as the initial questionnaire, was issued by the Respondent to employees without first being shown to the Complainant.4/

2/ On January 14, 1972, the Veterans Administration announced its intention to close down a number of buildings in its California hospital system based on the recommendations of a special committee of seismic experts appointed by the Administrator of Veterans Affairs. In this connection, it was expected that within two weeks a number of patients at the Center were to be transferred to other stations. The first formal meeting between the Respondent and the Complainant to discuss the announcement, its implementation, and its effect on employees was held on January 14, 1972 following the above-noted announcement made earlier that day.

3/ This questionnaire was dated Wednesday, January 19, 1972, and it contained instructions that it was to be returned no later than Monday, January 24, 1972.

4/ The Administrative Law Judge concluded that the credible evidence indicated that the second questionnaire was issued prior to showing it to the Complainant. Moreover, the Respondent, in its answering brief, conceded that the second questionnaire had not been discussed with the Complainant prior to its issuance.

Unlike the first questionnaire, the second was printed on the reverse side of an explanatory letter addressed to "Selected Employees - Extended Care, Wadsworth, and Brentwood Hospitals" and had as an attachment a "staffing needs" page listing patient receiving stations with their specific staffing requirements by job title. While the first questionnaire had solicited desired preferences, the second questionnaire requested that the employees specifically commit themselves as to whether or not they would "accept transfer" to any of the listed stations and, if so, what their top three "location preferences" were. It also requested information concerning the "earliest date" employees could transfer and whether they would "accept a detail" to their transfer location preferences. Similar to the first questionnaire, the second contained space for the individual employee's printed name and signature. The evidence establishes that at the parties' next formal meeting on February 1, 1972, following the issuance of the second questionnaire, the Complainant specifically objected to its issuance to employees without prior consultation.

With respect to the issuance of the second questionnaire, the Administrative Law Judge concluded, among other things, that such conduct was clearly inadvertent and "could hardly be concluded to be an attempt to bypass the Union and to avoid collective bargaining obligations" in violation of Section 19(a)(6) of the Order. The Administrative Law Judge noted also that the Complainant presumably had approved the issuance of the first questionnaire which was issued to solicit information similar to that sought by the second questionnaire, had discussed and approved other communications which were issued directly to employees, and had never objected in principle to such communications. Moreover, the Administrative Law Judge found that the Complainant had not specifically contended that the second questionnaire was an attempt by the Respondent to bypass the exclusive representative and communicate directly with unit employees.

In my view, the allegations contained in the instant complaint pertaining to the Respondent's alleged failure to "consult regarding the transfer of patients, employees and hospital functions" are sufficiently broad to encompass the alleged improper failure by the Respondent to meet and confer with its employees' exclusive representative prior to the issuance of the second questionnaire. And, contrary to the Administrative Law Judge, I find that the Respondent's unilateral conduct in this connection was violative of the Order. The record is clear that prior to the issuance of the second questionnaire the Respondent properly had shown the Complainant an initial questionnaire as well as other letters and communications to be sent unit employees concerning the change in operations and had solicited the Complainant's views as to format and content prior to any distributions. The record also is clear that the Complainant was not afforded a similar opportunity with regard to the second questionnaire because, as testified to by the Personnel Officer of the Center, the Respondent "simply could not find the time to sit down and consult" with the Complainant regarding the second questionnaire prior to its issuance.

In this latter regard, however, there is no evidence of any overriding exigency which precluded the Respondent from affording the Complainant notice and an opportunity to meet and confer regarding the matters contained in the second questionnaire. Moreover, the Respondent made no attempt, either prior to the issuance of the second questionnaire or immediately thereafter, to communicate with the Complainant concerning the alleged need for the issuance of the questionnaire without first meeting and conferring with the Complainant.

Nor was the Complainant's approval of the issuance of the first questionnaire and its acceptance, without objection, of other communications by the Respondent to bargaining unit employees considered to estop the Complainant in this regard. Thus, while, in general, both questionnaires solicited similar information, they clearly placed differing burdens on the solicited employees. Unlike the first questionnaire which sought the desired preferences of employees, the second questionnaire specifically required the employees affected to commit themselves as to whether or not they would "accept transfer" at their location preference as of a specific time or would "accept a detail." Under these circumstances, I find that the Complainant's conduct with respect to the first questionnaire and with respect to other communications by the Respondent did not estop the Complainant from asserting its right under the Order to be afforded notice and an opportunity to meet and confer regarding the matters contained in the second questionnaire which, in my view, involved personnel policies and practices and concerned matters affecting working conditions within the meaning of Section 11(a) of the Order.

Accordingly, I conclude that the above-described conduct by the Respondent constituted an improper bypass and undermining of the status of its employees' exclusive representative and, therefore, was violative of the Order. 5/ Further, I find that such conduct by the Respondent necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order. Consequently, I conclude that the Respondent's improper conduct described above also violated Section 19(a)(1) of the Order. 6/

5/ Cf. Veterans Administration, Veterans Administration Center, Hampton, Virginia, A/SLMR No. 385; Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301; and United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42.

6/ See, in this regard, U. S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SLMR No. 341.

THE REMEDY

Having found that the Respondent 7/ engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Wadsworth Hospital Center, Los Angeles, California, shall:

1. Cease and desist from:

(a) Soliciting a commitment from employees represented by the American Federation of Government Employees, Local 1061, or any other exclusive representative, through a questionnaire, as to whether or not they would accept reassignment or detail without first notifying Local 1061, American Federation of Government Employees, or any other exclusive representative, and affording such representative the opportunity to meet and confer regarding the matters contained in such questionnaire insofar as such matters involve personnel policies and practices and affect working conditions.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

7/ The Administrative Law Judge found that, under the circumstances, the Veterans Administration's Central Office in Washington, D.C., was the Respondent in this matter. However, it is clear that any bargaining obligation owed to the Complainant herein stemmed from the recognition accorded it by the Veterans Administration's facility at Wadsworth Hospital Center in Los Angeles, California. Accordingly, and noting that the Wadsworth Hospital Center was appropriately named as Respondent on the complaint form and was on notice of the allegations contained therein, it was concluded that the remedial order herein, based on the failure of the Wadsworth Hospital Center to act in accordance with its obligations set forth in Section 11(a) of the Order, should run solely against the Wadsworth Hospital Center.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT solicit a commitment from employees represented by the American Federation of Government Employees, Local 1061, or any other exclusive representative, through a questionnaire, as to whether or not they would accept reassignment or detail without first notifying American Federation of Government Employees, Local 1061, or any other exclusive representative, and affording such representative the opportunity to meet and confer regarding the matters contained in such questionnaire insofar as such matters involve personnel policies and practices and affect working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature and 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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services of the Labor-Management Services Administration, U. S. Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Ave., San Francisco, California 94102.

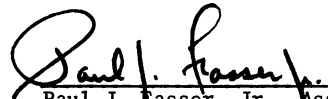
(a) Notify American Federation of Government Employees, Local 1061, or any other exclusive representative, of any proposed attempt to solicit a commitment from unit employees, through a questionnaire, as to whether or not they would accept reassignment or detail and, upon request, meet and confer in good faith with such representative regarding the matters contained in said questionnaire insofar as such matters involve personnel policies and practices and affect working conditions.

(b) Post at its facility at Wadsworth Hospital Center, Los Angeles, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Wadsworth Hospital Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(1) and (6) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 15, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



Statement of the Case

.....
 In the Matter of :
 :
 VETERANS ADMINISTRATION :
 WADSWORTH HOSPITAL CENTER :
 LOS ANGELES, CALIFORNIA :
 Respondent :
 :
 and :
 :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL UNION 1061 :
 Complainant :

Case No. 72-3811 (CA)

Stephen L. Shochet, Esq.
 Office of the General Counsel
 Veterans Administration
 810 Vermont Avenue
 Washington, D. C. 20420
 and

Leon M. Cornfeld, Director
 Employee Management Relations Service
 Veterans Administration
 810 Vermont Avenue
 Washington, D. C. 20420

For the Respondent

Dolph David Sand, Esq.
 American Federation of Government Employees
 1325 Massachusetts Avenue, N. W.
 Washington, D. C. 20005

For the Complainant

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

REPORT AND RECOMMENDATION

The proceeding herein arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing on Complaint issued on March 12, 1973 by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, San Francisco, California.

American Federation of Government Employees, Local Union 1061 (herein variously called Complainant, Local 1061, Union, or AFGE) initiated the matter by filing a Complaint on September 5, 1972, against the Veterans Administration, Wadsworth Hospital Center (herein variously called Respondent, Activity or VA). The Complaint alleges that Respondent violated Section 19(a)(1) and (6) of the Order by determining to close down part of the Wadsworth Hospital Center without prior consultation with the Union and by failing to consult the Union regarding the transfer of patients, employees, and hospital functions.

A hearing was held before the undersigned on June 6 and 7, 1973 at Los Angeles, California. Both parties were represented by counsel and were afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Both parties presented oral argument at the close of the hearing and were afforded an opportunity to file briefs. The Activity filed such a brief, AFGE did not.

Upon the entire record in this case, from his observation of the witnesses and their demeanor, and from all the evidence adduced at the hearing, the undersigned makes the following Findings of Fact, Conclusions of Law and Recommendation:

Findings of Fact

Background

In February 1971 an earthquake in California severely damaged the Veteran's Administration Hospital in San Fernando, resulting in loss of life. As a result the VA initiated a study of all its West Coast facilities to determine whether they could resist substantial damage in the event of an earthquake. A number of specialized committees were established and they performed studies and evaluated information from April 1971 through the remainder of the year. No labor organization was consulted or represented on any of these committees.

Prior to January 14, 1972 there existed a VA Hospital complex on 578 acres in West Los Angeles (referred to herein,

variously, as the West Los Angeles Complex, or the Wadsworth Hospital Center). This complex consisted primarily of three major facilities and certain support buildings. The three facilities were, the Brentwood Hospital, a mental and psychiatric hospital; the Domiciliary Facility, 1/ an institution where patients who needed a limited amount of medical care and treatment reside; and the Wadsworth Hospital, an acute surgical and medical hospital. At all times material herein AFGE Local 1061 was the recognized exclusive collective bargaining representative for a collective bargaining unit composed of all non-professional and non-supervisory civilian employees of the VA at the Wadsworth Hospital Center at all three of the above described institutions, including the canteen service and non-appropriated funds instrumentality.

During the latter part of December 1971 and the early part of January 1972 the Administrator of Veterans Affairs decided, in consultation with the White House and the Office of Management and Budget, and based on the above described studies and evaluations, that, because portions of the Wadsworth Hospital Center, as well as VA installations located elsewhere, could not withstand an earthquake of the magnitude of the one that had damaged San Fernando, such buildings or portions of buildings would be torn down and the patients and functions relocated. This decision was not, at first, made public or communicated to AFGE. On January 12, at a meeting in Washington, D. C., the Administrator of Veterans Affairs informed those present of the planned hospital closings and patient relocation. With respect to the West Los Angeles Complex it was determined to close down part of the Wadsworth Hospital and transfer some of the affected patients to other specialized VA hospitals and to the area then occupied by the Domiciliary Facility. The Domiciliary was to be closed or greatly cut back and its patients placed in other VA hospital and community facilities. The Domiciliary was, in effect, to be combined with the Wadsworth Hospital and to cease to exist as a separate facility. Present at the meeting were members of the Administrator's staff, the various VA hospital directors and certain personnel officers from the affected hospitals, and other VA officials. AFGE was not represented at this meeting. A group of VA officials was chosen to travel to California to make the public announcement on January 14, 1973.

1/ Also called the Extended Care Hospital.

On January 14, 1972, at 1:00 p.m. PST Deputy Administrator for Veteran's Affairs, Fred B. Rhodes, read a prepared announcement of the Administrator's decision with respect to the hospital closing. 2/ Present at this announcement, in addition to the public, press and members of Veterans groups were representatives of Local 1061, AFGE. 3/ Members of the group that traveled from Washington remained to assist in the hospital closing and patient relocation.

Prior to the January announcement, in addition to the decision to close certain hospitals and relocate patients, certain other decisions were also made at the Washington level including guaranteeing a job to each career VA employee, transfers to be at agency expense for any employee who transfers, salary protection, and out-placement assistance. There was also a decision made to freeze employment at all West Coast facilities and nearby VA facilities. Admittedly the AFGE was not consulted or advised concerning any decisions prior to January 14, 1972. 4/

Immediately following the January 14 announcement, on that same day, representatives of the Activity met with Union representatives to discuss the announcement, its implementation and effect on employees. AFGE was advised that it had been decided at the national level, among other things, that affected employees were assured of jobs with the VA; that transfers would be at government expense; that employment at other facilities was frozen; that there would be full salary protection; reduction in force regulations would be followed, etc. AFGE did not raise any objection with these policies and plans. Subsequently, representatives of AFGE and the Activity met weekly and twice weekly at regularly scheduled meetings to discuss the ramifications of the decision to close portions of the Wadsworth Hospital and to transfer those affected patients, as well as the affected patients

2/ Simultaneously the Administrator read the same announcement at 10:00 a.m., EST in Washington, D. C.

3/ Representatives of the AFGE National Office were present at the Washington announcement.

4/ AFGE submitted evidence that prior to the January 14, 1973 announcement it had heard rumors of the closings and had tried to check them out with various hospital administrators. The local VA officials denied knowledge of any such plans. No evidence was submitted to establish that the local VA officials knew of these plans prior to the January 12 meeting in Washington, D. C.

located at the Domiciliary Facility. Between January 14 and April 21, 1972, there were approximately 13 such formal meetings between the Activity and Local 1061, as well as informal discussions and conversations on an almost daily basis. At these formal and informal meetings AFGE and VA management discussed the effects of the major decision to close the hospital and relocate patients on the employees in the unit and management's plans for these employees. Many specific matters relative to the implementation of these decisions and their impact on the employees in the unit were discussed. A few of the items discussed at the formal meetings, by way of example only, were transfer and reduction in force (RIF) procedures; parking facilities; complaints of individual employees concerning transfer rights; "out placement" activities; salary retention rights; mileage expenses to be paid to employees who were required to drive further to new assignments; voluntary transfers from Brentwood to other VA hospitals; less use of "purchase and hire" employees at Brentwood, etc. 5/ The Union was given an opportunity to express its opinions and views concerning the Activity's plans. Management listened to these views and, in some instances, as a result of these discussions, management plans were changed, i.e., the allowance for mileage was increased, a proposed retirement letter was changed, etc. The Union was advised that its suggestions with respect to any of the proposed plans would be considered. The Union's witnesses alleged that a request was made soon after the January 14 meeting that the Union "participate" with the management personnel working in each area of implementing the basic decisions. The record is vague as to precisely what the Union was requesting. 6/ The Union's request was denied, but the Union was advised at the meetings described above of the plans management had arrived at and given an opportunity to express its views, which were considered and, as described above, sometimes adopted. There was no evidence submitted that the Activity refused any request made by the Union to discuss or confer concerning any specific matter. Similarly, the Activity made it clear that any policies or decision, no matter where formulated, could be examined, discussed, and reevaluated.

5/ Problems of specifically named employees that were transferred or affected were also discussed. In fact Union officials were granted substantial administrative leave to assist employees in preparing complaints to the Civil Service Commission concerning transfers, RIFs, etc.

6/ The Union president testified that the Union didn't have a precise concept of what role it would plan, it just wanted to "help and cooperate".

The record establishes that at a meeting on January 18 a proposed questionnaire was shown to AFGE by the Activity and was discussed. The questionnaire was to solicit from employees approximately how many would be willing to move and transfer. AFGE made a suggestion concerning to whom this questionnaire should be sent. There was no evidence submitted to establish that AFGE objected to the Activity's issuing questionnaires to employees soliciting this type of information. The Union's suggestion was accepted and the questionnaire was issued accordingly. 7/ A second questionnaire was issued a few days after the one discussed above, soliciting from employees further information concerning employees' interest in transfers; more precisely, whether employees in certain categories did in fact want to transfer. This information was necessary because some of the Domiciliary patients were being moved and the receiving stations wanted to know if employees to care for them were to be transferred or should be obtained from the outside. This questionnaire was not shown to AFGE before it was distributed to employees. It was discussed with the Union after it was issued. 8/

In subsequent meetings AFGE was shown drafts of a number of other letters and communications to be sent employees concerning the change of operation (e.g., RIF letters, etc.) These drafts were discussed and AFGE suggestions were considered.

A decision was made by the Activity to consolidate the existing three dietetic services 9/ into one such service. At the January 18th meeting prior to its taking effect, AFGE was advised that the Activity had decided to consolidate the three dietetic services into one, located at the Brentwood Hospital. This decision to consolidate the dietetic services was probably made in Washington and the Union was admittedly not included in the decision making process to consolidate the dietetic services. At the February 1st meeting the Union was advised that management had changed its mind and had decided that the consolidated dietetic service would be

7/ A proposed retirement letter was also discussed and some changes suggested by AFGE were made.

8/ There is some confusion and conflict in evidence as to whether it was the first or second questionnaire that was issued before showing it to AFGE. It is concluded that the weight of the credible evidence indicates and I find that it was this second questionnaire that was issued prior to showing it to AFGE.

9/ The dietetic services were located at the Wadsworth Hospital, Domiciliary and Brentwood Hospital.

located at the Wadsworth Hospital rather than at the Brentwood Hospital. There was no evidence submitted that the Union requested to bargain about how the consolidation would be implemented or on any specific impact it might have on employees or that the Activity refused to discuss or consult about any such matters.

At the February 18th meeting between AFGE and the Activity the procedures for detailing employees to nearby hospitals was discussed in detail. Among the specific items discussed was the criteria for details and transfers and the provision of bus services. It was agreed that a memorandum would be prepared by the Activity which would be discussed with AFGE the following week. At the February 23rd meeting this memorandum was discussed. Although AFGE pointed out at this meeting that the policies were already prepared and therefore this did not constitute consultation, the Activity assured AFGE that their suggestions and viewpoints were important and would be considered. Among the matters raised by AFGE were that the mileage allowance of six cents was inadequate and should be 12 cents ^{10/} and that those traveling on VA provided buses, who do not reach the home station by 4:30 p.m. should receive overtime. These buses were to transport employees who were detailed to the Sepulveda and Long Beach VA Hospitals and who did not have adequate private transportation, to those hospitals from the Wadsworth Hospital Center. Employees were not required to ride these buses. Although apparently there was no notification to the Union before the bus system was "set up", ^{11/} the record does not establish that the AFGE ever objected to or asked to bargain about the provision of the buses or whether or how the buses should be supplied or whether such service should be cut out. Further the record does not establish that the Activity refused to discuss any of these matters. Rather the Union seemed interested in discussing the overtime question, which subject was discussed. Further, the record does not establish precisely when the buses were first provided or if they were provided before February 18, when such service was apparently first discussed, or how many employees were affected.

^{10/} Apparently the mileage was raised to 10 cents.

^{11/} None of the witnesses presented by AFGE stated that there was no consultation on this issue. The only evidence to establish this was by Mr. Stanford Tsugawa, the Personnel Officer for Wadsworth who stated that he didn't handle this matter himself but that Mr. Cox of the Southern Regional Medical District did. Mr. Tsugawa testified that he was aware of no consultation between Mr. Cox and AFGE before setting up the bus system.

CONTENTIONS OF THE PARTIES

The Complaint in the subject case alleges that Section 19(a)(1) and (6) of the Order was violated by the Activity's failure to consult concerning its decision to close part of the Wadsworth Hospital and further that it failed to consult concerning the "transfer of patients, employees and hospital functions..." During opening oral argument AFGE stated it was alleging the Section 19(a)(6) violation based on the Activity's failure to consult concerning changes in "personnel policies and/or working conditions". AFGE went on to state it was alleging failure to consult regarding both the decision to close and move part of the Wadsworth Hospital Center Operation and the impact of that decision. AFGE went on to state that "this violation would also represent a violation of Section 19(a)(1)". During closing argument AFGE specifically alleged that §19(a)(1) and (6) of the Order was violated by the Activity because it failed to consult about the decisions and policies announced during the January 14 announcement and failed to consult regarding the implementation and impact of announced policies. AFGE counsel then cited only three examples where no consultation was offered the Union after requests were made. The three examples given were: (1) the issuance of a questionnaire with no consultation because there was allegedly no time; (2) the provision of buses for employees who were on detail and a "concern about overtime relating to these buses"; and (3) the consolidation of three dietetic services into one. AFGE filed no brief and did not specify any other examples where the Activity allegedly failed to meet its bargaining obligation.

The VA contends that the charge was addressed to the VA Wadsworth Hospital and not the VA in Washington, therefore the VA National Office is properly not a party. Secondly the VA contends that certain of the decisions that were made at the Washington level were not subject to consultation because of management rights or because they had impact broader than the unit. Finally, VA contends that subsequent to January 14 there was adequate consultation.

Conclusions of Law

The Activity contends that the Wadsworth Hospital Center, and not the VA Central Office is the proper respondent in this case, because the charge letter required under Section 203.2(a)(1) of the Assistant Secretary Regulations ^{12/} was addressed to "Director, Wadsworth Hospital Center, Veterans

^{12/} This Section states in part: "A charge in writing alleging the unfair labor practice must be filed directly with the party or parties against whom the charge is directed..."

Administration, Los Angeles, California, 90073," and the complaint form filed as required by Section 203.3(a)(2) of the Regulations ^{13/} sets forth "Veterans Administration" under "name of agency"; "Wilshire and Samtelle Blvds, Los Angeles, California 90073" under "address"; "J.J. Cox, Director," under "Representative to Contact, Title"; and "Wadsworth Hospital Center" under "activity involved". The "Complaint" is required to be served on the Respondent and the VA alleges it was only served on Mr. Cox and his representative. ^{14/} It is clear from the body of the charge and the body of the complaint the general decisions and other areas of conduct that are alleged to violate the Order. Further, the charge and the complaint were addressed to and served upon responsible officials of the VA, albeit at the Wadsworth Hospital Center, the place where the collective bargaining unit was located, rather than the VA national office in Washington, D. C. It is concluded that this constituted compliance with the Regulations and was sufficient notice to make the Veterans Administration the respondent. Hospital Director Cox is a responsible Veterans Administration agent in Los Angeles and the record establishes he was one of the VA representatives that the Union normally dealt with. If the National Office was somehow unaware of the charge, a fact not established, it was the fault of its own agents for not notifying it. To place the obligation upon the Union to determine precisely which official of the VA was responsible for the alleged unfair labor practice, knowledge which really only the VA would have, and then to require that that person or office be served is clearly unreasonable. Rather it was quite reasonable and in keeping with the objective of the Order for AFGE to address the charge and complaint to the responsible local VA official. In these circumstances therefore, it is concluded that the VA itself was adequately served and named as required by the Regulations.

A. Decisions made before January 14, 1972.

The Union contends that the VA violated Section 19(a)(6) of the Order by failing to notify and consult with the Union before it announced its decisions on January 14, 1972.

^{13/} This Section requires, in part, that the complaint contain "...the name, address and telephone number of the agency, or activity or labor organization against whom the complaint is made."

^{14/} It should be noted that the "Notice of Hearing" with the Complaint attached was served on Robert E. Coy, Assistant General Counsel, VA, 810 Vermont Ave, N.W. Washington, D.C. 20420 and further that, at the hearing Mr. Shochet stated that he also appeared on behalf of the VA National office.

The decisions announced fall basically into two areas. In the first area are the decisions to close down part of the Wadsworth Center, to combine the Wadsworth Hospital and Domiciliary Facility into one operation and to transfer patients to other VA and community facilities. In the second area are the decisions to guarantee each regular VA employee a job; to offer salary protection and to freeze hiring in other western VA facilities.

Section 19(a)(6) of the Order states in pertinent part that "Agency management shall not refuse to consult, confer or negotiate with a labor organization as requires by this Order." Section 11(a) of the Order states in pertinent part that an agency and exclusively recognized labor organization "...shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions..." Section 11(b) goes on to state "...However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work;....This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change." Section 12(b) of the Order reserves to management the right:

- "(1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency;..."

With respect to the first area of decisions, i.e., to close down and consolidate hospital facilities and to transfer patients, it is apparent that there were "matters, affecting working conditions" within the meaning of Section 11(a) of the Order. However, it is equally clear that such decisions are of the basic organizational type that Sections 11(b) and 12(b) of the Order intended to exempt and exclude

from the "meet and confer" requirements of Section 11(a). Therefore, the activity was under no obligation to meet and confer with the Union concerning these decisions. See U. S. Department of Air Force, Norton Air Force Base, A/SLMR 261; U. S. Department of Navy, Great Lakes Naval Hospital, A/SLMR No. 289; and Plum Island Animal Disease Laboratory, FLRC No. 71A-11. 15/

The second area of decisions, as announced, involved the decisions to guarantee a job to each career VA employee and to provide salary protection. These decisions are clearly within the coverage of Section 11(a) as they are "personnel policies and practices and matters affecting working conditions", and therefore create an obligation on management's part to "meet and confer in good faith" with the Union and to discuss them. However, at the January 14 meeting the VA announced those decisions as a part of the plans for implementing the basic decisions to close down the hospital facilities and transfer patients and to minimize any adverse impact on employees. These plans were of a very basic and broad nature. Management and the Union met on January 14, discussed these plans and other plans, and immediately set up the series of weekly and twice weekly meetings during which they were to meet and discuss the implementation and impact of the basic decisions. When these plans were announced on January 14, no final steps had been taken so that management was irrevocably committed to these plans and no evidence was introduced to establish that during any of the meetings the Union objected to the plans for salary protection or for guaranteeing each VA employee a job. Further, the record does not establish that the Activity failed to advise the Union of the precise proposals for implementing these plans or that VA management refused to discuss and consider any of the Union's views about the plans or their implementation or impact. The record establishes that the VA timely advised AFGE of these plans, afforded AFGE an opportunity to negotiate and confer concerning all aspects of these plans, their implementation and impact. The record does not establish that the VA refused any request by AFGE to confer and negotiate about any of these matters, or with respect to these matters, that the Activity violated Section 19(a)(6) of the Order. See U. S. Department of Air Force, Norton Air Force Base, supra. With respect to the decision to freeze employment

15/ Whether the Activity complied with the Section 11(b) requirements of "negotiating" concerning "employees adversely affected by the impact" of these basic decisions is discussed below.

at the West Coast and nearby VA installations, this is a decision which under Sections 11(b) and 12(b) is excluded from a bargaining obligation since it involves staffing, etc. Insofar as it applies to VA facilities other than the West Los Angeles Complex, the VA had no obligation to negotiate with AFGE under any circumstances. Further, there is no evidence that AFGE objected to the policy or that the VA refused to confer and negotiate with the AFGE concerning the hiring freeze, its implementation or its impact on unit employees. Further such a policy of freezing new hiring was highly desirable in order to allow the Activity and AFGE to meaningfully negotiate and confer about the implementation and impact of the plans to close down part of the operation and transfer patients. It was necessary in order to provide the parties with the greatest amount of flexibility and choice for bargaining. In any event, this policy was of such a nature that had AFGE objected it could have been halted by the Activity at any time.

In light of all of the foregoing, it is concluded that the record herein does not establish that the VA violated Section 19(a)(6) by failing to confer and negotiate with AFGE with respect to its decisions to close down part of the Wadsworth Hospital Center and to transfer patients or its plans to freeze new hiring on the West Coast, to guarantee a job to all regular VA employees, and to provide salary protection.

B. Plans announced after January 14, 1972.

The record establishes that after January 14 the VA and AFGE met often, both formally and informally, and the VA advised the Union of the plans it proposed to follow in order to implement its decisions as announced on January 14, to partially close down and reorganize the Wadsworth Hospital Center and to transfer patients, including its proposed reduction in force (RIF) and transfer procedures as well as many other plans. At these meetings AFGE was given an opportunity to voice its objections, views and thoughts on each proposal. Further the Union was advised by the Activity that the Union's views as to any plan would be considered, no matter at what level the plan was made. Proposed plans were fully discussed and the AFGE's views and suggestions were considered, and in certain instances, adopted. Therefore, it is concluded that at least generally the VA did meet its Section 11(a) and 19(a)(6) obligations to "meet and confer" both with respect to the procedures for implementing the decisions and to the impact of its decisions on employees. Cf. United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, supra.

AFGE specified only three such matters with respect to which the Activity allegedly failed to meet its bargaining obligations.

1. Dietetic Services.

The Activity advised the Union at the January 18 meeting that it had decided that the three dietetic services that then existed would be combined into one such dietetic service located at the Brentwood Hospital. At the February 1st meeting the VA advised the Union that the consolidated dietetic service would be located in the Wadsworth Hospital. This decision by the Activity which the Union was apparently advised of before it actually went into effect, is clearly exempted from any bargaining obligation by Sections 11(b) and 12(b) of the Order. Cf. U. S. Department of Air Force, Norton Air Force Base, supra. Therefore the Activity did not, as contended by the Union, fail to bargain in good faith about the decision to consolidate the dietetic services. Further there was no evidence submitted and therefore the record does not establish that the Activity failed or refused to bargain about either the implementation or impact of this decision.

2. Questionnaire.

Admittedly, a few days after showing its first transfer questionnaire to the Union, discussing it and then issuing it, the VA issued a second transfer questionnaire to its employees without first showing it to the Union. The record further establishes that a number of communications to employees were shown to the Union and discussed at various meetings before being issued. The second transfer questionnaire was the only instance of such a communication being issued before the Union's views as to its format and content were solicited. The record does not establish that, with respect to any of the other questionnaires and communications, the Union ever objected in principal to such forms of communications. In all of these circumstances it is concluded that the issuance of the second transfer questionnaire did not constitute a refusal or failure to "meet and confer" about a decision affecting working conditions. The questionnaire was not a "decision" in that sense, but was merely an attempt to ascertain information upon which decisions could be based. Further, there was no evidence submitted that the VA refused or failed to discuss the information obtained from the questionnaire or any decision that might have been based upon this information. At most it could be considered an attempt to bypass the employees collective bargaining agent and to communicate directly with the employees. The Union did not allege it as such a violation or present such a rationale. In the instant situation the Union had presumably

approved the issuance of a questionnaire that was to solicit similar information, had approved and discussed other communications directly between the VA and employees and had never objected to such communications. Further, the issuance of the questionnaire without prior discussion with AFGE was clearly an inadvertance. In all of these circumstances the issuance of this questionnaire could hardly be concluded to be an attempt to bypass the Union and to avoid collective bargaining obligations and therefore did not constitute a violation of Section 19(a) (6) of the Order.

3. Bus service.

The record establishes that at the February 18 and February 23 meetings the Union and the Activity discussed the provision of bus service from Wadsworth Hospital Center to employees transferred to the Sepulveda and Long Beach VA Hospitals. No employees were required to utilize such bus service. The record does not clearly establish that the Union was advised of and given an opportunity to discuss the bus service after the service had a head start. ^{16/} Even assuming, however, arguendo, that the AFGE was not advised until after the bus service started to operate, the record herein does not establish that the Activity did not fulfill its obligation to "meet and confer." Although it would have been better form to have advised the Union before the bus service actually started, the Union was advised at least soon after it started and the Activity had the authority and ability to stop or alter the bus service after hearing AFGE's position. Further AFGE did not object to the providing of the bus service to transferred employees, but rather it requested that the Activity pay such transferred employees overtime if they are traveling on the bus after quitting time. This suggestion was received, discussed and considered by the Activity. Further the record does not establish that there was any prior demand by the Union to confer concerning whether the Activity should provide any transportation to transferred employees or that the Activity refused such a request. In light of all the foregoing, and especially in view of the large number of meetings and extensive discussions concerning all of the other varied and numerous aspects of the basic decisions, and their implementation and impact on employees, it is concluded that the Activity did not violate Section 19(a) (6) of the Order by failing to meet its collective bargaining obligations concerning the providing of bus service.

In view of all of the foregoing, I conclude that the record herein does not establish that Respondent Activity

^{16/} The record established that the Union was apparently not consulted before the bus service was "set up." It was never explained whether this refers to the setting up of the plans or the actual institution of bus service.

violated Sections 19(a)(6) of the Order, as alleged. Further because the Section 19(a)(1) violations were intended to flow from the alleged Section 19(a)(6) violations, I conclude that the record fails to establish that Respondent Activity violated Section 19(a)(1) of the Order.

Recommendation

Upon the basis of the above findings and conclusions I recommend that the entire complaint herein be dismissed.


Samuel A. Chaitovitz
Administrative Law Judge

DATED: December 20, 1973
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,
TOOELE ARMY DEPOT,
TOOELE, UTAH
A/SLMR No. 389

The Petitioner, International Association of Machinists and Aerospace Workers, Tooele Federal Lodge No. 2261, AFL-CIO (IAM), filed a petition for clarification of unit (CU) seeking to clarify an existing exclusively recognized bargaining unit in order to have it conform to a new organizational structure brought about by the reorganization of the Directorate for Maintenance at the Tooele Army Depot, Tooele, Utah. More specifically, the IAM sought to include in its existing unit of Wage Grade employees at the Activity employees of the newly formed Shop Supply Division and Special Equipment Branch of the Electronics Shops Division who, prior to the reorganization, were represented by both IAM and the American Federation of Government Employees, Local 2185, AFL-CIO (AFGE). The AFGE agreed that the unit currently represented by the IAM should be clarified to include the above-mentioned Wage Grade employees, including those previously represented by the AFGE who now are located in the Shop Supply Division and the Special Equipment Branch of the Electronics Shops Division. The Activity contended that the existing units at its facility traditionally had been established on a division-wide basis and that bargaining and agreement administration at a branch level "would be cumbersome."

The Assistant Secretary found that although the employees of the Shop Supply Division and Special Equipment Branch of the Electronics Shops Division had been administratively merged, they had not been so thoroughly combined or integrated as to constitute accretions or additions to previously existing units. In this connection, he noted that the reorganization resulted only in limited physical relocation of the employees involved and did not substantially affect the terms and conditions of their employment. Further, he found that the administrative transfer of the employees involved to a new division did not result in the employees involved having a community of interest separate and distinct from other employees in the existing units in which they previously were included. Accordingly, and noting that their continued inclusion in the existing units will promote effective dealings and efficiency of agency operations, the Assistant Secretary ordered that the CU petitions be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
TOOELE ARMY DEPOT,
TOOELE, UTAH

Activity

and

Case No. 61-2175(CU)

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
TOOELE, FEDERAL LODGE NO. 2261,
AFL-CIO

Petitioner

DEPARTMENT OF THE ARMY,
TOOELE ARMY DEPOT,
TOOELE, UTAH

Activity

and

Case No. 61-2176(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2185, AFL-CIO

Petitioner

DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Hiroshi Hirokawa. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject cases, the Assistant Secretary finds:

In Case No. 61-2175(CU) the Petitioner, the International Association of Machinists and Aerospace Workers, Tooele Federal Lodge No. 2261, AFL-CIO, herein called IAM, filed a petition for clarification of unit (CU) seeking to clarify an existing exclusively recognized bargaining unit in order to have it conform to a new organizational structure brought about by a reorganization on September 5, 1973, of the Directorate for Maintenance at the Tooele Army Depot, Tooele, Utah. More specifically, the IAM seeks to include in its existing unit of Wage Grade employees at the Activity employees of the newly formed Shop Supply Division and Special Equipment Branch of the Electronics Shops Division who, prior to the reorganization, were represented by both the IAM and the American Federation of Government Employees, Local 2185, AFL-CIO, herein called AFGE. In Case No. 61-2176(CU) the Petitioner, AFGE, agreed that the unit currently represented by the IAM should be clarified to include the above-noted Wage Grade employees, including those previously represented by the AFGE who now are located in the Shop Supply Division and the Special Equipment Branch of the Electronics Shops Division. ^{1/} The Activity contended that the existing units at its facility traditionally had been established on a division-wide basis and that bargaining and agreement administration at a branch level which would result from a clarification action herein "would be cumbersome."

On July 6, 1967, the IAM was granted exclusive recognition for a unit of all Wage Grade employees of the Activity's Support and Mobile Equipment Division (General Shops) in the Directorate for Maintenance. Thereafter, on February 16, 1968, the AFGE was granted exclusive recognition in a unit of Wage Grade employees of the Tooele Army Depot and the Rail Equipment Division, excluding, among others, employees of the General Shops and Support Divisions.

The evidence established that the Activity is organized into seven directorates and an Ammunition Equipment Office which has directorate status. The directorates are: Comptroller, Services, Administration, Supply, Maintenance, Management Information Systems, and Quality Assurance. Each directorate, except the Comptroller and the Management Information Systems directorates, has Wage Grade employees. The record reveals that within the directorates having Wage Grade personnel there are approximately 150 Wage Grade occupations.

The Directorate for Maintenance, which contains the bargaining units allegedly affected by the reorganization, employs approximately 1,861 employees. Its mission is to plan, implement, direct, coordinate, and review the repair, reconditioning, overhaul, rebuilding, modification, conversion, and testing of automotive equipment, combat vehicles, construction equipment, missiles systems, armament, rail equipment, general equipment, topographic equipment, reproduction equipment, and

^{1/} The IAM and the AFGE expressed a desire to be treated as "joint petitioners" in this matter.

assigned commodity groups. Prior to the September 5, 1973, reorganization 2/ the Directorate for Maintenance was composed of five divisions: Production Control, Missiles, Support, General Shops, and Rail Equipment. As noted above, the AFGE represented the Wage Grade employees in the Missiles and Rail Equipment Divisions and the IAM represented the Wage Grade employees in the Support and General Shops Divisions. 3/

The evidence establishes that following the reorganization, the Directorate for Maintenance was composed of six divisions: Production Planning and Control, Support, Electronics Shops, General Shops, Shop Supply, and Rail Shops. In this regard, the functions of the following branches or sections were combined in order to form the newly established Shop Supply Division: the supply branches of the Support and General Shops Divisions (Wage Grade employees represented by the IAM), the Supply Section in the Missiles Systems Engineering Branch of the Missiles Division (Wage Grade employees represented by the AFGE), and the material movement function of the Material Movement Section, Metal Finishing Branch of the Support Division (Wage Grade employees represented by the IAM). The establishment of the Shop Supply Division involved the administrative reassignment of 61 employees represented by the IAM and the administrative reassignment of 6 employees represented by the AFGE. The evidence establishes that these reassigned employees continued in the same job classifications and performed the same duties as before the reorganization. Further, except for those employees in the Property and Tool Room Branch, who moved from one building to another, there was no physical change of location by any employees. 4/ The record also reveals that while the reporting channels for those in the Supply Shop are now different, there were few changes in the immediate supervision of the employees involved.

With regard to the effect of the reorganization on Wage Grade employees assigned to the Special Equipment Branch of the newly established Electronics Shops Division, the record discloses that prior to the reorganization these employees were assigned to the Armament Branch of the General Shops Division and the Gas Turbine Section, Guided Missile Branch of the Missiles Division. Approximately 80 nonsupervisory Wage Grade employees from the IAM and AFGE units were reassigned administratively to the Special

2/ According to the Activity, the Depot is undergoing a period of prolonged reorganization and realignment due to a declining work force and the Depot's changing environment.

3/ General Schedule employees in the Production Control Division were unrepresented.

4/ Although employees of the Property and Tool Room Branch moved physically they were not moved near to or integrated with any other particular branch, but occupied one area exclusively.

Equipment Branch in the Electronics Shops Division. The evidence establishes that the employees involved remained in the same job classifications, performing the same duties, and, for the most part, worked at the same facility or location, under the same immediate supervision.

In prior decisions, 5/ it has been indicated that in deciding matters involving reorganizations, the Assistant Secretary will consider the actual impact on employees resulting from such reorganizations. The record indicates that the reorganization herein has resulted in only limited physical relocation of the employees involved and has not substantially affected the terms and conditions of their employment. Thus, the record discloses that the reorganized employees are still engaged in the same duties, are employed in the same job classifications, and are working essentially at the same locations under the same immediate supervision as prior to the reorganization. And, although in some cases they have been administratively merged, they have not been so thoroughly combined or integrated so as to constitute accretions or additions to previously existing units.

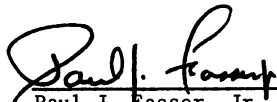
Accordingly, under the particular circumstances of this case, I find that the employees of the Shop Supply Division and the Special Equipment Branch of the Electronics Shops Division continue, after the reorganization, to share a community of interest with employees of the existing exclusively recognized units at the Tooele Army Depot represented by the IAM and the AFGE. Although the employees of the Shop Supply Division and Special Equipment Branch have been transferred administratively to a new division, I find that such action is insufficient to establish that Shop Supply and Special Equipment Branch employees, as a result of the reorganization, enjoy a community of interest separate and distinct from other employees in the existing units in which they previously were included. Moreover, I find that in these circumstances their continued inclusion in the existing units will promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the instant petitions be dismissed.

5/ Army and Air Force Exchange Service, Kirtland Air Force Base Exchange, A/SLMR No. 371; Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360; Department of the Army, Strategic Communications Command, Fort Huachuca, Arizona, A/SLMR No. 351; Department of the Army, Headquarters, U. S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, A/SLMR No. 328; and AMC Ammunition Center, Savanna, Illinois, A/SLMR No. 291.

IT IS HEREBY ORDERED that the petitions in Cases Nos. 61-2175(CU) and 61-2176(CU) be, and they hereby are, dismissed.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Dated, Washington, D.C.
May 15, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

DEPARTMENT OF THE NAVY
SUPERVISOR OF SHIPBUILDING,
CONVERSION AND REPAIR
PASCAGOULA, MISSISSIPPI
A/SLMR No. 390

This proceeding arose upon the filing of an unfair labor practice complaint by the National Federation of Federal Employees, Local No. 561 (Complainant), against the Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi (Respondent). The complaint alleged that the Respondent violated Section 19(a)(6) of the Order by its unilateral implementation of Naval Ship Systems Command (NAVSHIPS) Instruction 12340.7, which established certain mobility requirements in all subordinate activities of NAVSHIPS for, among other things, vacant positions and new positions.

The Complainant contended that the NAVSHIPS Instruction was in violation of the existing negotiated agreement between the parties and that the Respondent failed to confer, consult, or negotiate with Complainant prior to the implementation of the instruction. The Respondent contended that it was under no obligation to confer, consult, or negotiate the local implementation of a higher level instruction. Moreover, it was the position of Respondent that the NAVSHIPS Instruction was so narrowly defined that it left no room for negotiation at the local level.

The Assistant Secretary found, contrary to the recommendation of the Administrative Law Judge, that the unilateral local implementation of the NAVSHIPS Instruction by the Respondent was violative of Section 19(a)(6) of the Order. In arriving at this conclusion, the Assistant Secretary found that the NAVSHIPS Instruction was not the regulation of an "appropriate authority" within the meaning of Section 12(a) of the Order which might properly supersede or modify the terms of the negotiated agreement between the Complainant and the Respondent. In this connection, the Assistant Secretary noted that the United Federation of College Teachers, Local 1460 and Merchant Marine Academy, FLRC No. 71A-15, and Department of the Air Force, Shepherd Air Force Base, FLRC No. 71A-60, decisions of the Federal Labor Relations Council (Council) and the Air Force Defense Language Institute, Lackland Air Force Base, A/SLMR No. 322, decision of the Assistant Secretary, all cited by the Administrative Law Judge in support of his conclusion that the NAVSHIPS Instruction could serve to modify the SUPSHIPS, Pascagoula, negotiated agreement, were distinguishable because they all involved higher level regulations controlling the scope of negotiations, rather than regulations modifying the terms of an existing agreement. The Assistant Secretary noted that the Study Committee in its Report and Recommendations, (1969), made clear that only if a regulation met one of the standards set forth in

Section 12(a) of the Order could it supersede or modify the terms of an existing agreement; that the Report and Recommendations and the Council's decision in IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 70A-9, indicate that the term "appropriate authorities" as used in the Order means an authority outside the agency involved, and not a higher echelon, such as NAVSHIPS, within the same agency; and, therefore, that the NAVSHIPS Instruction was not the regulation of an appropriate authority and could not, under Section 12(a) of the Order, serve as authority for the unilateral modification of the negotiated agreement during its life.

The Assistant Secretary then turned to the parties' negotiated agreement and determined, contrary to the conclusion of the Administrative Law Judge, that the NAVSHIPS Instruction as implemented locally resulted in a unilateral modification of such negotiated agreement and, therefore, constituted a violation of Section 19(a)(6) of the Order. Accordingly, the Assistant Secretary ordered that the Activity rescind the local implementation of the NAVSHIPS Instruction retroactive to its implementation date and discontinue implementation of such Instruction.

A/SLMR No. 390

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
SUPERVISOR OF SHIPBUILDING,
CONVERSION AND REPAIR
PASCAGOULA, MISSISSIPPI

Respondent

and

Case No. 41-3342(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL No. 561

Complainant

DECISION AND ORDER

On January 29, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

The instant complaint alleged essentially that the Respondent violated Section 19(a)(6) of the Order by unilaterally implementing Naval Ship Systems Command (NAVSHIPS) Instruction 12340.7. As discussed in detail below, this Instruction established mobility requirements in all of the subordinate activities of the NAVSHIPS with respect to all vacant positions, new positions, and as to those positions in which incumbent employees had volunteered.

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendation and I shall repeat them only to the extent necessary.

The Respondent, the Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, (hereinafter called SUPSHIPS, Pascagoula), is one of the 15 activities, each a SUPSHIP, under the command of the NAVSHIPS to which the Instruction, dated December 29, 1972, was distributed for immediate implementation. On February 1, 1973, the Deputy, SUPSHIPS, Pascagoula, spoke to the Complainant's Shop Steward and informed the latter that in the near future the Respondent would issue an Instruction at the local level patterned after the NAVSHIPS Instruction of December 29, 1972. Approximately one week later, the SUPSHIPS, Pascagoula, issued a local Instruction, which summarized the attached NAVSHIPS Instruction and stated that all vacant and newly created positions would have added to their job descriptions a statement that the employee in that position was subject to rotation or reassignment at four year intervals; that an employee appointed to one of these positions would be required to sign a statement that he had read, understood, and accepted the mobility requirements; that all personnel were eligible to volunteer for rotation or reassignment; and that those volunteering for rotation or reassignment would have their names placed on a SUPSHIP Mobility List and have their job descriptions changed to effect the mobility requirements statement. Although, the NAVSHIPS Instruction indicated that exceptions might be made on a case by case basis by the NAVSHIPS Command, this information was not contained in the local instruction, but was included in the attached NAVSHIPS Instruction.

At the time of the events herein, the Complainant was a party to a negotiated agreement with the Respondent which was executed on May 23, 1972, and ran for two years. The Complainant contends that the Respondent violated this negotiated agreement by its local implementation of the NAVSHIPS Instruction. Moreover, the Complainant contends that under Section 11(a) and 11(b) of the Executive Order the Respondent was obligated to consult and negotiate with its employees' exclusive representative regarding the impact of the NAVSHIPS Instruction.

The Respondent, on the other hand, contends that, notwithstanding the existence of a negotiated agreement, it was under no obligation to negotiate the local implementation of a higher level regulation. Further, the Respondent claims that the mobility requirements contained in the NAVSHIPS Instruction did not, in any way, violate the negotiated agreement. With respect to the allegation that the Respondent was obligated to consult and negotiate regarding the impact of the NAVSHIPS Instruction, at SUPSHIPS, Pascagoula, it is the Respondent's position that the NAVSHIPS Instruction was explicit and did not leave any room for negotiation at the local level.

In his Report and Recommendation, the Administrative Law Judge concluded that Respondent had not violated its obligation under Section 11(a) of the Order. In reaching this determination, the Administrative Law Judge noted that the mobility Instruction was issued by a higher authority, i.e., NAVSHIPS, and was not within the control of the Respondent, SUPSHIPS, Pascagoula; that the NAVSHIPS Instruction was uniformly applicable to all SUPSHIPS, including SUPSHIPS, Pascagoula 1/; that such a regulation of higher authority which was uniformly applied could properly limit the scope of bargaining locally 2/; and that the Complainant was advised of the NAVSHIPS Instruction prior to the issuance of the local Instruction and only suggested that the Instruction be "rescinded," which the Administrative Law Judge found was an action beyond the authority of Respondent.

With regard to the Complainant's contention that the Instruction resulted in a breach of the parties' existing negotiated agreement, the Administrative Law Judge concluded that there was nothing in the record to show that the new policy, in fact, caused the Respondent to depart from any provision in the agreement and that, "It simply added an additional provision to eligibility for promotion." Moreover, the Administrative Law Judge noted that there was nothing in the above-cited decisions of the Federal Labor Relations Council and the Assistant Secretary "to indicate that they are limited to situations in which the collective bargaining agreement is first being negotiated" and that, in any event, the negotiated agreement specifically provided that it was subject to "subsequently published agency policies required by regulations of appropriate authorities" and that the SUPSHIPS, Pascagoula, Instruction was such a regulation, as it was required by the NAVSHIPS Instruction.

Contrary to the Administrative Law Judge, I conclude that the unilateral local implementation by the Respondent of the NAVSHIPS Instruction regarding mobility requirements was violative of Section 19 (a)(6) of the Order. In arriving at this conclusion, I find that the NAVSHIPS Instruction at issue herein was not the regulation of an "appropriate authority" within the meaning of Section 12(a) of the Order which properly may supersede or modify the terms of the parties' negotiated agreement. Further, I find that the Merchant Marine, Shepherd Air Force Base and Lackland Air Force Base decisions, cited by the Administrative Law Judge, are distinguishable from the instant proceeding because they involved higher level regulations affecting the scope of negotiations, rather than, as in the instant case, regulations which, in my view, modified the terms of an existing negotiated agreement.

1/ The Administrative Law Judge cited in this regard, United Federation of College Teachers, Local 1460 and Merchant Marine Academy, FLRC No. 71A-15.

2/ The Administrative Law Judge cited in this regard, Department of the Air Force, Shepherd Air Force Base, FLRC No. 71A-60; and Air Force Defense Language Institute, Lackland Air Force Base, A/SLMR No. 322.

Section 12(a) of the Order sets forth certain standards governing the administration of negotiated agreements between agencies and labor organizations. The evidence establishes that Article 1.4, of the parties' negotiated agreement, entitled "Controlling Authority," which the Administrative Law Judge set forth, in part, in his Report and Recommendation, is a verbatim recitation of Section 12(a) of the Order. In its entirety it reads:

In the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level. (Emphasis added.)

The Study Committee, in its Report and Recommendations, (1969), made clear that only if a regulation meets one of the standards set forth in Section 12(a), can it serve to supersede or modify the terms of an existing agreement. Thus, in Section E.5 of the Report and Recommendations, the Study Committee, after noting the contention that agencies had, in the past, changed their regulations to nullify clauses in existing agreements, indicated, among other things, that it believed "that the administration of an agreement should be governed by published agency policies and regulations in existence at the time the agreement was approved ... and by any changes in policies and regulations subsequently required by law or other appropriate authority outside the agency or authorized by the terms of a controlling agreement at a higher agency level." The Study Committee concluded, in this regard, that, "It should be understood --- that an agreement must be brought into conformance with current agency policies and regulations at the time it is renegotiated or before it is extended ---." The record in the instant case does not reflect that the SUPSHIPS Instruction was issued pursuant to law, or to agency regulations in existence at the time the negotiated agreement herein was entered into, or that it was authorized by a higher level controlling agreement. Therefore, it is clear that the SUPSHIPS Instruction could effectively modify the terms of the parties' negotiated agreement, only if such Instruction constituted a policy or regulation required by the regulation of an "appropriate authority." In this regard, both the Study Committee and the Federal Labor Relations Council (Council) have indicated that the phrase "appropriate authorities" as used in the Order does not mean a higher echelon, such as NAVSHIPS, within the same agency. Thus, as noted above, in Section E.5 of the Report and Recommendations, the Study Committee indicated that negotiated agreements under the Order should be governed by, among other things, "regulations

subsequently required by law or other appropriate authority outside the agency." (Emphasis added.) And, consistent with this view, the Council has held that the term "appropriate authorities" as used in Section 12(a) of the Order "was intended to mean those authorities outside the agency concerned, which are empowered to issue regulations and policies binding on such agency." ^{3/} As the NAVSHIPS Instruction was an issuance of a higher echelon within the same agency as SUPSHIPS, Pascagoula, under Section 12(a) of the Order and Article 1.4 of the parties' negotiated agreement, I find that it was not the regulation of an "appropriate authority" as that term is used in the Order and, therefore, it cannot serve as authority for the unilateral modification of the negotiated agreement during the life of such agreement.

Based on the foregoing, I find that the decisions of the Council and of the Assistant Secretary relied on by the Administrative Law Judge are inapposite herein because, as noted above, those decisions involved regulations issued by a higher echelon or by an agency which did not modify the terms of an existing negotiated agreement. Nor does the Assistant Secretary's decision in Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SIMR No. 341, cited by the Administrative Law Judge, require a different result, for, although there was a negotiated agreement at a lower echelon involved in that case, the agreement itself stated specifically that the parties would be governed by future regulations of the Department of Interior, Bureau of Indian Affairs. Thus, in that case the labor organization in its negotiated agreement itself waived the protections of Section 12(a) and made itself subject to regulations of the agency issued during the term of the parties' existing agreement.

Having found that, under the circumstances of this case, the Respondent was not entitled to modify unilaterally the terms of its negotiated agreement based on the issuance of an Instruction by NAVSHIPS, it is now necessary to consider whether the implementing Instruction issued by SUPSHIPS, Pascagoula, did, in fact, change the terms and conditions of the negotiated agreement. In this connection, Section 9.1, Article 9, Promotions: provides as follows, in pertinent part:

9.1 It is a continuing policy of SupShip Pascagoula to utilize to the fullest extent practicable, the skills, knowledge and potentials of employees of this activity. Promotion procedures must conform to the applicable CSC regulation, FPM, CMMI and the SupShip Pascagoula Merit Promotion Plan. It is hereby agreed that, in accordance with the regulatory requirements of these governmental directives, certain groups of individuals must be given priority consideration for promotion as an exception

^{3/} See IAM Local Lodge 2424 and Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 70A-9.

to Merit Promotion Procedure. These groups and/or individuals and the priority order in which they must be considered are as follows: (First) - any qualified Navy employee who has been demoted without personal cause and who is eligible for repromotion to the grade level of the position being filled; (second) - employees who have been affected by reduction-in-force and who have been referred for priority placement either through the Department of Defense Centralized Referral System or through direct referral by another DoD activity within the commuting area of SupShip Pascagoula.

When making selections from the two groups discussed above, full consideration will be given to the selection of available SupShip Pascagoula employees who are qualified to be included in such groups as defined above. If there are persuasive and acceptable reasons for not selecting any qualified available applicant from one of the aforementioned excepted groups, the position will then normally be filled under the Merit Promotion Plan..." ^{4/}

The NAVSHIPS Instruction in the instant case directed that individuals who volunteered for reassignment or relocation would have their names placed on a SUPSHIP Mobility List along with having their job description changed to effect the statement concerning the mobility requirements of the job. The NAVSHIPS Instruction also directed that, "As long as there are qualified individuals in appropriate occupations available from an SML [SUPSHIP Mobility List], no other recruitment source (internal or external) may be utilized to fill a vacancy."

Contrary to the conclusion of the Administrative Law Judge, I find that the NAVSHIPS Instruction did more than simply add a provision to eligibility for promotion. Rather, I view such Instruction to have, in effect, changed the standards for selection set forth in Section 9.1, Article 9 of the parties' negotiated agreement. Thus, in the negotiated agreement the parties agreed to give priority with regard to promotions to certain groups of employees, but the NAVSHIPS Instruction would give that priority to individuals on the SUPSHIP Mobility List who might or might not meet the preferential standards of the negotiated agreement. Under these circumstances, I find that the Respondent's local implementation of the NAVSHIPS Instruction resulted in a unilateral modification of the parties' negotiated agreement. Such unilateral conduct, in my view, constituted a failure to meet and confer in good faith with respect to

^{4/} CSC refers to the Civil Service Commission; FPM refers to the Federal Personnel Manual; and CMMI refers to the Civilian Manpower Management Instruction.

personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) and thereby was violative of Section 19(a)(6) of the Order.

REMEDY

Having found that the Respondent has engaged in conduct prohibited by Section 19(a)(6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, shall:

1. Cease and desist from:

Unilaterally implementing NAVSHIPS Instruction 12340.7 at the Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, during the term of the negotiated agreement with the National Federation of Federal Employees, Local No. 561, executed May 23, 1972.

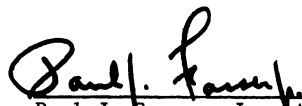
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

a. Rescind SUPSHIPS, Pascagoula Instruction 12340.3 insofar as it applies to the Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, retroactively to February 2, 1973, the date of its implementation, and abide by the terms and conditions of the negotiated agreement of May 23, 1972, with the National Federation of Federal Employees, Local No. 561.

b. Post at the Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Executive Officer of the Respondent and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Executive Officer shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

c. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of the Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
May 15, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT continue to implement NAVSHIPS Instruction 12340.7, regarding mobility requirements, prior to the expiration of the term of the negotiated agreement of May 23, 1972, with the National Federation of Federal Employees, Local No. 561.

WE WILL rescind SUPSHIPS, Pascagoula's Instruction 12340.3 implementing the NAVSHIPS Instruction 12340.7, retroactive to its implementation date of February 2, 1973, and abide by the terms of the negotiated agreement of May 23, 1972, with the National Federation of Federal Employees, Local No. 561.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director, Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



The Area Administrator investigated the complaint and reported to the Assistant Regional Director. On September 21, 1973, the Assistant Regional Director issued a Notice of Hearing to be held November 6, 1973 in Pascagoula, Mississippi.

Hearings were held that day and at that place. The Complainant was represented by the General Counsel of the National Federation of Federal Employees. The Respondent was represented by an attorney who is the Labor Relations Advisor of the Office of Civilian Manpower Management of the Department of the Navy. The parties filed timely briefs on December 4, 1973.

.....
In the Matter of :
 :
DEPARTMENT OF THE NAVY :
SUPERVISOR OF SHIPBUILDING, :
CONVERSION AND REPAIR :
PASCAGOULA, MISSISSIPPI :
Respondent :
 :
and :
 :
NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL NO. 561 :
Complainant :
.....

Case No. 41-3342(CA)

Facts

The Complainant, Local 561, is the exclusive representative, certified under the Executive Order, of most of the non-supervisory, non-professional employees of the Supervisor of Shipbuilding, Conversion and Repair, at Pascagoula, Mississippi. The parties have a collective bargaining agreement executed May 23, 1972. Local 561 represents also employees other than Respondent's employees. The President of Local 561, Sherwood O. Brown, has his office in Mobile, Alabama. The Local has a Shop Steward, Newburn Rachel, employed by Respondent.

Irving I. Geller, General Counsel
National Federation of Federal Employees
1737 H Street, N. W.
Washington, D. C. 20006
For the Complainant

Edward T. Borda, Labor Relations Advisor
Office of Civilian Manpower Management
Department of the Navy
Washington, D. C. 20390
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

The Respondent Supervisor of Shipbuilding, Conversion and Repair ("SUPSHIPS, Pascagoula") is one of 15 activities of the Naval Ship Systems Command ("NAVSHIPS") engaged in the administration of Navy contracts with private contractors for the building, conversion, or repair of Navy ships. In terms of number of employees, SUPSHIPS, Pascagoula is one of the larger of the Navy's SUPSHIPS.

The administration of SUPSHIPS contracts involves a relationship between SUPSHIPS employees and employees of the contractor at the particular site. The Ship Systems Command observed that at some locations, other than Pascagoula, there was sometimes reason to question the objectivity of SUPSHIPS employees in administering contracts because of long standing relations that had developed between a SUPSHIPS employee and the contractor's counterpart employee.

Meetings of heads of the 15 Activities with the Commander of the Naval Ship Systems Command considered various methods of overcoming such problem. Among the techniques considered was the adoption of a policy of requiring non-clerical employees, upon moving from one position to another by promotion or otherwise, to agree to reassignment to another Navy contract administration activity at intervals of not less than four years at the same or higher grade. It advised the national heads of the five unions, with locals of which SUPSHIPS had exclusive

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated June 8, 1973 and filed June 11, 1973. It alleges a violation of Section 19(a) (6) of the Executive Order by the Respondent. The violation was alleged to consist of the Respondent implementing a new personnel mobility policy of its national office without negotiating or consulting with the Complainant although the Complainant was the exclusive representative of the Respondent's employees. The Complainant contends that negotiation or consultation prior to such implementation was required by Section 11 of the Order.

recognition, of such proposed policy and solicited their comments. The policy would not apply to incumbents of positions so long as they remained in their positions. On September 27, 1972, it wrote such a letter to the national President of N.F.F.E. and solicited his comments. On October 19, 1972, the national President of N.F.F.E. replied expressing strong opposition to such a mobility requirement. The record does not show what responses were received from the other unions.

On December 29, 1972, the Commander of NAVSHIPS issued Instruction 12340.7 to the 15 SUPSHIPS. The Instruction established a new policy of mobility of SUPSHIPS non-clerical personnel. It provided that the job descriptions of all new positions and positions that should become vacant would be modified to include a statement that the incumbent of the position would be subject to reassignment to another activity at the same or higher grade at intervals of approximately four years and would be required to sign an acceptance of such requirement before he could be appointed to such new or vacant position. It did not apply to incumbents of such positions so long as they remained such incumbents. It provided that no general exceptions to the new mobility policy could be made but that on a case-by-case basis, where the ability of the activity to meet its workload would be affected, a request for an individual exception could be submitted by the SUPSHIPS to the Command of NAVSHIPS. It directed each SUPSHIPS "immediately" to announce the new mobility policy.

On February 1, 1973, the Deputy SUPSHIPS, Pascagoula (Captain Lisanby) spoke to Complainant's Shop Steward (Mr. Rachel), who had been designated by the President of the Complainant to conduct Complainant's business at Pascagoula. Captain Lisanby believed that Mr. Rachel would reflect the views of the people affected. He discussed the national Instruction and told Mr. Rachel that in a few days the Respondent would issue an Instruction like the national Instruction. Mr. Rachel expressed his concern and the concern of others about having promotion and other reassignments foreclosed without agreeing to being reassigned to other localities every four years with its attendant disruption of family arrangements.

Under date of February 2, 1973, but not released until about a week later, the Respondent (one of the 15 SUPSHIPS) issued Instruction 12340.3. It summarized NAVSHIP Instruction 12340.7 except that it omitted any reference to the possibility of exceptions to the policy but attached a copy of the NAVSHIP Instruction. Copies were posted on bulletin boards and delivered to department heads for distribution within the departments.

About two months later Rachel went to the office of the Local's President, Mr. Brown, in Mobile, to discuss the new mobility program. Brown was not in and Rachel left a memorandum and a copy of the national Instruction. The next day Brown called the Assistant Personnel Officer, Wooten, and stated that the Respondent could not change the promotion plan, a subject covered by the collective agreement, without negotiations. Wooten said that the action had been taken upon instructions from headquarters, that he would discuss it with others in the Personnel Office and call Brown back.

Several days later Wooten's superior in the Personnel Office called Brown and asked what bothered him. Brown repeated his conversation with Wooten and stated that he considered the issuance of the local Instruction to be a violation of their agreement. Haggert (Wooten's superior) stated that he could not retract or change anything in the local Instruction. After further discussion Brown said that he would talk with Admiral Payne, the head of SUPSHIPS, Pascagoula.

About April 15, 1973, Brown called Admiral Payne and spoke to his Deputy. The Deputy reiterated that the new mobility requirement was Navy-wide and therefore not subject to the agreement. Brown disagreed, and when the Deputy Supervisor said that there was nothing he could do about it Brown said he would send a letter.

On April 30, 1973, Brown sent Admiral Payne a letter charging that the national Instruction was in violation of the Local's agreement with the Respondent and of Sections 11(b) and 19(a)(6) of the Executive Order. The letter said also that unless the Instructions were rescinded immediately and the Local invited to negotiate prior to the Instructions again becoming effective, he would file an unfair labor practice complaint. 1/ Admiral Payne replied on May 9, 1973, denying a violation of the agreement or the Executive Order. He stated also that the policy was directed by higher authority and not a matter within local discretion; that an invitation to the Complainant to negotiate about it was inappropriate since it could not produce results; that prior to the issuance of the local Instruction discussions had been had with the Shop Steward, the Complainant's local representative; and that he could not comply with the request that the Instruction be rescinded. A month later the complaint was filed.

There is no evidence that Respondent at any time refused a request by the Complainant to discuss either the national or the local Instructions. There is a conflict in evidence

1/ Exh. C-2. This is not what the letter says literally, but that is what it was meant and understood to say.

concerning the extent, if any, to which employees in the unit were in fact inhibited by the Instruction from applying for a vacancy. Such conflict need not be resolved since the resolution of such fact is irrelevant to the resolution of this case.

Article 9 of the agreement between the parties covers promotions. It provides the bases of and the procedures for making promotions.

Paragraph 1.4 of the agreement is captioned "Controlling Authority" and provides:

"In the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities...by published agency policies and regulations...by subsequently published agency policies and regulations required by...the regulations of appropriate authorities...."

Paragraph 2.2 is captioned "Amendment" and provides:

"By mutual consent, the parties may effect amendment of, or may make supplements to, this agreement if such action is necessary to reflect legal or regulatory changes or at other times when considered necessary. Said supplemental agreements shall become effective on the approval date of the Director, Office of Civilian Manpower Management."

Paragraph 3.1 is subcaptioned "Employer Rights" and includes:

"...The right to make rules and regulations is an acknowledged function of the Employer. In making rules relating to personnel policy... the Employer shall have due regard for the obligations imposed by this Agreement and the provisions of Executive Order 11491...."

Paragraph 4.1 in substance copies a portion of Section 11(a) of the Executive Order.

Paragraph 4.2 provides:

"...matters appropriate for consultation or negotiation...are policies...related to working conditions which are within the discretion of the Employer. These matters include...promotion plans...."

Discussion and Conclusions

The complaint in this case charges a violation of Section 19(a)(6) of the Executive Order, a refusal to consult, confer, or negotiate with the Complainant "as required by this Order" concerning the new mobility policy. More specifically, it contends that there was a violation of the obligation imposed by Section 11(a) of the Order on the Respondent to meet at reasonable times with Complainant, the certified and recognized exclusive representative, and confer concerning personnel policies, and a violation of Section 11(b) which imposes on an agency the duty, in prescribing regulations concerning personnel policies, to have "due regard for the obligation imposed by paragraph (a)".

The Respondent in this case is SUPSHIPS, Pascagoula, a subordinate unit of NAVSHIPS, which in turn is a division of the Department of the Navy. The collective bargaining agreement between the parties is an agreement between SUPSHIPS, Pascagoula and Local 561, the Complainant.

The obligation imposed by Section 11(a) is to confer concerning personnel policies "so far as may be appropriate under applicable laws and regulations, including...published agency policies and regulations...." The inquiry, then, is to determine whether the Respondent, the local Activity, failed to confer, consult, or negotiate concerning the new personnel policy of mobility "so far as may be appropriate" under governing regulations of higher authority in the Agency.

First it should be observed that the NAVSHIP mobility instruction was uniformly applicable to all 15 of the SUPSHIPS within NAVSHIPS jurisdiction. This case, then, does not fall within that part of the decision in Merchant Marine Academy, FLRC No. 71A-15 (November 1972), which states that an Agency may not evade the obligation to bargain by an order restricting bargaining by an individual unit in the agency by an ad hoc order applicable to that one unit and that the limitation in Section 11(a) on the scope of appropriate negotiations is limited to policies and regulations of higher authority which are "issued to achieve a desirable degree of uniformity in the administration of matters common to all employees of the agency, or, at least, to employees of more than one subordinate activity." The NAVSHIP Instruction here involved meets that test. It was issued to all 15 SUPSHIPS to govern all employees of all 15 performing similar work, civilian employees of the Navy engaged in quality assurance in the performance of NAVSHIPS contracts.

The extent to which the obligation of an Activity to bargain, imposed by Section 11(a), is limited by the phrase

"so far as may be appropriate under applicable laws and regulations, including...published agency policies and regulations", is not a question of first impression. In addition to the Merchant Marine Academy case, two other decisions are particularly pertinent here.

In Department of the Air Force, Sheppard Air Force Base, FLRC No. 71A-60 (April 1973), the Air Training Command had issued a comprehensive merit promotion plan to govern the activities throughout its jurisdiction. The union in that case contended, inter alia, that the Command's regulation was invalid because, although it permitted negotiation on matters of merit promotion not in conflict with the plan, it violated Section 11 because it was so detailed and overly prescriptive as to prevent any significant negotiations at the local level. As in this case, the Command had solicited the views of the national unions whose locals held recognition at the local activities. Also as in this case, the only specific suggestion made by the complainant was that the regulation be rescinded. The Council held:

"...the ATC regulation is the type of higher level published policy or regulation applicable uniformly to more than one activity, that may properly limit the scope of negotiations at such subordinate activities under section 11 of the Order."

The Council noted that while the wisdom of issuing an explicit and detailed regulation concerning a matter of personnel policy, thereby reducing the scope of bargaining, might be questioned, that did not affect its validity so long as it was issued to achieve a desired degree of uniformity in the administration of matters common to the subordinate activities.

Air Force Defense Language Institute, Lackland Air Force Base, A/SLMR No. 322 (November 1973) is strikingly similar to this case. In that case the headquarters of Defense Language Institute had issued a new regulation changing the pre-existing basis for selection of personnel to be assigned to overseas duty. The new regulation was applicable to all its branches including the respondent in that case. Upon receiving the new regulation on April 14, 1972, the respondent had a meeting with representatives of the complainant and informed them of the new regulation and that it would be announced to the staff and implemented on Monday, April 17, 1972, and asked for comments. The complainant objected both to the fact that it had not had time to read the regulation and that it had not been consulted. The respondent replied that it had been issued by higher authority and that therefore it was not necessary to consult with the complainant.

At subsequent discussions the only specific suggestion made by the complainant was that the regulation be rescinded. In deciding the complaint based on a violation of Section 19(a)(6), the Assistant Secretary said that while it might have been better practice for headquarters to have notified the complainant of its intention to issue the new regulation and to have sought its views, he held:

"...once the Agency headquarters issued the Regulation applicable uniformly to employees of other branches of DLI as well as those DLIEL employees at Lackland Air Force Base, the matters contained therein, in effect, were removed from the scope of negotiations at the local level. Accordingly, the Respondent was not obligated to meet and confer with the Complainant concerning the issuance of DLI Regulation 690-2."

In the instant case, as in those cases, the issuance of the governing Instruction 12340.7 was by higher authority in the agency and not within the control of the Respondent. As in the Lackland Air Force Base case, the local Activity (the respondent), advised the complainant of the new national Instruction and solicited comments prior to issuing its local implementing Instruction 12340.3. As in both these cases, thereafter the only specific suggestion made by the Complainant was that the Instruction be rescinded, an action beyond the authority of the Facility to do. The national Instruction directed that the new policy be applied "immediately". All that the local Instruction did was to announce and summarize the national Instruction and attach a copy of it. There was nothing for negotiation. The foregoing decisions thus require a dismissal of the complaint in this case.

The Complainant argues that the parties could have negotiated about exceptions to the application of the new policy. During the hearing the Complainant first conceded ^{2/} that the local Instruction only summarized the national instruction. Later it withdrew that concession ^{3/} to the extent of pointing out that the summary did not include a reference to the possibility of exceptions. But the local Instruction referred to and attached a copy of the national Instruction. And the national Instruction states specifically that "No general exceptions to the mobility policy will be granted" but that, on an individual case-by-case basis, "where the ability of the activity to meet its workload could be

^{2/} At Tr. 49-50.

^{3/} At Tr. 95.

affected, individual requests for exceptions may be submitted to the Command." (Emphasis added) That left no room for negotiation of a meaningful provision to be included in the collective agreement. Although asked repeatedly during the hearing what subject the parties could have negotiated about, the Complainant nowhere, during the hearing or in its brief, specified any subject other than possible exceptions. And even if there were room for negotiation on the matter of exceptions, the Complainant never made a proposal on that subject although it knew Respondent intended to put the new Instruction in effect, and so there was no refusal to discuss it. The only proposal made by the Complainant was that the Instruction be rescinded, something the Respondent could not do.

In addition, the obligation imposed by Section 11(a) to confer concerning personnel policies is not a unilateral obligation. It provides that an "agency and a labor organization that has been accorded exclusive recognition", both of them, have the obligation to confer on such subject. The record does not show that the Respondent ever, upon request, refused to confer on that subject or any other. Nor does the record show that the Complainant ever made any specific proposal other than that the Instruction be rescinded. It was beyond the authority of the Respondent to accede to such request, nor did it ever refuse to discuss it. The Union, although consulted prior to the issuance of the local Instruction, never objected to it until two months later, and then only to contend that it was invalid.

The Complainant argues that the decisions cited above are not applicable where, as here, there is a collective agreement between the Activity and the local union and especially where the change by higher authority caused a breach of that agreement.

First, there is nothing in the record to show that the new policy caused the Respondent to depart from any provision of the agreement. It simply added an additional provision to eligibility for promotion. There is nothing in the decisions cited above to indicate that they are limited to situations in which the collective agreement is first being negotiated. And even if there were involved a breach of contract, a simple breach, of itself, is not a violation of the Executive Order. But even more persuasively, the agreement itself envisages changes in working conditions being effectuated in the manner as was done here.

As recited above under "Facts", the parties' agreement itself, in paragraph 1.4, provides that the parties are governed by regulations of appropriate authorities including

subsequently published agency policies and regulations required by regulations of appropriate authorities. The local Instruction here involved fits exactly within that description, a regulation required by regulation of higher authority, and so the agreement itself was subject to the additional condition to promotion here involved. Also, paragraph 4.2 provides that the matters appropriate for consultation or negotiation are those within the discretion of the Respondent. Here the Respondent had no discretion whether to comply with the national Instruction; it was under mandate to do so "immediately". Since the agreement itself provided that it would be subject to such conduct, such conduct was not a breach of the agreement.

The Complainant relies also on Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289 (July 1973) and the decision of the Administrative Law Judge in Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, Case No. 63-4128(CA), now A/SLMR No. 341 (January 1974).

The first of those cases is totally inapposite. It did not involve a direction from higher authority. It held that the Activity was under obligation to consult with the recognized union concerning the implementation of a decision to have a reduction in force. It is by now well established that while an agency may not have an obligation to consult with the union on whether there shall be a RIF, it does have the obligation to consult on the impact of the RIF.

The Indian Affairs Data Center case is distinguishable. In that case the Bureau of Indian Affairs, the higher authority, issued a new policy, governing all subordinate units including the respondent, expanding considerably the previously recognized Indian preference in employment. But in that case the directive itself stated that in the application of the new policy careful attention must be given to the rights of non-Indian employees, and its implementing instructions emphasized that the impact of the new policy required a special sensitivity to assure equitable application of the new policy within the prescribed limits. The new directive and its implementing instructions by the Bureau thus themselves recognized room for consultation and discussion on local implementation. The Assistant Secretary held that the adamant position of the respondent in that case, that it was without authority to do anything concerning the new policy because it left it no discretion or room for negotiation, was in violation of Section 19(a)(6) of the Order. In the instant case, unlike in that case, the Complainant never made a proposal within the authority of the Respondent to negotiate nor has it been able to identify a significant point within the ambit of Respondent's authority to negotiate.

The Complainant makes other arguments, some of them having in the abstract a degree of persuasiveness, pertaining to the undesirable results that may flow from not sustaining the complaint in this case. E. g., it demoralizes collective bargaining by a recognized representative to have working conditions subject to unilateral change by higher authority and discourages support of such a representative. Such arguments, made to me, are made in the wrong forum. They constitute simply a challenge to the wisdom of the limitation in Section 11(a) of the Executive Order as interpreted and applied by the Federal Labor Relations Council and the Assistant Secretary. I am bound by the decisions of the Council and the Assistant Secretary.

Recommendation

The complaint should be dismissed.



MILTON KRAMER
Administrative Law Judge

DATED: January 29, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION, ORDER AND DIRECTION OF ELECTION
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION SERVICES
REGION (DCASR), BOSTON, MASSACHUSETTS
A/SLMR No. 391

This case arose as a result of RO petitions filed by the National Association of Government Employees (NAGE) and by Local 1906, American Federation of Government Employees, AFL-CIO (AFGE). The NAGE sought an election in a unit of all unrepresented nonprofessional employees of the Defense Contract Administration Services Region (DCASR), Boston, and the AFGE sought an election in a unit consisting of a portion of the employees claimed by the NAGE. There are 15 exclusively recognized units in the Region and, at the hearing, the Activity and the NAGE stipulated that the unit claimed by the NAGE covers all nonsupervisory, non-professional employees of the Activity who currently are unrepresented.

Although the Activity agreed that the unit claimed by NAGE is a legitimate residual unit, it contended that the only appropriate unit is a Regionwide unit of all eligible employees which would include all employees in the currently existing 15 exclusively recognized units. In the alternative, the Activity asserted that an appropriate unit should include the employees in the existing unit of nonprofessional employees at the Activity's headquarters office currently represented by NAGE. Moreover, the Activity noted that the unit sought by the AFGE would result in a group of employees remaining unrepresented.

The AFGE was timely notified of this proceeding; however, it did not enter an appearance or present any evidence in support of its petition at the hearing. Accordingly, consistent with the precedent set forth in Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21, wherein the Assistant Secretary held that when a petitioner fails to cooperate in the processing of its petition, such conduct warrants dismissal of the petition, the Assistant Secretary ordered the dismissal of the AFGE's petition.

The Assistant Secretary found that the unit sought by the NAGE constituted an appropriate residual unit for the purpose of exclusive recognition. In this regard, he noted, among other things, that the employees in the claimed unit are under the direct supervision of the Activity's Commander who administers personnel policies for all Activity employees and that the petitioned for unit includes all of the remaining unrepresented employees of the Activity.

Accordingly, the Assistant Secretary directed that an election be conducted in the residual unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION SERVICES
REGION (DCASR), BOSTON, MASSACHUSETTS 1/

Activity

and

Case No. 31-7549(RO)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Petitioner

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION SERVICES
REGION (DCASR), BOSTON, MASSACHUSETTS

Activity

and

Case No. 31-7552(RO)

LOCAL 1906, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION, ORDER AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Peter F. Dow. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, including the brief filed by the Activity, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

1/ The name of the Activity appears as amended at the hearing.

2. In Case No. 31-7549(RO), the National Association of Government Employees, herein called NAGE, seeks an election in a residual unit which includes all eligible nonprofessional employees of the Defense Contract Administration Services Region (DCASR), Boston, headquarters, except those whose duty station is at the regional headquarters office and those in the Quality Assurance Directorate regardless of the location of their duty station. 2/ At the hearing, the Activity and the NAGE stipulated that the claimed unit covers all eligible nonsupervisory, nonprofessional employees of the DCASR, Boston, who currently are unrepresented.

In Case No. 31-7552(RO), Local 1906, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all employees of the Office of Industrial Security at Waltham, Massachusetts; Hartford and Bridgeport, Connecticut; and Syracuse, Rochester, and Buffalo, New York. 3/

Although the Activity agrees that the unit petitioned for by the NAGE in this matter is a legitimate residual unit, it asserts that neither of the claimed units is appropriate because they would not promote effective dealings and efficiency of agency operations. 4/ Moreover, the Activity notes that the unit petitioned for by the AFGE would result in a group of employees remaining unrepresented.

Although timely notified of the instant proceeding, the AFGE did not enter an appearance or present any evidence in support of its petition at the hearing. It has been held previously that cooperation in the investigation of a representation petition by the parties involved, and particularly the petitioner, is of the utmost importance in the administration of the Executive Order and that dismissal of a petition is warranted where a petitioner fails to cooperate in the processing of its petition. 5/ In my view, by failing to appear at the representation hearing in this matter, the AFGE, in effect, demonstrated a lack of cooperation in the processing

2/ The NAGE's petition was amended at the hearing.

3/ The record reveals that the Industrial Security Offices at the named locations other than Buffalo are Field Offices of the Office of Industrial Security.

4/ The Activity contends that the only appropriate unit is a Regionwide unit of all eligible employees which would include all of the employees in the currently existing 15 exclusively recognized units. In the alternative, the Activity asserts that an appropriate unit should include the employees in the existing unit of nonprofessional employees at the Regional headquarters office currently represented by the NAGE.

5/ See Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21.

of its own petition. Accordingly, consistent with the above-noted precedent, I find that dismissal of the AFGE's petition for lack of cooperation is warranted.

DCASR, Boston, is one of a number of such Regions of the Defense Supply Agency which provides contract administration services in support of the Department of Defense and other Federal agencies. DCASR, Boston, encompasses a geographic area which includes the six New England states and the State of New York (except New York City and adjoining counties), and is under the command of a Regional Commander, a military officer, whose office is located in Boston at the Activity's headquarters. Directly under the Commander and located at headquarters are a number of offices and directorates which are responsible for planning and monitoring all facets of the Activity's operations. DCASR, Boston, exercises line responsibility over the Hartford and the Rochester Defense Contract Administration Services Districts (DCASD's); five plant site Defense Contract Administration Services Offices (DCASO's); field offices of the Office of Contract Compliance and the Office of Industrial Security; and personnel clerks 6/ stationed at the Rochester and Hartford DCASD's. DCASD, Rochester, exercises line responsibility over one plant site and three area DCASO's. DCASD, Hartford, exercises line responsibility over one area and three plant site DCASO's. The record reveals that personnel policies of DCASR, Boston, are implemented through a Civilian Personnel Office located also at headquarters which serves all of the Activity's employees.

The evidence establishes that currently there are 15 exclusively recognized units in the Region. The AFGE represents professional employees located at the Activity's headquarters, a mixed unit of professionals and nonprofessionals at the DCASO Sanders plant site, Nashua, New Hampshire, and nonprofessional employees at the DCASO Hamilton Standard plant site, Windsor Locks, Connecticut, and of the Operations Division, Directorate of Quality Assurance, whose duty stations are other than at Regional headquarters. The NAGE, through various locals, exclusively represents nonprofessional employees located at the Activity's headquarters, and of the DCASD, Hartford, four DCASO plant sites and four area DCASO's, and mixed units of professionals and non-professionals of DCASD, Rochester, and at two DCASO plant sites.

The record reveals that the unit petitioned for by the NAGE consists of approximately 47 employees of certain offices and directorates of the DCASR, Boston, headquarters, who have duty stations throughout the Region. Thus, the unit includes employees of the Office of Contract Compliance with duty stations at Rochester, New York, and Hartford, Connecticut; employees of the Office of Industrial Security with duty stations at Rochester, Buffalo, and Syracuse, New York; Hartford, Bridgeport, and Groton, Connecticut; and Waltham, Massachusetts; employees of

6/ There was no contention that the personnel clerks are engaged in Federal personnel work in other than a purely clerical capacity.

the Directorates of Contract Administration and of Production stationed at the DCASO GTE-Sylvania, plant site, Needham, Massachusetts; and two personnel clerks of the Civilian Personnel Office stationed at the Rochester and Hartford DCASD headquarters, respectively. As noted above, at the hearing the Activity and the NAGE stipulated that the unit petitioned for by the NAGE covers all eligible nonsupervisory, nonprofessional employees of DCASR, Boston, who currently are unrepresented.

Based on the foregoing, I find that the unit petitioned for by the NAGE constitutes an appropriate residual unit for the purpose of exclusive recognition. Thus, the record demonstrates that the employees in the unit requested include all of the remaining unrepresented employees of the Activity. Further, all of the employees in the claimed unit are under the direct supervision of the Activity's Commander who administers personnel policies for all Activity employees, including employees in the petitioned for unit, through a common Civilian Personnel Office. Under these circumstances, and noting the above conclusion that the AFGE's petition herein warrants dismissal and in the absence of any other labor organization seeking to represent these remaining nonprofessional employees on any other basis, I find that the residual unit sought by the NAGE petition is appropriate for the purpose of exclusive recognition under the Order. 7/

Accordingly, I find that the following employees of the Activity constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All nonprofessional employees of the Defense Contract Administration Services Region headquarters, Boston, with duty stations at Hartford, Bridgeport, and Groton, Connecticut; Rochester, Buffalo, and Syracuse, New York; and Waltham and Needham, Massachusetts, excluding employees of the Operations Division, Directorate of Quality Assurance, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

7/ Cf. Department of the Navy, Naval Air Station, Alameda, California, A/SLMR No. 6. Under the circumstances of this case and noting that the NAGE did not indicate on the record a desire to include in its claimed unit the employees at the Regional headquarters office which it represents currently, I reject the Activity's contentions set forth at footnote 4 above. See, in this regard, Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Boston, Massachusetts, A/SLMR No. 271, in which the Activity raised similar contentions.

IT IS HEREBY ORDERED that the petition filed in Case No. 31-7552(RO) be, and it hereby is, dismissed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Association of Government Employees.

Dated, Washington, D.C.
May 31, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ARMY-AIR FORCE EXCHANGE SERVICE,
CAPITOL EXCHANGE REGION,
TACONY WAREHOUSE
A/SLMR No. 392

The case arose as a result of a representation petition filed by Highway Truck Drivers and Warehousemen, Local 107, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Petitioner) seeking an election in a unit consisting of all of the Activity's nonsupervisory employees, including those represented on an exclusive basis by the Intervenor, Local R3-105, National Association of Government Employees. The parties stipulated as to the appropriateness of the unit and to the inclusion of truck drivers who are employed by the Activity but who are stationed away from its facilities. However, the Petitioner and Intervenor would include employees employed by tenant activities, whereas the Activity would exclude such employees.

The Assistant Secretary accepted the stipulation of the parties with respect to the appropriateness of the claimed unit and the unit placement of the truck drivers. The Assistant Secretary found, however, that there was insufficient evidence on which to determine the unit placement of the employees employed by the tenant activities. In this connection, he noted that the record was silent on whether the functions of the Activity and the tenant activities were integrated and interdependent and whether the employees of the Activity and the tenant activities shared work-related contacts.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY-AIR FORCE EXCHANGE SERVICE,
CAPITOL EXCHANGE REGION,
TACONY WAREHOUSE

Activity

and

Case No. 20-4282(RO)

HIGHWAY TRUCK DRIVERS AND WAREHOUSEMEN,
LOCAL 107, AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner

and

LOCAL R3-105, NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Herbert Rose. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, Highway Truck Drivers and Warehousemen, Local 107, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called IBT, seeks an election in a unit consisting of all regular full-time and regular part-time hourly paid employees, including off-duty military personnel in either of the foregoing categories, employed by Army-Air Force Exchange Service, Capitol Exchange Region, Tacony Warehouse, excluding temporary full-time

and temporary part-time employees, on-call and casual employees, managers, personnel workers employed in other than a purely clerical capacity, professional employees, guards and supervisors. The parties are in agreement with respect to the appropriateness of the unit sought and the unit placement of all employees except those employees employed by four "tenant activities," namely, the Philadelphia Liaison Office, the Quality Assurance Office, the Transportation Office and the Key punch Unit, which the Activity seeks to exclude, and the IBT and the Intervenor, Local R3-105, National Association of Government Employees, herein called NAGE, seek to include.

The Army-Air Force Exchange Service is a non-appropriated fund instrumentality of the United States Department of Defense and is charged with the mission of operating retail and service facilities for the convenience of military personnel and their dependents. Its operations are divided into four Regions, including the Capitol Exchange Region involved herein, located in the continental United States and several major overseas divisions which include the European Exchange System. The Capitol Exchange Region, which is headquartered at Alexandria, Virginia, is responsible for a number of local exchange operations and operates two warehouses including the Tacony Warehouse, the subject Activity. The Activity is under the supervision of a Warehouse Manager who reports to the Chief of the Distribution Branch at the headquarters of the Capitol Exchange Region. It employs approximately 265 nonsupervisory employees, including truck drivers located at Westover, Massachusetts, and Fort Meade, Maryland. 1/

The history of collective bargaining on an exclusive basis involving the claimed employees reveals that the NAGE was certified as exclusive representative of all of the Activity's nonsupervisory employees in August 1971, and that, thereafter, in January 1972 it entered into a negotiated agreement with the Activity which had a termination date in January 1974. While the evidence indicates that some employees of one of the tenants noted above have had dues withheld under the negotiated agreement and that certain employees employed by the tenants previously worked for the Activity, it appears that the negotiated agreement was in no other respect applied to any of the tenants' employees sought to be included in the unit petitioned for by the IBT.

1/ The parties stipulated that the truck drivers share a community of interest with the unit employees currently represented by the NAGE and, consequently, should be included in such unit. The evidence reveals that the truck drivers and other unit employees share common supervision, are subject to the same personnel and labor relation policies, are part of an integrated work process, and their personnel records are maintained by the Activity. Under these circumstances, and in the absence of any evidence that the stipulation of the parties was improper, I find that the truck drivers should be included in the unit found appropriate herein.

The Philadelphia Liaison Office established at the Activity in May 1973, is engaged in purchasing items on the domestic market which are not readily available in Europe and shipping them to the European Exchange System. It is under the supervision of a purchasing agent who reports directly to the European Exchange System's Headquarters at Munich, Germany, and employs three nonsupervisory employees. The Quality Assurance Office was established at the Activity in May 1971, and is responsible for inspecting merchandise which flows through the warehouse to ensure that it meets the specifications and standards of the Army-Air Force Exchange Service. It is supervised by a Quality Assurance representative who reports directly to the Quality Assurance Office of the Army-Air Force Exchange Service at its headquarters in Dallas, Texas, and employs two nonsupervisory inspectors. The Transportation Office employs one nonsupervisory employee and is under the supervision of the Vehicle Manager who reports directly to the Chief of the Distribution Branch at the Activity's Alexandria, Virginia, Headquarters. ^{2/} The Key Punch Unit employs two nonsupervisory employees and is engaged in compiling data generated by the Activity's warehousing operations and transmitting such data through the use of teletype equipment to the Key Punch Section at the Headquarters of Capitol Exchange Region. It is supervised by a Data Control Clerk who reports directly to the Chief of the Key Punch Section at the Regional Headquarters.

The record reflects that while the Activity provides the tenant activities with administrative and housekeeping services such as housing, maintenance of personnel records, and preparation of payrolls, it does not have any direct control over the personnel and labor relations policies of such activities. Nor does it appear that the Activity has authority either to direct the work of the tenants or to discipline their employees. Each of the tenants is responsible for handling the grievances of its own employees. The record reveals that the area of consideration for vacancies or promotions and reductions-in-force is limited to the Activity and to each of the respective tenant activities. Further, there is no evidence of interchange or transfer of employees between the Activity and the tenants. While the record indicates that each of the tenants is engaged in a separate and distinct mission, there is insufficient evidence to determine whether the functions of the various tenants and the Activity are integrated and interdependent. In this regard, the record is silent as to whether there are work-related contacts between the unit and tenant employees. Under all of the circumstances, I find that there exists insufficient evidence upon which to make a finding as to whether the tenant activities' employees in question should be included within the unit found appropriate herein. Accordingly, I make no findings in this regard. ^{3/}

^{2/} The record does not reflect the function of the Transportation Office.

^{3/} In the absence of a finding as to the eligibility of the tenants' employees, if they choose to vote in the election directed herein, they would, of course, vote subject to challenge.

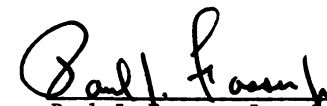
Based on the foregoing, including the stipulations of the parties and the previous bargaining history, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10(b) of Executive Order 11491, as amended:

All regular full-time and part-time employees, including truck drivers, and off-duty military personnel in either of the foregoing categories, employed by Army-Air Force Exchange Service, Capitol Exchange Region, Tacony Warehouse, excluding temporary full-time and part-time employees, casual and on-call employees, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they wish to be represented for the purpose of exclusive recognition by Highway Truck Drivers and Warehousemen, Local 107, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; by Local R3-105, National Association of Government Employees; or by neither.

Dated, Washington, D.C.
May 31, 1974


Paul J. asser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

May 31, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
WASHINGTON, D.C.
A/SLMR No. 393

This case involved the complaint filed by the Boilermakers, Local 290 (Complainant) against the Department of the Navy, Office of the Secretary, Washington, D.C., (Respondent) alleging violations of Section 19(a)(1) and (3) of the Order. The basis of the complaint was that the Respondent violated the Order when Paul C. Warner, an employee of the Respondent's Employee Appeals Review Board (EARB), located in Washington, D.C., wrote a memorandum dated November 17, 1972, endorsing an employee of the Puget Sound Naval Shipyard, (Shipyard), for the office of President of the Bremerton Metal Trades Council, (BMTC), which memorandum subsequently was circulated by mail, with a supporting letter of a business representative of one of the constituent members of the BMTC, to the other organizations affiliated with the BMTC.

The Administrative Law Judge recommended that the instant 19(a)(1) and (3) complaint be dismissed. He concluded that the endorsement made by Warner was not an agency function, nor was it known by the Respondent that an endorsement had been made. In reaching his decision, the Administrative Law Judge concluded that Warner, on November 17, 1972, was not a management official nor a representative of management within the meaning of Section 2(f) of the Order and that he had no authority, expressed or implied, to act for the EARB.

Contrary to the Administrative Law Judge, the Assistant Secretary found that Warner's conduct resulted in a violation of Section 19(a)(1) and (3) by the Respondent. In so finding, the Assistant Secretary concluded that Warner was a "representative of management" within the meaning of Section 2(f) through his involvement in the processing and disposition of grievances and administrative appeals made to the Department of the Navy. He noted that for a representative of management to become involved in the internal elections of a labor organization clearly contravenes the strictures of Section 1(b) of the Order, interferes with rights of employees assured under Section 1(a) and constitutes a violation of Section 19(a)(1) and (3) of the Order.

In determining that Warner was a "representative of management," the Assistant Secretary observed that Warner was clothed with both actual and apparent authority to act in behalf of the EARB in the implementation of the agency's labor-management relations program as it related to employees of the Shipyard. Thus, in his official job capacity, Warner was responsible for reviewing and recommending the

disposition of grievances and administrative appeals including "those involving complaints from employees represented by organized groups/unions." Further, Warner had in June 1972, visited the Shipyard as a designated representative of the EARB to discuss his work and the functions of the EARB. Under these circumstances, the Assistant Secretary found that the endorsement by Warner of a candidate in the union election constituted, in effect, an effort by agency management to influence the results of that election. In this connection, the Assistant Secretary viewed as immaterial whether Warner's signature on the letter of endorsement could be construed as that of a Board member because Warner was, as a minimum, a representative of the Board, within the meaning of Section 2(f). Thus, his action in injecting himself in the BMTC election was viewed as incompatible with his official duties and was, therefore, in conflict with the prohibitions contained in Section 1(b) of the Order.

Having found Warner to be a representative of management, the Assistant Secretary found Warner's efforts to influence the election within the BMTC interfered with employee rights assured under Section 1(a) of the Order and thereby violated Section 19(a)(1). Moreover, it was concluded that the memorandum of November 17, 1972, constituted, in effect, an effort by agency management to control improperly the BMTC by influencing its election of officers in violation of Section 19(a)(3).

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
OFFICE OF THE SECRETARY,
WASHINGTON, D.C.

Respondent

and

Case No. 71-2615

BOILERMAKERS,
LOCAL 290
BREMERTON, WASHINGTON

Complainant

DECISION AND ORDER

On February 11, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. 1/ Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

The instant complaint alleged, in substance, that the Respondent violated Section 19(a)(1) and (3) of Executive Order 11491 when Paul C. Warner, an employee of the Respondent's Employee Appeals Review Board (EARB), located in Washington, D.C., wrote a memorandum endorsing George R. Robertson, an employee of the Puget Sound Naval Shipyard,

1/ At the hearing, the Respondent renewed its motion to dismiss the complaint on the basis that it had made a "satisfactory" written offer of settlement. The Administrative Law Judge concluded that the question whether the proposed settlement offer was adequate was rendered moot in view of his recommendation to dismiss the complaint. Under the Assistant Secretary's Regulations only the Assistant Regional Director for Labor-Management Services has the authority to approve written offers of settlement. Because no such approval occurred herein, it was concluded that the Respondent's motion to dismiss should be, and it hereby is, denied.

hereinafter called Shipyard, for the office of President of the Bremerton Metal Trades Council, hereinafter called BMTC. It was alleged that the memorandum in question subsequently was circulated by mail, with a supporting letter of a business representative of Sheet Metal Local No. 274, one of the constituent members of the BMTC, to the other organizations affiliated with the BMTC.

The essential facts in the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

The EARB, among other things, is assigned the responsibility and authority to review and make final decisions on employee grievances, administrative appeals and complaints of discrimination made to the Secretary of the Navy by civilian employees of the Navy, and to direct civilian personnel actions within the Department of the Navy necessary for the implementation of those decisions. It is headed by a chairman, Frank A. Robey, Jr., who reports to the Assistant Secretary of the Navy for Manpower and Reserve Affairs. Chairman Robey supervises the work of a review staff of seven employees, including Warner. 2/

The cases appealed to the EARB are assigned by Chairman Robey to individual members of the review staff. Case analysts, such as Warner, are responsible for reviewing cases, preparing briefs, consulting with the Chairman and making such recommendations as are warranted. The Chairman reviews the proposals made by all of the case analysts, makes the final determination, and signs all decisions issued by the EARB. The record indicates that Warner does not plan, execute or implement any Department of the Navy policies or make recommendations for changes of policy in the labor relations area.

On April 9, 1972, Warner assumed his duties with the EARB in Washington, D.C. Prior to that time he had been employed at the Shipyard where he served as President of the BMTC until he was defeated in 1971. After his defeat, he continued to serve as President of Copper-smiths' Local 463 in Bremerton, Washington, which post he retained after moving to Washington, D.C. as an employee of the EARB. The record indicates that in June 1972, Warner was invited by Captain Reh of the Shipyard to attend a change of command ceremony at the Shipyard and that the Chairman appointed Warner as an EARB representative to attend the ceremony and discuss the organization of the EARB. Warner subsequently appeared in such capacity at the Shipyard.

The memorandum of November 17, 1972, which precipitated the charge and complaint in this case, was captioned "Paul C. Warner, President-Coppersmith' Local #463; Subject: Mr. George Robertson, President Sheetmetal Workers Local No. 274." It endorsed Robertson's candidacy

2/ It was undisputed that although three other Board member positions originally were authorized, they never have been filled.

for the next President of the BMTC and was signed "Paul C. Warner, Employee Appeals Review Board, Washington, D.C." The memorandum was circulated to the various affiliate locals of the BMTC.

The Administrative Law Judge noted that Chairman Robey first became aware of Warner's memorandum and his continuing presidency of Copper-smiths' Local 463 after the filing of the unfair labor practice charge in this matter in January 1973. Thereafter, the Chairman indicated his doubts to Warner as to the propriety of his holding this office and Warner proceeded to resign as President of Copper-smiths' Local 463 and sent a memorandum to Robey advising him of this action.

The Administrative Law Judge recommended that the instant 19(a)(1) and (3) complaint be dismissed. He concluded, in this regard, that the November 1972, endorsement made by Warner was not an agency function, nor was it known by the Respondent that an endorsement had been made. In reaching his decision, the Administrative Law Judge concluded that Warner on November 17, 1972, was not a management official nor a representative of management within the meaning of Section 2(f) of the Order and that he had no authority, expressed or implied, to act for the EARB.

Under the particular circumstances of this case, I find, contrary to the Administrative Law Judge, that Warner's conduct resulted in a violation of Section 19(a)(1) and (3) by the Respondent. Section 1(b) of the Order states, in pertinent part, that, "Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, ... or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with ... the official duties of the employee." (Emphasis added.) "Agency Management" is defined in Section 2(f) of the Order, in pertinent part, as: "--all management officials, supervisors, and other representatives of management having authority to act for the agency on any matters relating to the implementation of the agency labor-management relations program established under this Order." (Emphasis added.) Although, as found by the Administrative Law Judge, the evidence revealed that, at all times material herein, Warner was neither a management official nor a supervisor within the meaning of the Order, I find, contrary to the Administrative Law Judge, that Warner was a "representative of management" within the meaning of Section 2(f) by virtue of his role in the processing and the disposition of grievances and administrative appeals made to the Department of the Navy. In my view, for a "representative of management" to become involved in the election of candidates for office in a labor organization or a council of labor organizations clearly contravenes the above-noted strictures of Section 1(b) of the Order, interferes with rights of employees assured under Section 1(a) and constitutes a violation of Section 19(a)(1) and (3) of the Order.

In determining that Warner was a "representative of management," as that term is used in Section 2(f) of the Order, it was noted that the evidence establishes that Warner was clothed with both actual and apparent authority to act in behalf of the EARB in the implementation of the Agency's labor-management relations program as it related to employees of the Shipyard. In this regard, Warner, in his job capacity as an EARB case analyst, was responsible for reviewing and recommending the disposition of, among other things, grievances and administrative appeals, including (according to his official job description), "those involving complaints from employees represented by organized groups/unions." Thus, clearly, Warner had the authority to act for the agency on matters relating to the implementation of the Respondent's labor-management relations program established under the Order. Moreover, Warner was clothed with apparent authority when, in June 1972, he was invited to visit the Shipyard as a representative of the EARB; was designated by Chairman Robey as the EARB representative at the ceremony involved; and appeared in such official capacity before the Shipyard employees discussing his work and the functions of the EARB.

Under these circumstances, I find that when Warner injected himself into the BMTC election by endorsing a candidate, in effect, such conduct constituted an effort by agency management to influence the results of that election. In this connection, I view it as immaterial whether the signature on the memorandum of November 17, 1972, of "Paul C. Warner, Employee Appeals Review Board, Washington, D.C." could or could not be interpreted as that of a "Board member," because Warner was, as a minimum, a representative of the Board within the meaning of Section 2(f), even though a nonmember. Based on the foregoing, I find that Warner's action in injecting himself in the BMTC election was incompatible with his official duties and was, therefore, in conflict with the prohibitions contained in Section 1(b) of the Order. Further, having found Warner to be a representative of management, it follows that his effort to influence the election within the BMTC interfered with employee rights assured under Section 1(a) of the Order to form, join and assist a labor organization and, thereby, violated Section 19(a)(1). Moreover, in my view, the memorandum of November 17, 1972, constituted, in effect, an effort by agency management to control improperly the BMTC by influencing its election of officers and, thereby, violated Section 19(a)(3) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations, hereby orders that the Employee Appeals Review Board, Washington, D.C., shall:

1. Cease and desist from:

(a) Interfering with or attempting to control the outcome of any election of officers of the Bremerton Metal Trades Council by

endorsing any candidate for office, or by participating, in any like or related manner, in the internal affairs of the Bremerton Metal Trades Council.

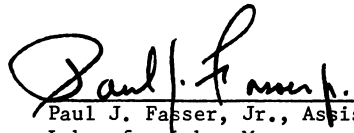
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Direct all management officials, supervisors and representatives of management of the Employees Appeals Review Board not to interfere with, or attempt to control the outcome of, any election of officers of the Bremerton Metal Trades Council by endorsing any candidate for office or by participating, in any like or related manner, in the internal affairs of the Bremerton Metal Trades Council.

(b) Post at the Puget Sound Naval Shipyard, Bremerton, Washington, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chairman of the Employee Appeals Review Board and shall be posted and maintained by the Commanding Officer of the Shipyard for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this order as to what steps had been taken to comply herewith.

Dated, Washington, D.C.
May 31, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with or attempt to control the outcome of any election of officers of the Bremerton Metal Trades Council by endorsing any candidate for office, or by participating, in any like or related manner, in the internal affairs of the Bremerton Metal Trades Council.

WE WILL direct all management officials, supervisors and representatives of management of the Employee Appeals Review Board not to interfere with, or attempt to control the outcome of, any election of officers of the Bremerton Metal Trades Council by endorsing any candidate for office, or by participating, in any like or related manner, in the internal affairs of the Bremerton Metal Trades Council.

Chairman, Employee Appeals Review Board

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



.....
In the Matter of :
DEPARTMENT OF THE NAVY :
OFFICE OF THE SECRETARY :
WASHINGTON, D.C., :
Respondent :
and :
BOILERMAKERS, LOCAL 290 :
BREMERTON, WASHINGTON, :
Complainant :
.....

Case No. 71-2615

Lee A. Holley, Esquire
2700 First Avenue
Seattle, Washington 98121

For the Complainant

Stuart M. Foss, Esquire
Labor Relations Advisor
Office of Civilian Manpower Management
Department of the Navy
1735 North Lynn Street
Arlington, Virginia 22209

For the Respondent

BEFORE: RHEA M. BURROW
Administrative Law Judge

This proceeding arose under Executive Order 11491 (herein called the Order) pursuant to a Notice of Hearing issued September 13, 1973, by the Assistant Regional Director of the U.S. Department of Labor, Labor Management Services Administration, San Francisco Region.

On April 26, 1973, a complaint was filed by Boilermakers Union Local 290, Bremerton, Washington, (herein referred to as Complainant) against the Department of the Navy, Office of the Secretary (herein called the Respondent). The Complainant charged the Respondent with having violated Sections 19(a) (1) and (3) of the Order when on November 17, 1972, Paul C. Warner, a member of Respondent's Employee Appeals Review Board wrote a letter endorsing George R. Robertson, an employee of the Puget Sound Naval Shipyard, Bremerton, Washington, for the office of President of the Bremerton Metal Trades Council (herein referred to as BMTC and/or incumbent union); the letter was subsequently circulated by mail with the supporting letter over the signature of Patrick Woln, Business Representative of Sheetmetal Local No. 274, to the various organizations affiliated with the BMTC in an attempt to influence the election of officers. The letter by Paul Warner as a member of the Board was stated to have been written with intent and purpose of making decisions affecting federal employees and in violation of the Order. 1/

Findings of Fact

I

Background Information

(a) Employee Appeals Review Board

The Department of the Navy in November 1971 established an Employee Appeals Review Board (herein referred to as EARB), and effective January 1, 1972, its mission under Secretary of Navy Instruction 12,000.21 provided among other things that it review and make final decisions on employee grievances, administrative appeals and complaints of discrimination made to the

1/ Testimony at hearing established that Paul C. Warner was not and had never been a member of Respondent's Employee Appeals Review Board but was an employee case analyst for the Board.

Secretary of the Navy; to direct civilian personnel actions within the Department of the Navy necessary for implementation of decisions; and, with respect to complaints of discrimination direct such actions as are necessary for improvement of personnel or supervisory practices within the Department. ^{2/} These functions had previously been performed by the Respondent's Office of Civilian Manpower Management.

The organizational structure of the Board under the Secretary of the Navy Instruction provided for a Chairman of the Board and other Board members each of whom is a full-time career Civil Service employee ^{3/} and a review staff composed of case analysts and clerical personnel.

Frank A. Robey, Jr., has been Chairman of the EARB since its inception on January 1, 1972. He reports to the Assistant Secretary of Navy for Manpower and Reserve Affairs and supervises the work of a review staff of seven (7) employees including Paul C. Warner. The EARB functions are in the nature of an appellate court review in the area of its subject matter jurisdiction and its adjudication is premised on case records made at the activity level. No de-novo hearings are held. Cases appealed to the EARB are assigned to individual members of the review staff by Chairman Robey. One of the review staff GS-11 case analysts, is Paul C. Warner, ^{4/} who has been employed by the EARB since April 9, 1972. He, like other case analysts, is responsible for reviewing assigned cases, preparing briefs, consulting with the Chairman and making recommendations as to the decision warranted. Warner as a case

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- ^{2/} Respondent Exhibit No. 2. (hereafter exhibits will be referred to as Exh.).
 - ^{3/} The record shows there were three positions established but because of financial and ceiling restraints placed on EARB, the board member positions were never filled and remained vacant even at the time of the hearing. (See Respondent Exh. 3 and 4 and tr. pp. 85 and 86.)
 - ^{4/} The testimony at the hearing was to the effect that Warner's duties remained unchanged throughout his tenure within the EARB and as a GS-11 he is the lowest rated Case Analyst on the Review Staff. His duties do not include those of management or supervisory personnel.

analyst does not have a private office but works at a desk in an open area of the Board's office space. Chairman Robey reviews the proposals made by all case analysts, makes the final determination and signs all decisions issued by the EARB. In the performance of his job duties Warner does not plan, execute or implement any Navy policies or make recommendations for changes in policy in the labor relations area. The job description for his position more specifically states:

"MAJOR DUTIES AND RESPONSIBILITIES. The incumbent thoroughly reviews less difficult and complex cases submitted to EARB for decision, particularly those involving complaints from employees represented by organized groups/unions. He prepares, for review by EARB, a brief, including recommendations, a proposed Secretary of the Navy decision, proposed personnel actions necessary for implementation of the decision. During the processing of a case, the incumbent may request administrative interpretations or advice from staff specialists or officials of the Office of Civilian Manpower Management; however, such requests will be the limit of OCCMM's participation in the adjudication of the case and incumbent's recommendations will be based on his independent judgment in consideration of all facts present in a case."

- (b) Bremerton Metal Trades Council and Constituents.

Among the stipulations made by the parties at the hearing, one was to the effect that since 1963, the Bremerton Metal Trades Council, AFL-CIO, is the labor organization which holds exclusive recognition for the unit comprising all eligible employees material to the issues herein involved. The Bremerton Metal Trades Council is a confederation of Trade unions comprised of fifteen constituent locals including complainant Boilmaker's Local 290, Coppersmith's Local 463, and Sheetmetal Union Local No. 274 referred to in the complaint.

- (c) Respondent Employee Paul C. Warner.

The record reveals that for ten years prior to 1972, Paul C. Warner was President of BMTC, the incumbent union as well as President of Coppersmith's Local 463 Sheet Metal Workers International Association, one of the BMTC's affiliated locals.

In December 1971, he was defeated in his bid for reelection as President of the BMTC by Robert Boyd but continued to serve as President of Coppersmith's Local 463. Between January and April 9, 1972, when he moved to Virginia and began employment with the EARB, he worked as an inspector in the Safety Office at the shipyard.

In June 1972, Paul C. Warner was invited by name by Production Officer, Captain Reh of the Shipyard to attend a change of command ceremony at that installation; pursuant to the request he was appointed as an EARB representative by Chairman Robey to attend the ceremony and talk concerning the organization of the Board. He appeared in that capacity and made a speech at the Naval Supply Center. His travel expenses for the trip were paid for by the Shipyard. This is the only occasion reflected by the evidence of record that he has been appointed to represent the Board in any capacity and he has not since returned to the Shipyard.

II

Memorandum Leading to Charge and Complaint

In a memorandum dated November 17, 1972, "Subject: Mr. George Robertson, President Sheetmetal Workers Local No. 274," and signed by "Paul C. Warner, Employee Appeals Review Board, Washington, D.C.," Mr Robertson was endorsed as a candidate for the next President of the BMTC. ^{5/} There was no designation as to whom the memorandum was addressed. The election was held on December 27, 1972, and complainant William K. Holt one of the candidates testified, that he found out about the memorandum about two weeks before the election but other than discuss its legality did nothing about it until after the election. It was stipulated that there were three candidates seeking the Office of President and that Robert Boyd was eliminated on the first ballot; in the run-off election George Robertson defeated William K. Holt by a 15 to 14 margin of the delegates of the constituent unions.

^{5/} Apart from the caption shown above, the memorandum stated:

"Mr. George Robertson, a sheetmetal worker has been nominated for President of Bremerton Metal Trades Council.

"As a past President of the Metal Trades Council, I wholeheartily endorse Mr. Robertson to be the next President of the Bremerton Metal Trades Council. Working many years in the Shipyard as a Union member I became acquainted with Mr. Robertson. While I was President of the Council, I appointed Mr. Robertson on many committees for the council. Mr. Robertson did an outstanding in bringing his reports to the Council, also Mr. Robertson was one of the Wage Data collectors for Laborer. Mr. Robertson working with his Craft Committee was respected by Management. Mr. Robertson working on Committee Assignments for Labor was respected, as to having a voice in the Activities in the Shipyard that effected every Blue Collar worker. Mr. Robertson handling Grievances for his Craft was one to be heard

III

The principal issue presented for consideration is whether Paul C. Warner at the time he wrote the memorandum of endorsement on November 17, 1972, was an agency management official within the purview of the Order, ^{6/} and, whether such action constituted violations of Sections 19(a)(1) and (3) of the Order. Incidental to this issue, the Complainant claims an estoppel on the part of the Respondent to deny that Paul C. Warner is a member of the Board, or an agency official or representative.

The Respondent's motion to dismiss the complaint on the basis that a satisfactory written offer of settlement has been made within the meaning of Section 203.7 of the Assistant Secretary's rules ^{7/} and has indeed been effectuated was referred to me by the Assistant Regional Director and renewed at the hearing. I did not consider it appropriate to rule on the motion from the bench without benefit of testimony and reserved judgment on it for consideration in my decision.^{8/} In view of the disposition recommended on the basis of findings as to the merits of the case, the question of whether the proposed settlement offer was adequate and effectuated is rendered moot.

(footnote continued)

and not put off by Management, as Mr. Robertson handled himself well for his fellow workers and would not be turned away until he had presented his Grievance getting satisfactory solution, or take the Grievance to the next higher authority. The many years of experience in Union affairs and knowing the responsibilities of the Council, I highly endorse Mr. George Robertson for the next President of the Bremerton Metal Trades Council." The memorandum was signed by Paul C. Warner, Employee Appeals Review Board, Washington, D.C.

^{6/} Under Section 2(f) of Executive Order 11491 "Agency Management" means the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency or any matters relating to implementation of the agency labor-management relations program established under this Order.

^{7/} 29 CFR 203.7(a) provides "If the Regional Administrator determines that the complaint has not been timely filed, that a reasonable basis for the complaint has not been established, that a satisfactory written settlement agreement or written offer of settlement by the Respondent has been made, or for other appropriate reasons, he may request the Complainant to withdraw the complaint and in the absence of such withdrawal within a reasonable time he may dismiss the complaint.

^{8/} The status of Paul C. Warner had been considered to be that of a member of the EARB, and the Assistant Regional Administrator did not have benefit of information that he was an employee rather than a board member prior to the hearing.

The regulations of the Assistant Secretary for Labor Management Relations provide that: "A complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence. 9/

Section 19(a) (1) and (6) of the Order are alleged to have been violated and are as follows:

"Sec. 19. Unfair Labor practices.' (a) Agency Management shall not -

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this order;

(3) sponsor, control, or otherwise assist a labor organization...."

IV

At the hearing EARB Chairman Robey testified to the effect that he first became aware of employee Paul C. Warner's November 17, 1972, letter and that he was President of the Coppersmith's local after the filing of the unfair labor practice charge on January 29, 1973; he was unaware of any departmental regulation precluding Warner from retaining the presidency while serving as an employee but he discouraged it as he did not believe it proper for an employee of EARB to retain the presidency of a local union. In a letter dated March 2, 1973, addressed to Coppersmith's Local No. 463, employee Warner resigned as its President 10/ and sent a memorandum dated March 2, 1973, to EARB Chairman Robey advising him of the action taken pursuant to their previous discussion. 11/

9/ 29 CFR 203.14.

10/ The letter states:

"It is with mixed emotions and with deep regret that I tender my resignation, to be effective immediately, as President of the Coppersmith's Local No. 463. It is not fair to the Local with my being in Washington, D.C., and not doing the duties as a President should. I thank all of you for your support while have been President." The letter was signed Sincerely, Paul C. Warner, 2301 Jefferson Davis Highway, Arlington, Virginia 22202.

11/ The memorandum, part of Respondent's Exh. No. 1 states:

"1. In accordance with our conversation on Tuesday, February 27, 1973, attached is a copy of my letter of resignation as President, Coppersmith's Local No. 463, which was submitted to the Union on March 2, 1973. Although I was not aware of the departmental policy in

V

From the foregoing I further find as follows:

(1) That Paul C. Warner began work as an employee of Respondent's EARB on April 9, 1972, and has since been employed by that agency. He was also President of Coppersmith's Local No. 463, one of fifteen constituent locals of the Bremerton Metal Trades Council, for a number of years prior to his resignation on March 2, 1973. Prior to employment with EARB he was President of BMTC for ten years before he was defeated in an election in December 1971.

(2) In June 1972 employee Warner attended a Change-in-Command ceremony at the Bremerton Naval Shipyard pursuant to authorization by Chairman Frank Robey and made a speech concerning the organization of the EARB. The record does not reveal that he in any way misrepresented his status or exceeded the extent of his authorization at the ceremony. Any official status which he had as a representative of the agency expired upon completion of the ceremonial function. This is the only occasion shown by the record of his having been appointed to represent EARB and I conclude that this was an isolated incident and may not reasonably be considered as a part of his job function. 12/

(footnote continued)

this regard, I regret any embarrassment which may have occurred from my retention of Union office.

12. Furthermore, it is my intention not to discuss intra-union matters with my former associates at Bremerton, even if requested to do so by them, or to participate in Puget Sound Naval Shipyard union affairs, in any manner, while I am a Member of this Board. Should any of my associates communicate with me about these matters, they will be advised of this intention, accordingly." (The memorandum was signed by Paul C. Warner, Board Member.)

12/ His position description, Respondent's Exh. No. 5, does not refer to duties and responsibilities that would relate to management, supervisory or agency official functions.

(3) On November 17, 1972, employee Warner wrote a memorandum endorsing George Robertson for the next President of BMTC. He signed the memorandum "Paul C. Warner, Employee Appeals Board, Washington, D.C." The memorandum shows that the endorsement was predicated on the work relationship he had with Robertson while President of BMTC before December 1971. ^{13/} Regardless of the propriety of the endorsement employee Warner did not in the memorandum represent himself as being a Board member or an official representative of the EARB. I conclude that employee Warner's memorandum of endorsement was made without the knowledge of or authorization by Chairman Robey or any other agency official.

(4) On January 29, 1972, the Complainant filed an unfair labor practice charge ^{14/} against the Respondent alleging among other things that Paul C. Warner as a member of the Employee Appeals Review Board must be considered as a part of management in accordance with Section 2 Paragraph(f) ^{15/} of the Order and that the endorsement by agency management of a candidate for office within a labor organization influenced the election and constituted violation of Sections 19(a)(1) and (3) of the Order. The allegation was later reiterated in the complaint. I find that at the time the unfair labor practice charge was made on January 29, 1973, that Complainant had not ascertained the true facts as Paul C. Warner's status with the EARB; that Warner was not in fact a member of the EARB nor was he then a representative of the Board, within the meaning of Section 2(f) of the Order. ^{16/} There was no sufficient basis on part of Complainant to infer from Warner's appearance at the Change-in-Command ceremony some five months before, that he was a member of the EARB or that he acting by or on its behalf as an agent or representative at the time the memorandum of endorsement was made.

^{13/} Footnote 5, *supra*.

^{14/} Complainant Exh. No. 5.

^{15/} Section 2(f) states:

"'Agency management' means the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency or any matters relating to the implementation of the agency labor-management program established under this Order."

^{16/} It was stipulated at the hearing that in the Department of Labor letter of May 31, 1973, addressed to Paul Burnsky, President of the Metal Trades Department. There was no reference or findings whatsoever with regard to Paul Warner's managerial status in the Section 18 proceedings not material to this case except insofar as the election was set aside. (tr. pp 26 and 28.)

(5) Upon learning of the January 29, 1972, unfair labor practice charge sometime in February of the same year EARB Chairman Frank Robey discussed it with employee Warner and obtained his letter of resignation as President of Coppersmith's Local No. 463 and a memorandum expressing regret for an embarrassment which may have occurred by reason of retention of the union office and an expression of intent not to discuss intra-union matters with former associates at Bremerton even if so requested, or participate in Puget Sound Naval Shipyard union affairs, in any manner, while a member of the Board. I find that EARB Chairman Robey took prompt action to inform Warner regarding the propriety of the November 17, 1972 memorandum; he obtained his resignation as President of Coppersmith's Local 463 and secured his assurance that he would not thereafter discuss intra-union matters with former associates at Bremerton or participate in Puget Sound Naval Shipyard union affairs while a member of the Board. ^{17/}

(6) In view of Respondent's action in referring to employee Warner as a Board member in documents submitted of record including the Motion to Dismiss the complainant claims that Respondent is estopped to deny that he is a management official or representative of the Board. I do not subscribe to this position. In the first place, the complainant was the first party to refer to Warner's status as a Board member in the Unfair Labor Practice charge; second, the complainant apparently assumed or inferred such status from an isolated appearance at a change in command ceremony at the Bremerton Shipyard some five months before the unfair labor practice was alleged to have occurred without evidence of any intercurrent action, participation or representation on Warner's part to suggest that he was an official of the EARB or a member of the Board, or a representative of the Respondent agency; third to sustain the plea of estoppel would require that I predicate my decision on facts fully litigated at the hearing that are shown to be false; fourth, the Respondent is not shown to have misled or made representations to the Complainant causing it to rely on its allegation that he, Warner, was a board member or representative of the Board at the time of the November 17, 1972 memorandum endorsement; and last, the record does not show that there have been any EARB Board members since its inception other than Chairman Robey. The term member has been loosely used to indicate what should have been termed agency employee.

^{17/} While Warner referred to and signed the March 2, 1973, memorandum as a Board member the memorandum was an internal one to Chairman Robey within the office where his status as a case analyst employee was well known.

(7) At the hearing Complainant's witness William K. Holt, testified that about August 1, 1973, he learned of a telephone call wherein the secretary-treasurer of the BMTC was asked to speak to Mr. Warner pursuant to a call from shop supervisor 856 and following the conversation the Secretary-Treasurer came to him with a request as to whether he would send Mr. Warner a copy of my letter of reconsideration of July 30, 1973. I do not view the incident as being material as to the alleged 19(a) (1) and (3) violations. Certainly as the person being charged with the violations against the agency he was interested in the status of the proceeding. It does not appear to be unreasonable for a copy of the reconsideration letter to have been made available to Mr. Warner either by his agency, the shipyard or pursuant to the request to obtain it from Mr. Holt. Certainly, the request alone by Mr. Holt without other evidence does not indicate an attempt to assist a rival labor organization, interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order.

(8) Section 1(a) of the Order provides in part that:

"Each employee of the Executive Branch of the Federal Government has the right, freely and without fear of reprisal, to form, join, and assist a labor organization or to refrain from such activity, and each employee shall be protected in that right...."

Section 19(a)(1) precludes agency Management from interfering with, restraining, or coercing an employee in the exercise of the rights assured by this Order and Section 19(a)(3) precludes Agency Management from sponsoring, controlling or otherwise assisting a labor organization. It is within this context that a determination be made as to whether there was a violation of this Order.

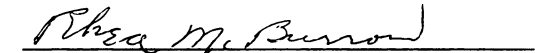
The November 1972 endorsement made by Warner was not an agency function nor was it even known by the agency that an endorsement had then been made. I find under the circumstances of this case that Warner on November 17, 1972, was not a management official or representative of management within the meaning of Section 2(f) of the Order and he had no authority, expressed or implied, to act for the EARB.

The parties at the hearing stipulated, and I so find, that William K. Holt was a necessary witness at the proceeding and is entitled to such official administrative leave or time, necessary transportation, and per diem expenses as are warranted pursuant to the requirements of 29 CFR 206.7(g).^{18/}

In view of the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that Respondent violated Section 19 (a) (1) and (3) of the Order.

Recommendation

Upon the basis of the above findings, conclusion, and the entire record, I recommend that the complaint herein against the Respondent be dismissed.


 Rhea M. Burrow
 Administrative Law Judge

Dated: February 11, 1974

Washington, D.C.

^{18/} Federal Register, Vol. 38, No. 215; Thursday, November 8, 1973.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IDAHO PANHANDLE NATIONAL FORESTS,
UNITED STATES DEPARTMENT OF AGRICULTURE
A/SLMR No. 394

IDAHO PANHANDLE NATIONAL FORESTS,
UNITED STATES DEPARTMENT OF AGRICULTURE

Activity-Petitioner

and

Case No. 71-2761

LOCAL 1295, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Labor Organization

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES COUNCIL -
KANIKSU NATIONAL FOREST (LOCALS 1402 and 1452)

Labor Organization

and

LOCAL 1205, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel Kraus. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the Activity-Petitioner's brief, the Assistant Secretary finds:

The Idaho Panhandle National Forests, United States Department of Agriculture, hereinafter called the Activity-Petitioner, filed an RA petition seeking a determination by the Assistant Secretary with respect to the effect of a recent reorganization on certain existing exclusively recognized units. More specifically, the Activity-Petitioner contends that certain exclusively recognized units are inappropriate due to a reorganization which consolidated three national forests into

The Idaho Panhandle National Forests, United States Department of Agriculture (Activity-Petitioner), following a reorganization which merged three former National Forests - the Kaniksu National Forest, the St. Joe National Forest, and the Coeur d'Alene National Forest - into a new organizational entity, the Idaho Panhandle National Forests, filed an RA petition seeking a determination by the Assistant Secretary that the three existing exclusively recognized units in each of three former National Forests were no longer appropriate, and that an overall unit consisting of all employees, including professionals and regular seasonal employees, employed by the Idaho Panhandle National Forests, is appropriate. In this connection, the Activity-Petitioner requested an election to determine whether Local 1295, National Federation of Federal Employees (NFFE), or the NFFE Council - Kaniksu National Forest (Locals 1402 and 1452), or Local 1205, American Federation of Government Employees, AFL-CIO (AFGE), represented the employees in the unit contended to be appropriate.

The Assistant Secretary found that the consolidation of the three National Forests into the Activity-Petitioner which, among other things, resulted in the merging of headquarters employees, including the personnel office functions, of all three National Forests into one staff, the consolidation of Ranger Districts, the actual physical movement of a number of employees in order for them to be closer to their new duty stations, the change from a functional to a management team concept at National Forest headquarters, and the creation of entirely new organizational zones for carrying out of specific work functions, which zones have the effect of cutting across former National Forest boundaries and existing exclusively recognized units, effected substantial changes in both the scope and character of the three former exclusively recognized units involved herein. In these circumstances, the Assistant Secretary concluded that the employees in the Kaniksu, St. Joe, and Coeur d'Alene National Forests did not continue to share a separate and identifiable community of interest from each other and that the exclusively recognized units limited to the employees of those former National Forests no longer remained appropriate within the meaning of the Order. Rather, the Assistant Secretary found that the employees of the three former National Forests together shared a clear and identifiable community of interest and that such a unit would promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary included them together in the activity-wide unit sought by the Activity-Petitioner and he directed an election in the unit found appropriate.

one national forest and that a single overall bargaining unit of: "All employees, including professionals and regular seasonal employees employed at the Idaho Panhandle National Forests, except temporary intermittent and casual employees, 1/ employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order" is appropriate for the purpose of exclusive recognition under the Order. In this connection, it requests that an election be ordered to determine whether Local 1295, National Federation of Federal Employees, herein called NFFE, or the NFFE Council - Kaniksu National Forest (NFFE Locals 1402 and 1452), herein called the NFFE Council, or Local 1205, American Federation of Government Employees, AFL-CIO, herein called AFGE, represents the employees in the unit which the Activity-Petitioner contends is appropriate. The NFFE agrees with the Activity-Petitioner's position with respect to the appropriate unit. The AFGE, on the other hand, contends that the formation of the Idaho Panhandle National Forests constituted merely a paper reorganization and that the unit for which it was recognized originally, the Coeur d'Alene National Forest, continues to be viable and appropriate.

Background and Bargaining History Prior to the Reorganization of July 1, 1973

The mission of the Department of Agriculture's Forest Service, of which the Activity-Petitioner is a part, is to provide leadership in national forest land resource management, including the management of timber, watershed, fish and wildlife, and recreation. To achieve this mission, the Forest Service is organized into the following three functional areas: a division of research; a division which lends assistance to state and private forest management organizations; and a division called the National Forest System, which manages the resources found on national forest lands. The National Forest System is headed by the Chief of the Forest Service and is organized geographically into various regions, each headed by a Regional Forester. Region 1 of the Forest Service, with headquarters in Missoula, Montana, encompasses 16 National Forests, among which were included, prior to the reorganization, the Kaniksu National Forest, the St. Joe National Forest, and the Coeur d'Alene National Forest.

Prior to the reorganization, the Kaniksu National Forest, the St. Joe National Forest, and the Coeur d'Alene National Forest were each headed by a Forest Supervisor who was directly responsible to the Regional Forester for Region 1. Each of these three Forest Supervisors had a headquarters' staff organized along functional resource lines.

1/ During the hearing, the parties agreed that temporary intermittent and casual employees should be excluded from any unit found to be appropriate by the Assistant Secretary because such employees do not have a reasonable expectancy of continued employment. As there is no evidence in the record which would require a contrary conclusion, such employees will be excluded from any unit found to be appropriate herein.

In addition, each Forest Supervisor had a number of Ranger Districts under his direction, each of which was headed by a District Ranger. In this connection, the Kaniksu National Forest had eight Ranger Districts, the St. Joe National Forest had five Ranger Districts and the Coeur d'Alene National Forest had four Ranger Districts in addition to the Nursery, whose primary function was to grow nursery stock for the entire Region. While the above three National Forests were organized and functioned in a similar manner with respect to chain of command, administration and management, the record reveals that there existed some disparities, including distinct differences in their geographical character, available resources, and recreational potential.

Prior to the reorganization, each of the three National Forests had a separate personnel officer and was a separate and distinct organizational unit in most matters involving personnel administration. Thus, the competitive area for promotions for grades GS-7 and below, as well as for some grade GS-9 employees, was the individual National Forest in which the vacancy occurred, with the remaining higher level grades being considered on a regionwide basis. The classification of employees in grades GS-9 and below also was performed in each National Forest, with a review of a percentage of such classifications being carried out by the Regional Forester's staff. For purposes of training and reductions in force, the area of consideration was, in most instances, each individual National Forest. In addition, the Forest Supervisor and the personnel officer in each National Forest had the responsibility for giving advice and taking action on grievances and adverse actions, as well as the primary responsibility for most labor-management relations matters.

On August 7, 1970, NFFE Local 1295 was certified as the exclusive representative of all professional and nonprofessional General Schedule and Wage Grade employees of the St. Joe National Forest with continuing appointments. Thereafter, on October 30, 1970, the NFFE Council was certified as the exclusive representative for a unit of all professional and nonprofessional General Schedule and Wage Grade employees with continuing appointments, of the Kaniksu National Forest. And on September 10, 1970, AFGE Local 1205 was certified as the exclusive representative of all professional and nonprofessional employees of the Coeur d'Alene National Forest with continuing appointments.

The record reveals that each of the above exclusive representatives has negotiated an agreement covering the employees in their respective units. Section 202.3(c)(3) of the Assistant Secretary's Regulations, provides that when an agreement covers a claimed unit, an election petition will be considered timely, "---(3) Any time when unusual circumstances exist which substantially affect the unit or the majority representation." As the instant RA petition raises the issue of whether the exclusively recognized units remain appropriate because of a substantial change in their character and composition due to the reorganization, I find that the current negotiated agreements do not constitute bars to the filing of the instant RA petition.

Reorganization, Reassignment of Personnel, and Conditions of Employment

On July 1, 1973, a reorganization occurred which effected a consolidation of the Kaniksu, the St. Joe and the Coeur d'Alene National Forests into one organizational and functional entity, the Idaho Panhandle National Forests. The record reflects that this consolidation affected employees in the headquarters' staffs of the three Forests in that now there is only one Forest Supervisor and one headquarters' staff over the employees in all three of the National Forests involved in the consolidation. In this regard, as a result of the reorganization and consolidation, the headquarters' units of both the Kaniksu National Forest, formerly located at Sandpoint, Idaho, and of the St. Joe National Forest, formerly located at St. Maries, Idaho, have been eliminated, and the headquarters for the consolidated organization currently is located at Coeur d'Alene, Idaho, the former site of the headquarters of the Coeur d'Alene National Forest. Moreover, the record discloses that the reorganization has resulted in an effective expansion of the area of consideration for reductions in force, promotions, training and related personnel actions from that of the former individual National Forests to that of the new organization, the Idaho Panhandle National Forests. In this connection, the record reveals that the personnel for this new consolidated headquarters' staff has been chosen primarily from the personnel of the previously existing organizations and that the net effect has been to reduce the total number of positions in the headquarters' staff, with some of the employees of the former headquarters staffs of the three forests being transferred to other Forests or to other Regions.

The evidence discloses further that many of the Ranger Districts in each of the former National Forests have also undergone a process of consolidation and change. Thus, the Priest Lake and Falls Ranger Districts of the Kaniksu were combined into one district with headquarters at Priest Lake, Idaho; the Sandpoint and Clark Fork Ranger Districts of the Kaniksu were combined into one district with headquarters at Sandpoint, Idaho; the Wallace and Kingston Ranger Districts of the Coeur d'Alene were combined into one district with headquarters at Wallace, Idaho; the Fernan and Magee Ranger Districts of the Coeur d'Alene were combined into one district with headquarters at Coeur d'Alene, Idaho; and the Clarkia and Calder Ranger Districts of the St. Joe were combined into one district with headquarters at St. Maries, Idaho. In addition, the record shows that several of the Ranger Districts of the three former National Forests were transferred to other National Forests, as follows: the Newport Ranger District of the Kaniksu was transferred to the Colville National Forest; the Noxon and Trout Creek Ranger Districts of the Kaniksu were transferred to the Kootenai National Forest, and the Palouse Ranger District of the St. Joe was transferred to the Clearwater National Forest. The net result of all of these organizational changes has been that the Idaho Panhandle National Forests' Supervisor has eight Ranger Districts plus the Coeur d'Alene Nursery under his direction.

While most of the employees of the three former National Forests have been placed in a position wherein they perform essentially the same kind of work at the same organizational level as they did prior to the consolidation, the record reveals further that some 132 employees out of a total of approximately 336 employees in the resultant organization have had to relocate physically in order to be closer to their new duty stations. And although the total number of employees who physically moved includes both supervisory and managerial personnel, the record indicates that some 38 employees who physically moved were eligible to be included in a bargaining unit both prior and subsequent to the subject reorganization.

The evidence further establishes that the organization of the Idaho Panhandle National Forests' consolidated headquarters is different from that of any of the three previous National Forests' headquarters. Thus, following the reorganization, there is one Forest Supervisor and one personnel officer for all three National Forests. In addition, the former functional resource staff positions in each headquarters organization, i.e., staff positions which were structured to cover all aspects of planning, supply, coordination and services relating to a particular resource such as timber, have been eliminated in favor of a management team concept wherein staff positions are structured to focus on a particular management function, such as planning, which encompasses the needs of all of the National Forests' resources in that one area.

Moreover, the record indicates that a totally new "zoning" concept has been implemented with respect to the engineering and multiple-use planning functions. Rather than the former centralization of these functions at the headquarters level of each National Forest, the zone concept has resulted in the retention of only one Supervisory Civil Engineer for the performance of this function at the headquarters level of the new organization. The Supervisory Civil Engineer has two assistants ("Zone Engineers") located in Sandpoint and St. Maries, Idaho. The Sandpoint zone covers an area which includes all of the former Kaniksu National Forest plus the western half of the former Coeur d'Alene National Forest, and the St. Maries zone covers an area which includes all of the former St. Joe National Forest plus the eastern half of the former Coeur d'Alene National Forest. As a result of the establishment of these zones, the engineering organization's employees, some fifty permanent employees in each zone, have been required, in many cases, to change the headquarters (Coeur d'Alene) to which they report administratively, and have been required to relocate physically in a new and different National Forest. Similar changes occurred, in a more limited fashion, with respect to some fifteen employees in the multiple-use planning groups when they were included in the new zone concept. In sum, the zoning of the engineering and the multiple-use planning groups has resulted in a change involving not only the crossing of former National Forest boundaries for administrative purposes, but also has necessitated the decentralization from headquarters to zones, with some attendant physical moves across former National Forest boundaries of the employees performing in each of these two functions.

In prior unit determinations, an activity-wide unit comprised of all nonprofessional employees of a National Forest, and an activity-wide unit comprised of all professional and nonprofessional employees of consolidated National Forests, have been found to be appropriate for the purpose of exclusive recognition. 2/ Thus, it has been found that where, as in the instant case prior to the reorganization and consolidation, employees of a National Forest share a common mission, work under centralized supervision, are subject to common personnel policies and a unified system of policies and directives, and enjoy essentially the same terms and conditions of employment, they have a clear and identifiable community of interest, and such a unit will promote effective dealings and efficiency of agency operations. However, as noted above, the subject case presents unusual circumstances in view of the effective consolidation of three National Forests into one. In view of the consolidation in the instant case which, among other things, resulted in the merging of headquarters employees, including the personnel office functions, of all three National Forests into one staff, the consolidation of Ranger Districts, the actual physical movement of a number of employees who were required to relocate to be closer to their new duty stations, the change from a functional to a management team concept at National Forest headquarters, and the creation of entirely new organizational zones for the carrying out of specific work functions, which zones have the effect of cutting across former National Forest boundaries and existing recognized units, I find that the reorganization of July 1, 1973, effected substantial changes in both the scope and character of the exclusively recognized units involved herein. Under these circumstances, I conclude that the employees in the Kaniksu, St. Joe, and Coeur d'Alene National Forests do not continue to share a separate and identifiable community of interest from each other and that the exclusively recognized units limited to the employees of those former National Forests no longer remain appropriate within the meaning of the Order. 3/ Rather, I find that, based on the factors outlined above, the employees of the three former National Forests involved herein now together share a clear and identifiable community of interest, and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, and to effectuate the purposes and policies of the Order, I shall include them together in the activity-wide unit sought by the Activity-Petitioner.

2/ See United States Department of Agriculture, Black Hills National Forest, A/SLMR No. 58; U.S. Department of Agriculture, Region Forester Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88; and United States Department of Agriculture, Forest Service, Francis Marion and Sumter National Forests, A/SLMR No. 227.

3/ In a case involving similar circumstances, United States Department of Agriculture, Forest Service, Mark Twain National Forest, Springfield, Missouri, A/SLMR No. 303, a petitioned for unit of a single National Forest involved in a consolidation with another National Forest was found to be inappropriate for the purpose of exclusive recognition.

Based on the foregoing, I find that the following employees of the Activity-Petitioner may constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional and nonprofessional employees, including regular seasonal employees of the Idaho Panhandle National Forests; excluding all temporary intermittent and casual employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

As stated above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10 (b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following groups:

Voting Group (a): All professional employees of the Idaho Panhandle National Forests, including professional regular seasonal employees; excluding all nonprofessional employees, temporary intermittent and casual employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All nonprofessional employees, including non-professional regular seasonal employees, of the Idaho Panhandle National Forests; excluding all professional employees, temporary intermittent and casual employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition by Local 1295, National Federation of Federal Employees; by the National Federation of Federal Employees Council - Kaniksu National Forest (Locals 1402 and 1452); by Local 1205, American Federation of Government Employees, AFL-CIO; or by none of these labor organizations. 4/

4/ In the absence of any record evidence as to whether or not both NFFE Local 1295 and the NFFE Council desire to appear on the ballot in this matter, both labor organizations will be placed on the ballot because they have properly intervened herein. However, it should be noted that under Section 202.17(d) of the Assistant Secretary's Regulations "...any intervening labor organization may request the Area Administrator to remove its name from the ballot," provided that the requirements for a timely written request are met and the Area Administrator approves the request.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by Local 1295, National Federation of Federal Employees; by the National Federation of Federal Employees Council - Kaniksu National Forest (Locals 1402 and 1452); by Local 1205, American Federation of Government Employees, AFL-CIO; or by none of these labor organizations. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the Area Administrator indicating whether Local 1295, National Federation of Federal Employees; the National Federation of Federal Employees Council - Kaniksu National Forest (Locals 1402 and 1452); Local 1205, American Federation of Government Employees, AFL-CIO; or none of these labor organizations was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find the following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Idaho Panhandle National Forests, including professional regular seasonal employees; excluding all nonprofessional employees, temporary intermittent and casual employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All nonprofessional employees, including nonprofessional regular seasonal employees, of the Idaho Panhandle National Forests; excluding all professional employees, temporary intermittent and casual employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

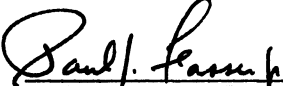
2. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees, including regular seasonal employees, of the Idaho Panhandle National Forests; excluding all temporary intermittent and casual employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by Local 1295, National Federation of Federal Employees; by the National Federation of Federal Employees Council - Kaniksu National Forest (Locals 1402 and 1452); by Local 1205, American Federation of Government Employees, AFL-CIO; or by none of these labor organizations.

Dated, Washington, D.C.
May 31, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

May 31, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SLMR No. 395

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 476 (Complainant) against the U.S. Army Electronics Command, Fort Monmouth, New Jersey (Respondent). The Complainant alleged that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by refusing to confer and consult with the Complainant with respect to the planning and announcement of an impending reduction-in-force (RIF) and the failure to furnish relevant information which was requested by the Complainant in connection with that action.

The Administrative Law Judge concluded that although the Complainant was entitled to relevant and necessary information in connection with a reorganization and RIF undertaken by the Respondent, the Respondent had not violated the Order in this regard. Thus, after being informed of the reorganization and pending RIF, the Complainant, by letter, asked for certain information. The Administrative Law Judge found that 9 of the original 11 items requested by the Complainant with respect to the impending RIF were supplied to the latter and that the record did not support the allegation that the Respondent willfully withheld the other two items requested.

The Administrative Law Judge also found that although under Section 11(b) and 12(b)(2) of the Order the Respondent was not obligated to consult as to the right to reassign or RIF employees, it did have a duty to meet and confer regarding the procedures to be used and any impact upon employees. The Administrative Law Judge concluded that the Respondent met its obligation in this regard. In reaching this finding, the Administrative Law Judge concluded that the Respondent met its responsibility with respect to conferring with the employees' bargaining representative through the briefings conducted by the Respondent between January 15 and April 17, 1973 - to which representatives of the Complainant and other affected labor organizations were invited - as the briefings provided the Complainant with sufficient notification and information regarding the contemplated actions. The Administrative Law Judge concluded that when the Respondent complied with its responsibility to notify the Complainant of the pending action, it was then incumbent upon the Complainant to request management to meet and confer regarding the methods to be adopted or the impact of the decision upon employees, and that such a request was never made. In these circumstances, the Administrative Law Judge determined that the failure of the Complainant

to request timely that the Respondent meet and confer regarding procedures and impact precluded a finding that the Respondent had violated its bargaining obligations under the Order.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the case, including the Complainant's exceptions and supporting brief, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

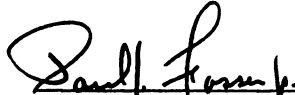
IT IS HEREBY ORDERED that the complaint in Case No. 32-3223(CA) be, and it hereby is, dismissed.

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Dated, Washington, D.C.
May 31, 1974

Respondent


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

and

Case No. 32-3223(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 476

Complainant

DECISION AND ORDER

On April 4, 1974, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge. 1/

1/ Although the Administrative Law Judge found that the Respondent did not violate Section 19(a)(6) of the Order, he made no specific findings with respect to the allegation that the Respondent's conduct also violated Section 19(a)(1). However, it is clear from a reading of his Report and Recommendations that the Administrative Law Judge was of the view that further proceedings under Section 19(a)(1) also were unwarranted. Under these circumstances, and as the evidence does not support the 19(a)(1) allegation in the instant complaint, such allegation is hereby dismissed.



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 In the Matter of :
 :
 U. S. ARMY ELECTRONICS COMMAND :
 FORT MONMOUTH, NEW JERSEY :
 Respondent :
 :
 and :
 :
 NATIONAL FEDERATION OF FEDERAL :
 EMPLOYEES, LOCAL 476 :
 Complainant :
 :

Case No. 32-3223(CA) 1/

Dorothy K. Light, Esq.
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 Fort Monmouth, New Jersey
 For the Respondent

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 National Federation of Federal Employees
 1737 H Street, N. W.
 Washington, D. C. 20006

Before: WILLIAM NAIMARK
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

The proceeding herein arose under Executive Order 11491, as amended (herein called the Order), pursuant to a Notice of Hearing on Complaint issued on November 2, 1973 by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, New York Region.

1/ The instant case was consolidated with Case No. 3462(CA) by Order issued on December 17, 1973. In view of the distinct and unrelated issues in both matters, the Assistant Regional Director issued an order on January 8, 1974 severing both cases.

On April 23, 1973 National Federation of Federal Employees, Local 476 (herein called the Complainant) filed a complaint against U. S. Army Electronics Command, Fort Monmouth, New Jersey (herein called the Respondent). The complaint alleged violations by Respondent of 19(a)(1), (2), (3), (4), (5), and (6) of the Order based on (a) the refusal to confer and consult with Complainant in respect to the planning and announcement of an impending reduction-in-force (RIF), (b) the failure to furnish relevant information which was requested by Complainant in connection with the intended RIF. 2/

A hearing 3/ was held before the undersigned on January 8, 1974 at Fort Monmouth, New Jersey. Both parties were represented by counsel and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter both parties filed briefs which have been duly considered.

Complainant concedes that an activity need not consult with a union as to whether a RIF or reassignment shall take place. However, it contends that an obligation exists to bargain regarding their implementation - the procedures to be followed - and the impact upon the employees in the unit by reason of such action. The union further urges that Respondent failed to furnish relevant information, as requested, pertaining to the RIF and the reassignments - all in violation of Sections 19(a)(1) and (6) of the Order.

Respondent maintains there is no obligation on its part to confer and consult regarding the RIF or its implementation; that, assuming arguendo, such a duty exists, it has afforded the union ample opportunity to bargain on the implementation and impact thereof; and, finally, that it has supplied all available information requested by the Complainant. Violations of Sections 19(a)(1) and (6) of the Order are denied.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At all times material herein Complainant was the exclusive bargaining representative of various employees attached to the United States Army Electronics Command (ECOM)

2/ This particular allegation is mentioned in Complainant's letter of April 9, 1973 to Respondent. Since the Complaint herein refers to this letter as specifying the alleged acts complained about, I am treating this additional allegation as part of the Complaint.

3/ The Notice of Hearing on Complaint stated the hearing would be held with reference to alleged violations of Sections 19(a)(1) and (6).

at Fort Monmouth, New Jersey. Within the ECOM Complainant represented approximately 300 employees who were in the following units: (a) Pictorial Audio Visual Branch, (b) Research & Development Technical Support Activity, (c) Atmospheric Sciences Laboratory, and (d) Internal Security Division (Guards).

2. Approximately 6000 civilian employees were assigned to ECOM, and various different units thereof were represented by other unions as American Federation of Government Employees (AFGE) and International Association of Firefighters (IAF).

3. On January 11, 1973 4/ at Fort Monmouth, the Army announced a forthcoming reorganization. The Army Materiel Command adopted the TOAMAC plan - The Optimum Army Materiel Command - to maximize its managerial effectiveness. This plan called for the closure of the Philadelphia, Pennsylvania facility and the movement of materiel management personnel from Philadelphia to Fort Monmouth. It provided also for consolidations, realignments, and reductions as part of the new army structure. At the time of this first official notification the Army contemplated that the reorganization would be completed by June 30, 1973.

4. Management held a meeting on January 15 in order to brief the various unions, including Complainant, regarding the reorganization and the resultant RIF at Fort Monmouth. The labor organizations representing employees affected by the impending move were invited to attend. Complainant was represented by Patrick Crowell, vice-president of the local and Matthew E. Poznar, executive member of the union, who attended in place of Herbert Cahn, its president. Several other members of NFFE were present, as well as members of other unions. Two men from Army Materiel Command briefed the representatives on the consolidation and described the division of the Army into three areas. Explanations were given regarding the consolidation of activities, the anticipated transfers of personnel, as well as a statement of which organizations were moving into particular areas. Management solicited inquiries from the unions at the end of the meeting, and Crowell asked a question re the effect the consolidation might have upon the number of employees coming into the area. Representatives from AFGE asked questions re the impact on ECOM as a result of the transfers from Philadelphia to Fort Monmouth, and they queried as to why the technicians were being "hit so hard." No specific answers were given as this meeting was a general discussion of the proposed reorganization.

5. By letter 5/ dated January 16, Cahn wrote Colonel M. Hisaka, Director of Personnel, Training and Force Development

4/ All dated hereinafter mentioned are in 1973 unless otherwise indicated.

5/ Complainant's Exhibit 1.

requesting 11 different items, including such information as retention registers, labor agreements with other unions, lists of employees, fact sheets and a Management Information Report showing encumbered and non-encumbered jobs by TDA paragraph and line number.

6. Between April and June Respondent supplied all of the items requested except for (a) Management Information Report showing encumbered and non-encumbered jobs by TDA paragraph and line - item #4 in the union's January 16 letter, and (b) listing of incumbents of all positions at Fort Monmouth listed as excess to TDA but currently funded. Also, duration of funding - item #11 of the union's request. Confirming letters 6/ from Colonel Hisaka to Cahn were written enclosing requested information to the union. Complainant received the retention register by April 17. Paul T. Coleman, Chief of Management-Employee Relations, Civilian Personnel Division, testified that, while there are a large number of management information reports there is no report containing the specific information sought in item 4. Further, Coleman averred he knew of no centralized source of information providing Respondent with the kind of data sought in item 11 of the union's request. Information with respect to which employees were affected by the RIF, the name of each unit involved and the number to be received in each unit, were not furnished the Complainant.

7. Management called and held a meeting on March 23 for union and employer officials. Crowell attended on behalf of the union and several other members of Complainant were present in addition to representatives from AFGE and the IAF. Major General Hugh Foster briefed them on a letter 7/ he intended to mail the employees that day, indicating the general overall effect of the reduction, how many would be affected, and what the authorized strength would be. Foster stated that briefing would be given in the various commands outlining how the RIF would proceed, and that individual steps would be given to the employees through briefings in their particular locations. Questions were asked by union representatives as to the impact expected by the transfer from Philadelphia. No specific answers were given nor did the Major General state which members of ECOM would be "riffed." It was mentioned by General Foster that he was directed to proceed with the RIF and it had to be completed by the specified date of June 30.

8. The March 23 letter (Complainant's Exhibit 4) was sent to all ECOM employees, notifying 8/ them the consolidation 6/ Respondent's Exhibits 5 through 13.

7/ Complainant's Exhibit 4.

8/ Complainant, in a letter of April 9, 1973, to Respondent (Complainant's Exhibit 7), contended there was a refusal to consult by reason of this notification being sent to the union and the employees simultaneously. It was further averred that management changed competitive areas and levels unilaterally without notice, denied the employees and the union access to RIF planning information, and refused to accord recognition in fact to Complainant.

of Philadelphia and Fort Monmouth ECOM elements would be completed by June 30; that, to effect the transfer, competitive levels and reduction-in-force registers of appropriate competitive areas in Philadelphia and Fort Monmouth have been merged. It also stated that specific notices of proposed personnel actions, including necessary separations, would be released to reach affected employees by April 25.

9. A letter 9/ dated April 16, was distributed by management to all employees, advising them that the requirement to effectuate the reorganization by June 30 was removed. The employees were notified therein that the reorganization and personnel actions would be consummated by March 24, 1974; that specific notices would be given each Fort Monmouth and Philadelphia employee affected by the consolidation by May 31, that Philadelphia employees desirous of relocating to Fort Monmouth would receive an additional 60 days notice prior to the actual move date thereto; that employees declining to transfer would receive a notice of proposed separation which would be effective on the date their function is transferred to Fort Monmouth.

10. On April 17 management met with the representatives of various unions, including Complainant, to discuss the extension, until March 24, 1974 of the reorganization and the consolidation. Respondent explained the impact would be spread over a longer period, and the employees would have more opportunity for other placement possibilities. Questions were asked by the union representatives and answers given by management thereto.

11. No meetings were held between Respondent and Complainant regarding the realignment and consolidation except for the briefings hereinbefore referred to. The substance of all requests for consultation is contained in the exhibits in evidence herein, according to the testimony of union president Cahn.

12. The numerical effect upon the employees in those units represented by Complainant at Fort Monmouth were as follows: (a) Pictorial Audio Visual - 15 reassigned to another job at same grade; (b) Research & Development Technical Support - 7 reassigned to lower or same grade; (c) Atmospheric Sciences Lab - 2 reassigned at another grade; (d) Internal Security - no changes.

13. Coleman testified, and I find, that Respondent, in effecting its reorganization and consequent RIF, followed a standardized reduction-in-force procedure which is set forth in the Federal Personnel Manual. The provisions therein

9/ Respondent's Exhibit 5.

determine who shall be affected by the RIF and who shall receive individual notices. The unions herein were assured that under this procedure, which has been pursued over the years, the regulations of the FPM would be adhered to and the Department of Defense Priority Placement Program would be followed to assist employees adversely affected.

Conclusions

Respondent's Refusal to Consult,
Confer, or Negotiate with Complainant

It is contended by the union herein that, in effecting the reorganization with its attendant consolidation, reassignments and RIF, Respondent acted in derogation of Complainant as the bargaining representative of various unit employees. Further, it is asserted that management acted unilaterally in this regard and thus weakened "the image of Complainant as the representative - all of which tended to discourage membership in the union." More specifically, the union maintains that (a) Respondent failed to furnish information requested in respect to the planned reduction-in-force, (b) there was no meaningful bargaining by Respondent regarding the implementing procedures or impact of the RIF.

(1) The doctrine is well entrenched in the private sector that an employer must furnish the bargaining representative, upon request, relevant and necessary information to provide intelligent representation of employees. F. W. Woolworth Co., 109 NLRB 196, enfd. 352 U.S. 938. This view has been embraced, in the federal sector, by the Assistant Secretary in Department of Defense, State of New Jersey, A/SLMR No. 323. While the matter was referred to the Federal Labor Relations Council, the Assistant Secretary agreed with the Administrative Law Judge that a union is entitled to relevant and necessary information in connection with the processing of grievances in order to responsibly represent employees in the unit.

Despite the fact that Respondent would be required, under the Order, to furnish such data to Complainant in connection with the consolidation and RIF herein, I do not find that it has violated the Order in this regard. The record reflects that 9 of the 11 items requested by the union in Cahn's letter of January 16 were supplied to the Complainant. The employer insists, and it does not appear otherwise, that there is no designation showing "encumbered and un-encumbered jobs by TDA paragraph and line number," nor is there any centralized source of information providing it with a "listing of incumbents of all as excess to TDA but currently funded, also duration of funding." While it would have been preferable for management to have stated beforehand to the union that

such information was not available in the form requested, the unavailability of said data militates against concluding that Respondent was desirous of frustrating the bargaining process. Further, there was no attempt by Complainant to modify its request in this regard or to seek discussion as to these particular items.

In respect to the failure by the employer to advise Complainant as to the persons affected by the RIF, management indicated, at the various briefings, that it did not have information as to which individuals would be involved. It was also stated to the union representatives that the local commands would have this data at a later date and apart from the fact that this information was never specifically included in the union's written request, it does not appear that management attempted to conceal from Complainant the names of employees affected by the consolidation. I am not persuaded that there was a specific request by the union for, and a concomitant refusal by the employer to give, the names of those individuals directly involved in the realignment at ECOM.

(2) Conceding that under Sections 11(b) and 12(b)(2) of the Order there was no obligation to consult as to the right to reassign or "RIF" employees, Complainant maintains there is a duty on the part of management to meet and confer regarding the procedures to be used and any impact upon employees. As primary support for its contention, the union adverts to the case of Department of Navy, Bureau of Medicine & Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289 wherein the Assistant Secretary concluded that management must consult on the method and impact of carrying out a RIF before final action is taken.

In the Great Lakes Naval Hospital case, supra, management issued 33 RIF notices to employees without notifying their bargaining representative and providing it with an opportunity to meet and confer as to the procedures which would be followed. The Assistant Secretary held this to be in derogation of the employer's obligation to meet and confer under the Order. 10/ In respect to the duty to bargain re the impact of the RIF decision on employees adversely affected, it was held that, after such notices were issued, the union made no request to bargain as to the impact of the intended action. Thus, management did not violate Section 19(a)(6) in this regard.

10/ The case of U. S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261 was distinguished. In Norton, the union was notified of an intended elimination of a grave yard shift prior to its elimination. Since the union failed to request the activity to meet and confer re the impact, although it had sufficient opportunity to do so, management did not violate its obligation to meet and confer under the Order.

In the light of both cited cases I conclude that Respondent herein has fulfilled its obligation imposed by the Order. Contrary to the factual situation in Great Lakes Naval Hospital, supra, the employer herein afforded ample opportunity to the union herein to meet and confer as to the consolidation and attendant RIF. The briefings conducted by management on January 11, March 23, and April 17, to which union representatives were invited, provided Complainant with sufficient notification and information regarding the contemplated actions. Further, Respondent's representatives discussed, at these meetings, the realignment flowing from the movement of Philadelphia personnel to Fort Monmouth. The reorganization was described as well as the particular sections which would be moved into certain areas. During these meetings questions were asked by representatives of various unions, including Complainant, and answers given to the extent possible. Although management did not have the names of particular individuals likely to be affected by the change, it indicated that the local commands would know these details later on.

Having notified the Complainant formally of the impending move and action to be taken - as well as meeting with the unions to brief them thereon - I conclude that Respondent has complied with its initial responsibilities in respect to conferring with the employees' bargaining representative. 11/ Thereafter, it was incumbent upon the union herein to request management to meet and confer regarding the methods to be adopted or the impact of the decision upon employees. The record does not support a finding that any such request was made by Complainant. 12/ While the letter by Cahn to Major General Foster, Jr., dated April 9, refers to the failure by the employer to confer and consult, I do not view it as an explicit request to do so with respect to procedures or impact. Moreover, Respondent met subsequently with Complainant and other unions on April 17, at which time the union herein was clearly in a position to ask management to bargain in these respects.


Under all of these circumstances, I conclude and find that the failure by Complainant to timely request that the activity meet and confer regarding procedures and impact precludes a finding that Respondent violated Section 19(a)(6) of the Order.

11/ Cf. Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, N. J., A/SLMR No. 329.

12/ The union agrees that all of its requests to, and discussions with, management regarding the consolidation are contained in the exhibits herein.

Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends the complaint against Respondent be dismissed.


WILLIAM NAIMARK
Administrative Law Judge

DATED: April 4, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

JOINT TECHNICAL COMMUNICATIONS OFFICE (TRI-TAC),
DEPARTMENT OF DEFENSE,
FORT MONMOUTH, NEW JERSEY
A/SLMR No. 396

This unfair labor practice proceeding involved a complaint filed by the National Federation of Federal Employees, Local 476 (Complainant), alleging that the Joint Technical Communications Office (TRI-TAC), Department of Defense, Fort Monmouth, New Jersey (Respondent), violated Section 19(a)(6) of the Order based on the latter's refusal to sign a negotiated agreement and forward same to higher authority for approval.

In January, 1972, the parties commenced negotiation of a Memorandum of Understanding (Memorandum) to establish the basic procedure for negotiating an agreement. The Memorandum was executed by the parties on April 3, 1972, and provided, among other things, for the Chief Negotiator for each side to initial those items of the basic agreement which had been agreed upon during the course of the negotiations. The parties commenced negotiations of the basic agreement on April 6, 1972, and by August 14, 1973, they had mutually agreed to, and initialed, substantially all of the items of the agreement. However, there were six items upon which the parties had reached impasse and, by mutual agreement, these six items were to be referred to a Federal Mediator for resolution with the understanding that these items, when resolved, would be contained in an addendum or supplemental agreement to the basic negotiated agreement. Thereafter, on August 17, 1973, the Respondent prepared a "clean copy" draft of all of the items that had been agreed upon and initialed by the Chief Negotiators for both parties. On September 13, the Complainant sent a signature sheet, signed by the Complainant's representative, to the Respondent and requested the latter to execute the August 14, 1973, agreement and forward it to the Department of the Army for administrative review and approval. Subsequently, the Respondent's Chief Negotiator presented the negotiated agreement to the Respondent's Vice Director. On October 2, 1973, the parties met to discuss six minor changes suggested by the Respondent's Vice Director and they reached agreement on five of these items. Thereafter, the Respondent's Director made additional changes in 20 additional clauses in the August 14 agreement. On October 30, 1973, the Respondent's Negotiator met with the Complainant's negotiating team to explain why the suggested changes were desired by the Respondent's Director. The Complainant indicated that it would consider the explanations. On November 9, 1973, the Respondent served the Complainant with a copy of an agreement acceptable to the Respondent, which included the 20 changes desired by the Respondent's Director, with the signature of the Respondent's Director and Chief Negotiator attached thereto.

The Administrative Law Judge found that as of August 14, 1973, the parties had reached full agreement on all of the terms and conditions of a negotiated agreement. Thereafter, by mutual consent, the parties agreed to certain minor modification of some five items. Subsequently, the Respondent refused to execute this agreement. The Administrative Law Judge found that the Chief Negotiator for the Respondent had been given full authority to negotiate and to bind the Respondent. This finding was based upon the provisions of the Memorandum, as well as upon the credited testimony of one of the members of the Complainant's negotiating team. Under the circumstances, the Administrative Law Judge concluded that the Respondent violated Section 19(a)(6) of the Order by refusing to sign the August 14 agreement negotiated and agreed upon by the parties. He recommended that the Assistant Secretary order the Respondent to take certain affirmative action, including the signing, upon request, of the August 14, 1973, agreement, as modified by mutual consent of the parties on or about October 2, 1973.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, noting that his findings were based, in part, on credited testimony, and noting also the absence of any exceptions to the Administrative Law Judge's Report and Recommendations.

A/SLMR No. 396

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

JOINT TACTICAL COMMUNICATIONS OFFICE
(TRI-TAC), DEPARTMENT OF DEFENSE,
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-3462(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 476

Complainant

DECISION AND ORDER

On March 15, 1974, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent, Joint Tactical Communications Office (TRI-TAC), Department of Defense, Fort Monmouth, New Jersey, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Joint Tactical Communications Office (TRI-TAC), Department of Defense, Fort Monmouth, New Jersey, shall:

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to sign the negotiated agreement as agreed to on August 14, 1973, and modified by mutual consent on or about October 2, 1973; with the National Federation of Federal Employees, Local 476.

WE WILL, upon request, sign the negotiated agreement as agreed to on August 14, 1973, and modified by mutual consent on or about October 2, 1973, with the National Federation of Federal Employees, Local 476.

1. Cease and desist from:

(a) Refusing to sign the negotiated agreement as agreed to on August 14, 1973, and modified by mutual consent on or about October 2, 1973, with the National Federation of Federal Employees, Local 476.


2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

(a) Upon request, sign the negotiated agreement as agreed to on August 14, 1973, and modified by mutual consent on or about October 2, 1973, with the National Federation of Federal Employees, Local 476.

(b) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
May 31, 1974



Paul J. Fasser, Jr. Assistant Secretary of
Labor for Labor-Management Relations

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515, 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 WASHINGTON, D.C. 20210



..... :
 In the Matter of :
 :
 JOINT TACTICAL COMMUNICATIONS OFFICE :
 (TRI-TAC), DEPARTMENT OF DEFENSE :
 FORT MONMOUTH, NEW JERSEY, :
 Respondent :
 and : Case No. 32-3462 (CA) 1/
 :
 NATIONAL FEDERATION OF FEDERAL :
 EMPLOYEES, LOCAL 476, :
 Complainant :

Captain James Cheslock
 Office of the Staff Judge Advocate
 Building 492A
 Fort Monmouth, New Jersey
 For the Respondent

Michael Sussman, Esq.
 1737 H Street, N. W.
 Washington, D. C. 20006
 For the Complainant

Before: WILLIAM NAIMARK
 Administrative Law Judge

REPORT AND RECOMMENDATIONS
Statement of the Case

This is a proceeding under Executive Order 11491, as amended (herein called the Order) arising pursuant to a Notice of Hearing on Complaint issued on December 17, 1973 by the Assistant Regional Director of the United States Department of Labor, Labor-Management Services Administration, New York Region.

1/ Official notice is taken that the instant case was consolidated with Case No. 3223(CA) by Order issued on December 17, 1973. In view of the distinct and unrelated issues involved in both matters, an order severing Cases Nos. 3223(CA) and 3462(CA) was issued by the Assistant Regional Director on January 8, 1974.

The complaint herein was filed on October 23, 1973 by National Federation of Federal Employees, Local 476 (herein called the Complainant) against Joint Tactical Communications Office (Tri-Tac), Department of Defense, Fort Monmouth, New Jersey (herein called the Respondent). The complaint alleged that Respondent negotiated a collective bargaining agreement with Complainant, mutually agreed upon its terms, and thereafter refused to sign the agreement and forward same to higher authority for approval--all in violation of Section 19(a)(6) of the Order.

A hearing was held before the undersigned on January 8, 1974 at Fort Monmouth, New Jersey. Both parties were represented by counsel and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter both parties filed briefs which have been duly considered.

The Union contends that after protracted negotiations it reached an agreement with Respondent covering the represented employees. It argues that the employer's chief negotiator had authority to bind the activity; that the parties mutually agreed upon the terms of the contract; and that the failure of Respondent to sign the contract and submit it to higher authority for approval, as well as changing 20 items previously agreed upon, constitute a refusal to consult, confer, or negotiate under the Order.

Respondent maintains that under Section 11(a) of the Order it is only obliged to negotiate in accordance with applicable laws and regulations, including policies set forth in the Federal Personnel Manual and published agency policies and regulations. Further, Section 7B(2)(i) of Chapter 711 of Civilian Personnel Regulation 700, which implements Department of Defense Directive 1426.1, provides that the activity commander is the local approval authority and requires that his signature be on the document before it is forwarded to higher approval authority. Accordingly, the local commander could refuse to approve the agreement with which he was not in accord, and such refusal was not indicative of bad faith bargaining.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. On or about August 3, 1971 Complainant was certified as the exclusive bargaining representative of all non-professional and professional employees in a non-supervisory capacity in the Tri-Tac office, Department of Defense, Fort Monmouth, New Jersey.

2. Commencing about January 1972 Complainant and Respondent commenced negotiating a Memorandum of Understanding (herein called MOU) to serve as the ground rules regarding negotiations for a collective bargaining agreement between the parties.

3. The MOU 2/ was signed on April 3, 1972 by Brigadier General Harold W. Rice, 3/ Activity Director and E.M. Pritchard, Chief Negotiator, for the Respondent, and by Herbert Cahn, President of the Union and Brian E. Charnick, Chief Negotiator for the Complainant.

It provided, inter alia, that (a) each party would have three members, including the Chief Negotiator, comprising its membership committee; (b) the Chief Negotiator of each team would be the official spokesman for his side; (c) upon reaching an agreement on each article, the Chief Negotiators shall signify such agreement by initialing the agreed-upon item; (d) the Chief Negotiator for the Activity Chief or his alternate is authorized to negotiate all aspects of employee-management relations subject to the Order, as amended, and that are under the control of the Activity Chief; (e) the Chief Negotiator for the Union or his alternate has authority to speak for the Union; (f) impasse items may be set aside, submitted to Federal Mediation & Conciliation Service for mediation and ultimately to the Federal Services Impasse Panel if not resolved by the mediator.

4. Negotiations for a collective bargaining agreement commenced on April 6, 1972. Each side was represented by 3 members, but ultimately Charnick and Pritchard were, as chief negotiators, the sole representatives for the Union and the employer respectively. There were approximately 18 formal bargaining sessions occupying 50 hours, the last such session occurring on February 22, 1973. In March 1973 Charnick and Pritchard commenced the first of five or six informal bargaining meetings to resolve some matters which were still open.

5. Alice Petrero, member of the Union negotiating team, testified, and I find, that the parties agreed, at the first formal meeting, that if any specific item was mutually agreed upon, each would initial the working contract, and the same was then disposed of as final and binding upon the parties.

2/ Complainant's Exhibit 1.

3/ General Rice, who appointed Pritchard as Chief Negotiator in November or December 1971, subsequently left Tri-Tac and was no longer the director during the bargaining negotiations.

6. Herbert Cahn, president of Complainant, testified, and I find, that during the early bargaining discussions management was informed there was no ratification procedure on the Union's part, but that its Chief Negotiator was vested with full authority to bind the Union as to the contract terms he negotiated on its behalf.

7. Both Charnick and Pritchard agreed, at the outset of negotiations, that the contract would consist of the terms agreed to, and the negotiating sessions centered around the working copy of a union proposed agreement. 4/ Each section of the proposed contract was discussed during the bargaining meeting, and upon agreeing to the clauses, or a modification thereof, each Chief Negotiator would initial the clauses. At various times during the negotiations Pritchard consulted with other representatives of the activity before initialing the contractual provisions.

8. By March 22, 1973 5/ the Chief Negotiators for Complainant and Respondent had agreed on all items of the proposed contract except for eight items concerning which the parties were at impasse. Three of these were later resolved, leaving the following items to be submitted to the Federal Mediation and Conciliation Service for resolution: job descriptions, parking, competitive area, personnel policies, and disputes. The parties agreed that these matters, if resolved and consented to, would become part of a supplemental agreement to be subsequently executed between them. The union wrote the Conciliation service a letter 6/ on June 26, requesting its services to help resolve the disputed matters.

9. The Chief Negotiators completed their bargaining sessions on or about August 14, at which time Pritchard stated he would have his secretary final type the initialed-off (agreed to) clauses of the contract, dated August 14, and present the agreement up the administrative chain for approval. A confirming letter 7/ dated August 17 to this effect was sent to Pritchard by Charnick.

4/ Complainant's Exhibit 2.

5/ Unless otherwise indicated, all dates hereinafter mentioned are in 1973.

6/ Respondent's Exhibit 2.

7/ Complainant's Exhibit 4.

10. No response was received from Respondent regarding the agreed upon contractual provisions. Therefore, the union sent the Director a letter 8/ dated September 14, enclosing a signature sheet 9/ signed by the union's representatives requesting that he sign same and forward it to the Department of Army for their administrative review and approval.

11. Pritchard testified, and I find, that he attempted to present the results of the negotiations - the agreed upon items - to Brigadier General Williams, Vice Director, for his review, but was unable to meet with him until September 28. They met on that date, as well as October 1, to discuss the contractual provisions. Williams indicated approval except for six clauses which he desired to change, and stated he would have to check with General Kay regarding the agreement.

12. On October 2 Pritchard met with Charnick to discuss the six items which Williams modified. The union agreed to the change as to four matters which involved (a) personnel policies (Article 10-Section A); (b) conditions, requiring attendance at work unless properly excused (Article 6-Section E); (c) union rights, requisites for steward to leave duty (Article IV); (d) policies for conduct of union business, (Article 3-Section A). These were sent to Charnick from Pritchard by a memo 10/ dated October 3, with a notation that he understood the union representative was willing to accept 11/ them with Pritchard's signature, and further stating he was reworking the other two matters in an attempt to anticipate the reaction of Major General Harold Kissinger, Director of the Activity. One of these two items was accepted by the union as revised by management.

13. On or about October 7 Complainant received from Respondent a typed up and "clean" copy 12/ of the agreement negotiated between the chief negotiators, which embodied the clauses initialed and agreed upon during the bargaining meetings. This is referred to as the "August 14 contract" between the parties.

8/ Complainant's Exhibit 5.

9/ Complainant's Exhibit 3.

10/ Respondent's Exhibit 4.

11/ Charnick refused to sign-off these items since the union had written a letter dated September 18 charging the Respondent with an unfair labor practice.

12/ Complainant's Exhibit 8.

14. Pritchard met with Director Kissinger on October 9, 10, and 11 and went over the contract terms already agreed upon by the Chief Negotiator. Apart from the six impasse provisions set aside for mediation and the five items which were changed by mutual agreement, the Director revised and changed 20 more clauses in the August 14 contract which had been agreed to by the Chief Negotiators. The August 14 agreement, together with the impasse matters, were set forth by Respondent in a document 13/ entitled UNION/MANAGEMENT CONTRACT AGREEMENT, which was prepared on December 28. It contained the version of clauses the union claimed had been agreed upon and the "version acceptable to the Director" as well as several pages explaining the reason for the 20 changes made by the Director.

15. On October 30 Pritchard met with Charnick and Cahn and explained why General Kissinger felt he did not have the authority to agree to the terms of the negotiated agreement. The union representatives stated they would consider the explanations and advise the employer's chief negotiator.

16. Management presented the union officials on November 9 with a copy of the modified contract 14/ embodying the twenty changes made by General Kissinger, and attached thereto was a signature page containing the signatures of Kissinger and Pritchard. Complainant union refused to sign this document. It contended this was a different contract that raised new items which would reopen all negotiations, since major concessions had been made by the union to gain objectives now taken back by the employer. Some of these matters were (a) notice during a reduction in force, (b) commitments by management to train employees in the event of a RIF, (c) career competitive areas, and (d) contracting out by management of work done by unit employees.

Conclusions

Refusal by Respondent to Consult, Confer, or Negotiate in Violation of Section 19(a)(6)

It is contemplated, under Section 11 of the Order, that an agency and a recognized union shall meet and confer with the aim of negotiating a collective bargaining agreement. Although limitations are placed on matters which may properly be negotiated, permissible subjects may form the content of a contract when agreed upon between the parties. Further, the

13/ Respondent's Exhibit 5.

14/ Complainant's Exhibit 9.

obligation to meet and confer carries with it the duty to reduce to writing, and sign, the terms and conditions of employment assented to and finalized, during such negotiations. While there is no requirement to agree on proposals or concessions, a party may not properly refuse to sign an agreement once it is reached. Such refusal is violative of Section 19(a)(6) of the Order. Headquarters, U. S. Army Aviation Systems Command, A/SLMR No. 168.

In the case at bar Complainant maintains such an agreement was reached and that management wrongfully refused to thereafter sign it. Presented for determination are two issues: (1) whether, after extended bargaining negotiations, the parties agreed upon the terms and conditions of employment as embodied in an agreement which Respondent refused to sign; (2) if so, may management justify its refusal on the ground that its Director was entitled to disapprove the agreement, with impunity, under a Civilian Personnel Regulation requiring his signature before being forwarded to higher approval authority.

(1) A review of the record facts, and the supporting data, convinces me that the parties, after negotiating for over a year, had agreed upon the substantive terms of a proposed agreement. Although they had reached an impasse as to six items, Complainant and Respondent agreed to sign a contract excluding these matters, with the further mutual understanding that the impasse items would be embodied in a supplemental agreement. All other provisions, which were contained in the "August 14 contract", had been proposed by the union and initialed by Pritchard, Chief Negotiator for management.

At the time that Pritchard met with Vice Director Williams on September 28 to review the aforesaid contract, there had been complete acceptance of all contract terms except for the impasse matters which were set aside for a separate agreement. Since Williams desired to change six provisions, Pritchard obtained Charnick's consent to negotiate 15/ said matter. Four of these were sent to Charnick by Pritchard on October 3, as revised, with a note that management understood they were acceptable with Pritchard's signature. The fifth was accepted at a later date in revised form. Thus, except for the sixth item and the impasse subject, all terms and conditions - as expressed in the "August 14 contract" - were agreed upon prior to Pritchard's meeting with Director Kissinger on October 9 and 10. The failure to renegotiate the sixth provision does not militate against a finding that the terms and conditions had been accepted by the parties.

15/ This was permitted under I 2(c) of the MOU.

This provision was, according to Respondent, minor in nature and had been accepted by management during negotiations.

Accordingly, I find and conclude that the parties hereto had on August 14, reached accord on all employment matters to be included in this finalized agreement, as modified through renegotiation in October. Further, that - except for the 6 impasse items to be part of a separate contract - no substantive issues were unresolved by October 9 when Pritchard met with Director Kissinger.

(2) In determining whether the local activity head could properly disapprove of the agreement reached during negotiations, it is essential to examine the memorandum governing the bargaining sessions as well as applicable law or regulations. Thus, the MOU herein clearly recites in Section II, that the Chief Negotiator for the Activity Chief shall be authorized to negotiate all aspects of employer-management relations, subject to negotiation under the Order and that are under the control of the Activity Chief. Moreover, in addition to being the official spokesman for his side, each Chief Negotiator is authorized and required, under Section I (2)(c), upon reaching agreement re each article, to signify such agreement by initialing the agreed-upon item.

Thus, it is apparent that Pritchard was vested with complete authority to bind the Respondent in its negotiations with the Union. The MOU was signed by the prior Tri-Tac Director, Brigadier General Rice, and the document leaves no doubt that Pritchard, as the Chief Negotiator for management, was cloaked with authority to negotiate and agree upon terms of a contract on behalf of management.

Respondent asserts that, notwithstanding the fact that the Chief Negotiators had agreed upon the terms of a proposed contract - and this is undenied - the Director had the right to disapprove the contract and make changes therein. This position is postured on Civilian Personnel Regulation 700 which provides that the activity commander is the local approval authority and his signature is required on a document before it is forwarded to higher authority for approval.

Consistency with the Order and the precepts governing labor management relations requires that such local approval be, in effect, a ministerial act. The said regulation would make a mockery of negotiations if the local Director, having knowledge that the activity's chief negotiator is engaged in binding and final bargaining sessions with the union, were permitted to negate the fruits of the negotiator's efforts. While the Assistant Secretary is not bound to follow the private sector, cases dealing with situations analogous to the instant matter have been decided by the National Labor Relations Board. In Industrial Wire Products Corp., 177 NLRB

328, the employer and union agreed on the terms of a contract which was repudiated by the company president, and the latter proposed changes in substantive terms previously accepted. The Board found the refusal to execute a contract embodying a stipulation, signed by the employer's bargaining agent and the union, was a refusal to bargain in good faith. As the trial examiner stated, "it would be a travesty upon the right of ratification to permit one whose agent has agreed to a contract to exercise a right of disapproval under these circumstances." Such a conclusion is particularly applicable where, as here, the Respondent endowed Pritchard with authority to enter into binding clauses, and then permits the Complainant to assume that a meaningful and final contract had been agreed upon. See Colony Furniture Company, 144 NLRB 1582.

The theory enunciated in the private sector should have applicability in the public area. Collective bargaining should recognize the same principles of negotiation which are conducted for the purpose of reaching an agreement. Any employer who refuses to honor with his signature an agreement he has made with a labor organization discredits the union and impairs the bargaining process. H. J. Heinz Company & NLRB, 311 U.S. 514. In the case at bar, if the Respondent may renege on the agreed-upon terms on the ground that Pritchard did not have final authority, one must conclude the employer never bargained in good faith *ab initio*. For to permit an agent to conduct negotiations with the express, as well as implied, understanding that he has authority to negotiate an agreement dictates that any agreement reached by the negotiators be accepted by the employer. Allowing Kissinger to unilaterally change 20 of the terms previously agreed to makes a travesty of the entire bargaining process which, in the instant matter, consumed nearly two years.

Note is taken that Section 15 of the Order makes provision for an agreement of this nature to be approved by the head of the agency, or his designee. Further, that such agreement shall be approved, if not contrary to applicable laws, existing agency policies and regulations, and other appropriate regulations. But Respondent does not raise Section 15 as a defense to its conduct herein, and the head of the agency did not refuse to approve this agreement for the reasons set forth therein. Apart from whether or not this agreement required approval under Section 15, the actions of Kissinger were intended to be substituted for those of Pritchard, and he could not, any more than the chief negotiator, disavow the agreement in good faith after reaching accord thereon. CPR 700 should not be utilized to replace the applicable section of the Order, and I construe it as calling for an administrative approval after the activity's negotiator has negotiated an agreement on behalf of the activity.

Accordingly, and in view of the foregoing, I conclude that Respondent has refused to confer, consult, and negotiate in good faith under Section 19(a)(6) of the Order by refusing to sign the "August 14 contract" negotiated and agreed upon by the parties.

Recommendations

Having found that Respondent has engaged in conduct which is violative of Section 19(a)(6) of the Order, I recommend the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491, as amended.


Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders the Joint Tactical Communications Office (TRI-TAC), Department of Defense, Fort Monmouth, New Jersey, shall:

1. Cease and desist from:
 - (a) Refusing to sign the negotiated collective bargaining agreement as agreed to on August 14, 1973, and modified by mutual consent on or about October 4, 1973, with National Federation of Federal Employees, Local 476.
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:
 - (a) Upon request, sign the collective bargaining agreement negotiated and agreed to on August 14, 1973, and modified by mutual consent on or about October 4, 1973, with National Federation of Federal Employees, Local 476.
 - (b) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are cus-

tomarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

- (c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.


 WILLIAM NAIMARK
 Administrative Law Judge

DATED: March 15, 1974
 Washington, D. C.

A P P E N D I X
 N O T I C E T O A L L E M P L O Y E E S
 P U R S U A N T T O

A D E C I S I O N A N D O R D E R O F T H E
 A S S I S T A N T S E C R E T A R Y O F L A B O R F O R L A B O R - M A N A G E M E N T R E L A T I O N S
 a n d i n o r d e r t o e f f e c t u a t e t h e p o l i c i e s o f
 E X E C U T I V E O R D E R 1 1 4 9 1 , a s a m e n d e d
 L A B O R - M A N A G E M E N T R E L A T I O N S I N T H E F E D E R A L S E R V I C E

We hereby notify our employees that:

WE WILL NOT refuse to sign the negotiated collective bargaining agreement as agreed to on August 14, 1973, and modified by mutual consent on or about October 4, 1973, with National Federation of Federal Employees, Local 476.

WE WILL, upon request, sign the negotiated collective bargaining agreement as agreed to on August 14, 1973, and modified by mutual consent on or about October 4, 1973, with National Federation of Federal Employees, Local 476.

 (Agency or Activity)

Dated _____ By: _____
 (Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515, 1515 Broadway, New York, New York 10036.

June 20, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AIR NATIONAL GUARD BUREAU,
STATE OF VERMONT
A/SLMR No. 397

This unfair labor practice proceeding involved a complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3002 (Complainant) alleging that the Air National Guard Bureau, State of Vermont (Respondent) failed and refused to bargain in good faith in violation of Section 19(a)(1) and (6) of the Order through its actions in: (1) engaging in dilatory tactics with respect to scheduling a meeting with the Complainant to agree upon the ground rules for bargaining; and (2) failing to provide its bargaining representative with sufficient authority at certain meetings on changes directed by the National Guard Bureau.

With respect to the allegation that the Respondent engaged in dilatory tactics in scheduling a meeting concerning ground rules for negotiations, the Administrative Law Judge found that the record failed to establish that the Respondent engaged in dilatory tactics or unduly delayed setting up meetings with the Complainant in this regard. He noted that the Complainant's June 14, 1972, letter requesting a 60-day extension of the existing agreement did not suggest dates or times for negotiations and did not express any sense of urgency for an early meeting. He noted also that no evidence was presented to indicate that the Respondent's suggested date of July 12, 1972, for negotiation of the ground rules was unacceptable to the Complainant, nor was there any evidence presented to show that the Complainant either protested concerning the Respondent's postponement of the July 12 meeting to July 19, 1972, or demanded that an earlier date be set for the meeting. The Administrative Law Judge found, additionally, that at the July 19 meeting, there was prompt agreement between the parties concerning the ground rules for negotiation. Under all of these circumstances, the Administrative Law Judge concluded that the record failed to establish that the Respondent engaged in any dilatory tactics concerning setting up the initial meeting or any subsequent meetings.

The Administrative Law Judge found also that the Respondent had not violated the Order by failing to provide its chief negotiator with sufficient bargaining authority at the February 6 and 7 meetings which were held after the negotiated agreement of August had been returned by the National Guard Bureau to the Activity for "changes . . . required in order to bring the agreement in conformity with applicable laws, regulations, and Executive Order 11491" In this connection, the Administrative Law Judge noted that the Complainant neither alleged that the Respondent's chief negotiator had insufficient bargaining authority during the earlier July 19, August 22, or August 23 meetings nor that the National Guard Bureau violated the Order by disapproving

the agreement signed on August 25, or by directing the changes. With respect to the February 6 and 7 meetings, the Administrative Law Judge concluded that there was an absence of evidence that the Respondent's chief negotiator did not have sufficient authority to negotiate on behalf of the Respondent. In this connection, he noted that although the National Guard Bureau was the approving authority under Section 15 of the Order, there was no requirement in the Order that the Respondent's chief negotiator have authority to negotiate on behalf of the National Guard Bureau or that the National Guard Bureau had to be represented at such negotiations. Rather, in the Administrative Law Judge's view, the Respondent's chief negotiator had to have adequate authority to negotiate on behalf of the Respondent, which he did, and that calls the chief negotiator made to the National Guard Bureau during the February 6 and 7 negotiations merely constituted an agreed upon procedure to obtain Section 15 approval of the modified clauses by the National Guard Bureau as they were renegotiated. Under all of these circumstances, the Administrative Law Judge concluded, therefore, that the Respondent had not engaged in conduct which violated Section 19(a)(1) and (6) of the Order and, accordingly, he recommended that the complaint be dismissed.

Upon review of the entire record in this proceeding, including the Administrative Law Judge's Report and Recommendation and the Complainant's exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the complaint in Case No. 31-6165 be, and it hereby is, dismissed.

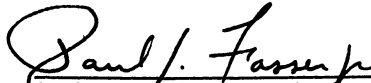
AIR NATIONAL GUARD BUREAU,
STATE OF VERMONT

Dated, Washington, D.C.
June 20, 1974

Respondent

and

Case No. 31-6165


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3002

Complainant

DECISION AND ORDER

On March 29, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions, 2/ and recommendation.

2/ November 21, 1972, letter to the Vermont Adjutant General contained the statement that ". . . [a] review of the proposed labor agreement between the Adjutant General, State of Vermont, and the American Federation of Government Employees, Local 3002, reveals that the following changes are required in order to bring the agreement into conformance with applicable laws, regulations, and Executive Order 11491, as amended, and before the agreement can be approved by the agency, (Chief, National Guard Bureau)." [Emphasis supplied.] However, my contrary interpretation of the facts in this regard was not considered to alter the ultimate disposition of the subject case.

1/ On pages 3 and 6, respectively, of the Administrative Law Judge's Report and Recommendation he inadvertently refers to July 19, 1974, rather than July 19, 1972; and to November 21, 1974, rather than November 21, 1972. In addition, at footnote 7 of his Report and Recommendation, the Administrative Law Judge inadvertently refers to "the Act" rather than the Order. These inadvertent errors are hereby corrected.

2/ At footnote 14 of his Report and Recommendation, the Administrative Law Judge stated that modifications in the negotiated agreement which the National Guard Bureau directed the Respondent to make "were merely the National Guard Bureau's suggestions as to those modifications of the submitted agreement which it could state in advance it would approve." I disagree with this conclusion of the Administrative Law Judge. In this connection, it was noted that the National Guard Bureau's

(Continued)



Statement of the Case

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 In the Matter of :
 :
 AIR NATIONAL GUARD BUREAU :
 STATE OF VERMONT :
 :
 Respondent :
 :
 and :
 :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, AFL-CIO :
 :
 Complainant :
 :

Case No. 31-6165

Lt. Col. Randall M. Nye
 Technician Personnel Officer
 Air National Guard
 Camp Johnson
 Winooski, Vermont
 For the Respondent

Guy Colletti
 National Representative
 American Federation of Government
 Employees, AFL-CIO
 512 Gallivan Boulevard, Suite 2
 Dorchester, Massachusetts 02124
 For the Complainant

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

REPORT AND RECOMMENDATION

Pursuant to a complaint filed March 9, 1973, under Executive Order 11491, as amended, (hereinafter called the Order) by American Federation of Government Employees, AFL-CIO, Local 3002 (hereinafter called the Complainant or the Union) against Air National Guard, State of Vermont,^{1/} (hereinafter called the Activity, Vermont Air National Guard or the Respondent) a Notice of Hearing on Complaint was issued by the Regional Administrator for the New York Region on July 6, 1973.

A hearing was held in this matter before the undersigned on October 10, 1973, in Burlington, Vermont. All parties were represented and afforded a full opportunity to be heard and to present witnesses and to introduce other relevant evidence on the issues involved. Upon the conclusion of the taking of testimony, both parties presented oral arguments and submitted briefs.

Upon the entire record herein, including the relevant evidence adduced at the hearing and my observation of the witnesses and their demeanor, I make the following findings, conclusions, and recommendations.

Findings of Fact

The Union has been recognized since 1970 as the collective bargaining representative of a unit composed of all non-supervisory employees of the Vermont Air National Guard. In July of 1970 the Union, on behalf of the above unit, entered into a collective bargaining agreement with the Adjutant General,^{2/} State of Vermont, which agreement was to expire on July 6, 1972.^{3/}

^{1/} It should be noted that the Complaint form states under, "1. F," that the Activity is part of the National Guard Bureau. The record does not establish that the National Guard Bureau was separately served with a copy of the Complaint and it was not represented at the hearing.

^{2/} The Adjutant General is the Commanding Officer of the Vermont Air National Guard.

^{3/} Article XXVIII, Section b provided:
 "This agreement will be automatically renewed from year to year unless either party gives written notice, including its proposals, to the other, during the period of sixty (60) calendar days immediately preceding the anniversary date of the agreement of its desire to terminate this agreement in its entirety or of its desire to effect changes thereto by amendment and/or supplement."

Apparently during the latter part of May 1972, Union President, Otis Light, telephonically requested to negotiate a new agreement.^{3/} In any event by letter dated June 14 the Union requested an extension of the collective bargaining agreement for 60 days to "allow both parties the opportunity to negotiate and agree to a new contract in the spirit and intent of the Executive Order." The Activity by letter dated June 26, 1972, granted the requested extension of the contract. This letter stated further, "In regards to negotiations for the ground rules, we request this be held on July 12, 1972, at 10:00 hours, at Camp Johnson. This date necessary as the Technician Personnel Officer and the Adjutant General are both performing AT."^{4/} This meeting date was apparently postponed to July 19, 1974, because an Operational Readiness Inspection of the Vermont Air National Guard, (hereinafter called ORI), was scheduled and actually conducted between July 7 and July 12.

Representatives of the Union and the Activity ^{5/} met on July 19, 1972, and agreed upon ground rules and agreed to meet on August 22 to negotiate a new contract. By letter of July 20 the Union submitted its contract proposals to the Activity. The Activity submitted its counter-proposals in a letter dated August 15, 1972. The representatives of the Union and Activity met on August 22 and 23 and successfully negotiated and reached agreement on a collective bargaining contract. This agreement was then submitted, pursuant to Section 15 of the Order, to the National Guard Bureau in Washington for approval. By letter dated November 21, 1972, the National Guard Bureau advised "The Adjutant General, State of Vermont" that

"A review of the proposed labor agreement between the Adjutant General, State of Vermont, and the American Federation of Government Employees, Local 3002, reveals that the following changes are required in order to bring the agreement into conformance with applicable laws, regulations, and Executive Order 11491, as amended, and before the agreement can be approved by the agency, (Chief, National Guard Bureau)."

The letter then set forth 41 such changes.

^{3/} This conversation was testified to solely by a Union witness who was not a party to it. The witness was apparently told about the conversation by Union President Light. Mr. Light was not called to testify.

^{4/} "AT" stands for active duty training.

^{5/} The chief negotiator and spokesman for the Activity at this meeting and all subsequent meetings was Lt. Col. Randall M. Nye.

On February 6 and 7, 1973, the Union's representatives and the Activity's representatives including its spokesman Colonel Nye, met to renegotiate the agreement. Prior to these negotiations the Union asked Colonel Nye to contact the National Guard Bureau and request a representative of the National Guard Bureau to be available for these negotiations. Colonel Nye responded that he could not.

The Union contended, at these meetings, that many of the changes directed by the National Guard Bureau were unnecessary and undesirable and that the National Guard Bureau's references to laws, regulations and the Order were inaccurate. Colonel Nye in many specific instances agreed with the Union and agreed that certain of the directed changes, in turn, should be modified in accordance with the Union's positions. He advised the Union that although, after discussion, he agreed with certain of the Union's suggestions and modifications of the changes directed by the National Guard Bureau, he could not finally, agree on these suggestions and modifications. He stated that he could not negotiate beyond the changes directed by the National Guard Bureau. The Union suggested, after Colnel Nye and the Union reached an agreement on certain of the clauses in question, that Colonel Nye call the National Guard Bureau in Washington, D.C., and ascertain whether the agreed upon changes satisfied the National Guard Bureau. Colonel Nye followed the Union's suggestion and apparently received the approval of the National Guard Bureau for the suggested changes. Colonel Nye and the Union representatives then followed this procedure of discussing various of the directed changes and, after reaching agreement as to suggested modifications of the clauses, on two or three occasions, Colonel Nye calling the National Guard Bureau to see if these agreed upon suggestions would meet with the National Guard Bureau's approval. By following this procedure full agreement was reached by the parties as to all terms of the contract on February 7, 1973.^{6/} The parties, although including the Arbitration Article in the February 7 agreement, left the Arbitration Article for further discussion and, in a Supplemental Agreement executed on March 21, 1973, agreed to certain modifications in the Arbitration Article and the Duration of Agreement Article.

^{6/} The parties "signed off" on the Grievance Procedure Article in the Contract and agreed to await a decision from the Federal Labor Relations Council (FLRC) concerning this grievance procedure. The grievance procedure and a Department of Defense Directive was being considered in a case then pending before the FLRC.

Contentions of the Parties and Procedural Matters

The Union contends that the Activity failed and refused to bargain in good faith with the Union in violation of Section 19(a)(6) of the Order by:

- (1) Engaging in dilatory tactics with respect to scheduling a meeting with the Union to agree upon the ground rules for bargaining; and
- (2) Failing to provide its bargaining representative at the February 6th and 7th meetings with sufficient authority. 7/

The Activity denied that it engaged in conduct which violated Section 19(a)(6) of the Order. The Union further requested that the complaint be amended to allege that the two above described allegations of misconduct by the Activity also constituted a violation of Section 19(a)(1) of the Order. The Activity opposed the motion. The undersigned reserved ruling on the Union's motion. After due consideration and noting particularly that the factual matters alleged were fully litigated by both sides, that no new factual or evidentiary matters were being raised by the requested amendment and that the Activity was advised to try its case as if the motion were granted and to request any additional time it needed, the Complainants' motion to amend the complaint is hereby granted. Further, Respondent's contention that the Complaint should be dismissed based on A/SLMR Report No. 48 because the Complaint contained a reference, "see attachment," is hereby denied. See Defense Supply Agency, A/SLMR No. 247.

Conclusions of Law

The record fails to establish that the Activity engaged in dilatory tactics or unduly delayed setting up meetings with the Union to agree upon ground rules and commence bargaining. Although during the latter part of May the Union apparently first requested that the parties schedule a meeting for setting up ground rules, the record seems somewhat confused concerning the circumstances of this request or what dates or times, if any, the Union suggested. In fact, in its June 14 letter the Union requested a 60-day extension of the contract to allow the parties to negotiate "in the spirit and intent of the Executive Order." Again no dates or times were suggested, no

7/ The Union set forth these contentions in its oral argument at the hearing and in its brief. The Union had not alleged or contended, *inter alia*, that Colonel Nye, the Activity's bargaining representative did not have sufficient bargaining authority during the July 19 or August 22 and 23 meetings or that the National Guard Bureau violated the Act by disapproving the agreement signed on August 25 or by directing 41 changes.

sense of urgency was expressed and in fact the request for the extension of time indicated that the Union was not stressing an early meeting. The Activity replied promptly by letter dated June 26 granting the Union's request for an extension of time and requesting that July 12 be set for the meeting concerning ground rules because both the Adjutant General and the Activity's Chief negotiator were on active duty training. There is no evidence in the record to indicate that this date was not acceptable to the Union. The activity subsequently requested a one week postponement of the meeting until July 19 because of an ORI. 8/ There is no evidence that the Union protested concerning this postponement or requested or demanded that an earlier date be set for the meeting. Further at the meeting on July 19th there was prompt agreement between the parties concerning the ground rules and there is no evidence in the record that the August 22 date agreed upon for the first negotiation session was not totally acceptable and agreeable to the Union. Based on all of the foregoing I conclude that the record fails to establish that the Activity engaged in any dilatory or stalling tactics concerning setting up the initial meeting, or for that matter any subsequent meetings. On the contrary, the record establishes that the Activity acted quite promptly and seemed quite cooperative in granting the Union its requested extension of the contract and in agreeing to negotiate a new agreement even though the Union did not give the timely written notice as required to terminate the existing agreement and bargain a new one.

The parties, after exchanging proposals and counter-proposals, bargained on August 22 and 23, promptly reached full agreement and executed a contract on August 25. This contract was submitted to the National Guard Bureau for its approval pursuant to Section 15 of the Order. 9/ The National Guard Bureau by letter dated November 21, 1974, 10/ advised the

8/ Although there was some dispute whether Colonel Nye was absolutely necessary for the ORI and its preparation, there was no evidence that the Activity failed to use him to prepare for and participate in the ORI or that the Activity was acting in bad faith. In any event the postponement was merely one week.

9/ Section 15 states:
"Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities..."

10/ No reason for this delay was placed on the record herein, and although the delay seems unduly long, it was not alleged as

Vermont Adjutant General that 41 changes in the submitted agreement were required before the agreement would comply with applicable laws, regulations and the Order and could be approved.

The Activity and the Union met on February 6 and 7, 1973,^{11/} to discuss these changes directed by the National Guard Bureau. The chief negotiator for the Activity, Colonel Nye, after discussing with the Union some of the Union's objections to the directed changes and some of the Union's suggestions for modifying the contract clauses, in fact, reached agreement with the Union as to some of the clauses but advised the Union that, in effect, he could not assure the Union that the National Guard Bureau would approve the modifications that the Union and Activity had agreed upon. At the Union's suggestion, Colonel Nye called the National Guard Bureau, after the Union and Activity had agreed to some modifications, and secured the National Guard Bureau's approval of these modifications. In this way the parties did reach virtually full agreement during these meetings. The Union alleges that these circumstances establish that Colonel Nye did not have sufficient authority as a negotiator to agree and bind the Activity and that therefore the Activity^{12/} violated Section 19(a)(6) of the Order. The Union relied upon the fact that Colonel Nye had to call the National Guard Bureau before he could finally "agree" to the modifications.

In the private sector it is clear that for an employer to bargain in good faith with the representative of its employees, during negotiations of a collective bargaining agreement, the employer must designate a representative with sufficient authority to negotiate and such representative

Footnote 10 continued

an unfair labor practice. Further there was no evidence submitted that the Union complained to the Activity about the delay or requested that the National Guard Bureau act more expeditiously.

^{11/} The record does not establish the reason for the delay between the receipt of the November 1972 letter and the February 1973 meetings.

^{12/} The Union did not specifically allege that the National Guard Bureau violated the Order. Further the proposed Order contained in the Union's brief directed only that the Activity cease the unlawful conduct, not the National Guard Bureau itself. It is noted, however, that the Union did submit evidence that it asked Colonel Nye to contact the National Guard Bureau and ask that it send a representative to the meetings.

may not be a mere intermediary or courier. Cf. eg. Colony Furniture Co., 144 NLRB 1582; Schnell Tool and Die Corporation, 144 NLRB 385; and Miami Swim Products, 145 NLRB 1348. Although these cases are not binding when interpreting the Order, their rationale seems quite persuasive. In order for an activity and union to meaningfully bargain and negotiate the terms of a collective bargaining agreement, it seems clear that the activity must be represented at the negotiations by an agent who has sufficient authority to meaningfully negotiate, discuss and agree to the terms of the collective bargaining agreement. An agent for the activity with any less authority would result in meaningless negotiations and frustrate the purposes of the Order. However, in the instant case there is no showing that Colonel Nye did not have sufficient authority to negotiate on behalf of the Activity itself. In fact during the August negotiations he did reach full agreement with the Union concerning the collective bargaining agreement, which was in fact signed on August 25. Further, during the February meetings Colonel Nye could and did negotiate on behalf of the Activity and reached agreements concerning the modifications of many clauses as suggested by the Union. There was no evidence that Colonel Nye had to or did, call the Vermont Adjutant General or any representative of the Vermont Air National Guard. He could and did, during the February meetings, agree on behalf of and bind the Vermont Air National Guard with respect to the modifications of clauses in the agreement.

The record establishes, however, that Colonel Nye apparently could not bind or agree, in advance, on behalf of the National Guard Bureau. He sought and received the National Guard Bureau's approval of the agreed to modifications before they became final. The question is then presented whether the National Guard Bureau was required to be represented at the meetings by an agent with sufficient authority to negotiate on its behalf and whether Colonel Nye's presence as chief negotiator for the Activity, without this authorization on behalf of the National Guard Bureau, violated Section 19(a)(6) of the Order.

The Section 15 of the Order provides that after an agreement with a labor organization is arrived at, it is subject to the approval of the head of the agency or his designee and that the agreement "shall be approved if it conforms to applicable laws, to existing published agency policies and regulations and other regulations of other appropriate authorities..." Section 11 of the Order provides that if an issue develops during negotiations as to whether a proposal is contrary to law, regulations, the Order, etc., and is therefore non-negotiable, certain procedures shall be followed to resolve such issue, culminating in taking the

dispute to the FLRC. The unfair labor practice provisions of the Order are not part of these procedures.

In the circumstances present in this case it is concluded that an official National Guard Bureau is the appropriate party, under Section 15 of the Order to have reviewed the August 25 agreement.^{13/}

The National Guard Bureau, did not approve the agreement and concluded that 41 changes were required, under Section 15 of the Order in order to bring the contract into conformity with applicable laws, regulations, policies and the Order. The Order provides that if the Union disagreed with the National Guard Bureau's refusal to approve the contract because the Union disagreed with the determination that certain clauses of the agreement violated laws, regulations, policies and the Order, the Union should proceed pursuant to Section 11(c) of the Order and ultimately present its arguments to the FLRC. Cf. AFTE, AFL-CIO, and Supship USN, 11th Naval District; FLRC No. 71A-49.

When the agreement was returned as disapproved, the Union chose not to appeal by following the procedure set forth in Section 11(c) of the Order; rather the Union decided to negotiate with the Activity concerning the clauses that had been disapproved and the modifications directed by the National Guard Bureau.

Because the National Guard Bureau was the approving agency under Section 15 of the Order, the Order does not require that they be present during negotiations. It merely provides that the agreement, after it is reached by both the local activity and union, be submitted to the National Guard Bureau for approval. The directed changes were, in effect, those changes of the existing clauses, which the National

^{13/} The parties were requested to brief the precise relationship between the Vermont Air National Guard and the National Guard Bureau. The Union in its brief did not do so. The parties were not able, at the hearing, to reach a stipulation as to the relationship of the Vermont Air National Guard and the National Guard Bureau and the Union did not submit any substantial evidence with respect to this relationship. However, the representations made by the counsel for the Activity at the hearing, although not agreed to by the Union, were not denied nor were any representations to the contrary made by the Union. I conclude therefore that the representative of the National Guard Bureau was an official who could properly act, pursuant to Section 15 of the Order, on behalf of the head of the Agency.

Guard Bureau perceived as necessary for it to approve the contrasting by bringing the agreement into conformity with the laws, regulations, etc. The Order does not require that the National Guard Bureau had to be present during the negotiation sessions of February 6 and 7, but merely that any agreement reached between the Union and the Activity, concerning clauses which the National Guard Bureau had previously found not acceptable, may be resubmitted to the National Guard Bureau for its approval under Section 15 of the Order.^{14/}

It is concluded therefore that the Order does not require that Colonel Nye had to have authority to negotiate on behalf of the National Guard Bureau or that the National Guard Bureau be represented, but only that Colonel Nye have adequate authority to negotiate on behalf of the Activity, which he did. When he stated that he could not negotiate beyond the directed changes, he was, in effect, merely stating that he could not state in advance that the National Guard Bureau would approve any changes other than the modifications it suggested.

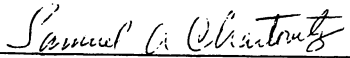
However, rather than agree on a series of different modifications and changes between themselves, and then submit them all at one time to the National Guard Bureau, the Union and the Activity, at the Union's suggestion, agreed that on a number of occasions, after certain changes had been agreed to, Colonel Nye would call the National Guard Bureau to see if it would approve such clauses, as modified. The Union and the Activity had between themselves, and with the cooperation of the National Guard Bureau, agreed upon a procedure whereby they were, in fact, obtaining Section 15 approval of the modified clauses from the National Guard Bureau as they renegotiated these clauses.

It is concluded therefore based on all the foregoing that Colonel Nye did have adequate authority to negotiate on behalf of the Activity during these February 6th and 7th negotiation meetings, that the National Guard Bureau did not have to be represented at these meetings and that, therefore, Respondent Activity did not engage in conduct which violated Section 19(a)(1) and (6) of the Order.

^{14/} The "directed" modifications were merely the National Guard Bureau's suggestions as to those modifications of the submitted agreement which it could state in advance it would approve.

Recommendation

In view of the findings and conclusions made above, it is recommended that the Assistant Secretary of Labor for Labor-Management Relations dismiss the complaint.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: March 29, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE,
U.S. ARMY,
U.S. ARMY COMMUNICATIONS COMMAND AGENCY,
FORT SAM HOUSTON, TEXAS
A/SLMR No. 398

The Petitioner, National Federation of Federal Employees, Local 28, (NFFE) sought an election in a unit of all employees of the U.S. Army Communications Command Agency (USACC) at Fort Sam Houston, Texas. The three USACC directorates located at Fort Sam Houston, which make up the petitioned for unit, were formed as the result of a reorganization which placed all communications related activities under the same major command located at Fort Huachuca, Arizona. The three USACC directorates in the claimed unit are the U.S. Army Communications Command Agency, Fort Sam Houston (USACC-FSH); the U.S. Army Communications Electronics Engineering Installation Agency - CONUS Regional Field Office (Central), (CEEIA); and the U.S. Army Communications Command Agency - Health Services Command (USACC-HSC). The USACC-FSH and the CEEIA were formed out of existing units located in the Headquarters, Fifth U.S. Army and the Headquarters, Fort Sam Houston, but the USACC-HSC was not in existence prior to the reorganization. The heads of all three of the directorates designated the Fort Sam Houston Civilian Personnel Office as their agent for personnel and labor relations matters.

The Assistant Secretary concluded that the unit sought was not appropriate for the purpose of exclusive recognition under the Order. In this regard, he noted that there is no individual who has overall command responsibilities for USACC activities at Fort Sam Houston; the three directorates involved report upward to the USACC, Fort Huachuca, through separate intermediate channels; there is no evidence of integration of the operations of the three directorates at Fort Sam Houston; there is no evidence that either interchange or transfers are limited to employees in the claimed unit; the area of consideration for promotions is basewide; the competitive area for reduction-in-force actions is within an individual directorate rather than among the employees of the three directorates; and grievances are processed through individual directorate channels to the USACC, Fort Huachuca. Under these circumstances, the Assistant Secretary found that the employees of the three directorates at Fort Sam Houston did not share a separate and identifiable community of interest with each other, and that such a unit would not promote effective dealings and efficiency of operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
U.S. ARMY,
U.S. ARMY COMMUNICATIONS COMMAND AGENCY,
FORT SAM HOUSTON, TEXAS

Activity

and

Case No. 63-4786(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 28

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert D. Victoria. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, National Federation of Federal Employees, Local 28, herein called NFFE, seeks an election in a unit of all General Schedule and Wage Grade professional and nonprofessional, nonsupervisory employees of the U.S. Army Communications Command with duty stations at Fort Sam Houston and which encompasses: (a) the U.S. Army Communications Command Agency, Fort Sam Houston; (b) the U.S. Army Communications-Electronics Engineering Installation Agency - CONUS Regional Field Office (Central); and (c) the U.S. Army Communications Command Agency, Health Services Command. 1/ The Activity and the NFFE are in agreement that the petitioned for unit is appropriate. However, the matter was sent to hearing because, in the Assistant Regional Director's view, the petition presented issues concerning whether there was a community of interest among the employees in the petitioned for unit because of the effects of a recent Army-wide reorganization and whether the petitioned

1/ The unit inclusions appear as amended at the hearing.

for unit was, in part, a "carve-out" from existing units represented by the NFFE and by the American Federation of Government Employees, AFL-CIO, Local 2154, herein called the AFGE. 2/

The record reveals that located at Fort Sam Houston are two principal Army activities, along with a number of other organizations, including the three directorates involved in the petitioned for unit. The first of the principal activities is Headquarters, Fifth, U.S. Army, in which the NFFE was certified under Executive Order 10988 for essentially an activity-wide unit of all nonprofessional employees. The other principal activity is the Headquarters, Fort Sam Houston, in which the AFGE was certified under Executive Order 10988 for essentially an activity-wide unit of all nonprofessional employees. The record indicates that, at present, there are negotiated agreements covering both of the above-described units.

The record reflects that, pursuant to a major Army-wide reorganization, entitled "Operation Steadfast," most of which was effective on July 1, 1973, all communications related activities were placed under one central command, the United States Army Strategic Communications Command, which subsequently was designated as the United States Army Communications Command, hereinafter referred to as USACC, with headquarters located at Fort Huachuca, Arizona. The claimed unit consists of all of the employees of the three communications related directorates located at Fort Sam Houston which report upwards to the USACC, Fort Huachuca.

The first of the three USACC directorates covered by the subject petition is the U.S. Army Communication's Command Agency, Fort Sam Houston, herein called USACC-FSH. The record reveals that this directorate was formed, pursuant to a two step procedure, by combining administratively the Telecommunications Center Division of Headquarters, Fifth U.S. Army and the Communications and Electronics Division of Headquarters, Fort Sam Houston. Thus, on February 4, 1973, the Telecommunications Center Division of Headquarters, Fifth U.S. Army, whose employees were included in the unit represented by the NFFE, were placed under the administrative command of the Communications and Electronics Division of Headquarters, Fort Sam Houston, whose employees were in the unit represented exclusively by the AFGE. Thereafter, on July 1, 1973, the Communications and Electronics Division of Headquarters, Fort Sam Houston, including the Telecommunications Center Division, was taken out from under the jurisdiction of the Fort Sam Houston Commanding Officer and placed under the major command jurisdiction of the USACC. The mission, immediate supervision, job functions and work locations of the employees of the USACC-FSH have remained essentially the same as prior to the reorganization, except that they are no longer employees of Headquarters, Fifth U.S. Army and Headquarters,

2/ The AFGE did not intervene in the instant proceeding.

Fort Sam Houston. Prior to the reorganization, the Director of the USACC-FSH, was the Chief of the Communications and Electronics Division under the Headquarters, Fort Sam Houston, to which he reported. As a result of the reorganization, the Director of the USACC-FSH reports through Fort McPherson, Georgia, to the USACC Headquarters at Fort Huachuca. Moreover, as the head of a tenant activity, he now possesses authority over personnel matters of employees in USACC-FSH, although, in this regard, the record reveals that he has designated the Fort Sam Houston Civilian Personnel Office as his agent for personnel and labor relations matters.

The second USACC directorate covered by the instant petition is the U.S. Army Communications Electronics Engineering Installation Agency - CONUS Regional Field Office (Central), herein called CEEIA. Prior to the reorganization, the CEEIA was designated as the Telecommunications System Division in the Headquarters, Fifth U.S. Army and its employees were part of the unit represented by the NFFE. The present Director of the CEEIA was the Chief of the Telecommunications System Division prior to the reorganization. Although the record reflects that, subsequent to the reorganization, there was some change regarding the activities serviced by the CEEIA, the employees of the CEEIA continue to work at the same work locations and perform the same basic mission of engineering, installation, planning, and preparing funds estimates with respect to communications services, as prior to the reorganization. The record reveals that as a result of the reorganization the CEEIA Director reports through Fort Ritchie, Maryland, to the USACC at Fort Huachuca. As in the case of the Director of the USACC-FSH, the Chief of the Telecommunications System Division did not, prior to the reorganization, have the full authority over civilian personnel matters which he now has as the director of a tenant activity. However, in this regard, as with his counterpart in the USACC-FSH, the Director of the CEEIA has designated the Fort Sam Houston Civilian Personnel Office as his agent for civilian personnel services.

The third USACC directorate covered by the NFFE's petition is the U.S. Army Communications Command Agency - Health Services Command, herein called USACC-HSC. This directorate is responsible for providing communication services to certain Health Services Command installations which are not located at Fort Sam Houston and for providing staff services to Headquarters, Health Services Command, which is located at Fort Sam Houston. The USACC-HSC was not in existence prior to the reorganization of July 1, 1973. The record reflects that, at the time of the hearing in this matter, the Colonel who serves as the Director of the USACC-HSC and his secretary were the only individuals employed in this directorate. As in the case of the other two directorates, the Director of the USACC-HSC has designated the Fort Sam Houston Civilian Personnel Office as his agent for personnel services.

The record reveals that the employees of the directorates covered by the instant petition are located throughout the Fort Sam Houston complex and, for the most part, work out of the same buildings as prior to the reorganization. There is no evidence of interchange or

transfers among the employees in these directorates. The employees of the three directorates have available all of the same facilities, such as health clinics, cafeterias, payment centers, and credit unions, as the employees of Headquarters, Fifth U.S. Army and Headquarters, Fort Sam Houston. The record reveals also that the personnel policies and practices applicable to the employees in the claimed unit are essentially the same as before the reorganization because, as noted above, the Directors of each of the three USACC directorates at Fort Sam Houston have designated the Fort Sam Houston Civilian Personnel Office as their representative for personnel and labor relations matters. Moreover, no personnel programs or labor relations matters are uniquely applicable to employees in the claimed unit, i.e., the three USACC directorates located at Fort Sam Houston. In this regard, the evidence establishes that the area of consideration for job opportunities is basewide for all the employees located at Fort Sam Houston, including those in the three directorates which composes the claimed unit. The evidence further indicates that the competitive area for reduction-in-force actions has been specified, in agreements executed by the Civilian Personnel Office and the head of each directorate, as within each individual directorate of the USACC at Fort Sam Houston. With respect to grievance actions under the agency grievance procedure, the first two steps remain the same as before the reorganization but at the third step, although handled administratively by the Fort Sam Houston Civilian Personnel Office, the grievance would go to the head of the individual directorate for a decision rather than to the Commanding Officer of Fifth U.S. Army or of Fort Sam Houston, as was the case prior to the reorganization. Further, when a grievance is appealed above the third step by an employee of one of the USACC directorates at Fort Sam Houston, it now goes through respective directorate channels to the USACC at Fort Huachuca.

Based on the foregoing, I find that the unit sought by the NFFE is not appropriate for the purpose of exclusive recognition under the Order. Thus, the record reflects that while the three USACC directorates at Fort Sam Houston which are covered by the instant petition are under the same major command, located at Fort Huachuca, at Fort Sam Houston each is under an individual director who reports upwards through separate intermediate channels to the USACC Headquarters, and there is no individual in overall command of the USACC related activities at Fort Sam Houston. Moreover, while the employees of the three directorates share the same overall mission involving communications related activities, there is no evidence that there is any integration of their operations, or that interchange or transfers are limited to employees in the claimed unit. Further, the area of consideration for promotions is base-wide, and the competitive area for any reductions-in-force involving employees of the directorates is within an individual directorate rather than among the employees in the three directorates in the claimed unit. Finally, the evidence establishes that grievances are processed through individual directorate channels to the USACC at Fort Huachuca.

Under all of these circumstances, I find that the employees of the three directorates of the USACC at Fort Sam Houston do not share


June 20, 1974

a clear and identifiable community of interest with each other, and that such a unit would not promote effective dealings and efficiency of operations. Accordingly, I shall order that the NFFE's petition herein be dismissed. 3/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-4786(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 20, 1974



Paul J. Fasser, Jr. Assistant Secretary of
Labor for Labor-Management Relations

3/ Cf. General Services Administration, PBS, FSS, ADTS, Fresno, California, A/SLMR No. 293.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,
OFFICE OF MANAGEMENT SYSTEMS
A/SLMR No. 399

The Petitioner, American Federation of Government Employees, Local 2211, AFL-CIO (AFGE), sought an election in a unit composed of all of the Activity's professional and nonprofessional employees assigned to the Office of Management Systems (OMS) at the Headquarters of the Federal Aviation Administration (FAA). The Activity contested the appropriateness of the unit sought contending that OMS employees did not possess a clear and identifiable community of interest apart from other employees in the other divisions of the Headquarters, and that the claimed unit would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary determined that the proposed unit was not appropriate for the purpose of exclusive recognition. He noted that the studies OMS performed in collaboration with other Headquarters' divisions resulted in a close working relationship between employees of the OMS and those of other Headquarters' divisions. He noted also that the OMS and other Headquarters' employees shared similar skills and job classifications; had the same fringe benefits; and were subject to the same personnel policies and procedures. Under these circumstances, the Assistant Secretary concluded that the employees sought by the AFGE did not possess a clear and distinct community of interest separate and apart from other Headquarters' employees and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
OFFICE OF MANAGEMENT SYSTEMS

Activity

and

Case No. 22-5048(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2211, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Madeline E. Jackson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the Activity and the Petitioner, American Federation of Government Employees, Local 2211, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The AFGE seeks an election in a unit consisting of all professional and nonprofessional employees assigned to the Office of Management Systems (OMS) located at the Headquarters of the Federal Aviation Administration (FAA) in Washington, D.C. The Activity contends that a unit of employees limited to the OMS, which is one of approximately 25 offices at the same organizational level in FAA Headquarters, is inappropriate in that the OMS employees do not possess a clear and identifiable community of interest that is separate and distinct from other Headquarters' employees. The Activity further contends that the requested unit is based on the AFGE's extent of organization and that, if granted, such unit would not promote effective dealings and efficiency of agency operations. On the other hand, the AFGE asserts that the OMS employees possess a separate and distinct

community of interest apart from other FAA Headquarters' employees based on their specific skills and functions. 1/ The Activity noted also that it would exclude the secretaries of the division chiefs of the OMS from any unit found appropriate on the basis that they are confidential employees. In this regard, the AFGE contends that the duties of these employees do not place them in the category of confidential employees and, therefore, they should be included in the unit requested.

The FAA is one of the operating components of the Department of Transportation. Its mission is to promote all aspects of aviation safety. FAA Headquarters, which is under the direction of an Administrator, assisted by a Deputy Administrator, is located in Washington, D.C., and employs approximately 3500 employees of whom approximately 180 are employed in the OMS. In the Headquarters there are six staff offices (Aviation Medicine, General Aviation, Civil Rights, Information, Chief Counsel, and International Aviation Affairs) and four administrative divisions, Plans, Operations, Administration, and Engineering and Development. The administrative divisions are under the supervision of Associate Administrators who are responsible directly to the FAA Administrator and the Deputy Administrator. Each administrative division is responsible for staff direction in the particular program area indicated by its title.

The OMS is one of eight components under the jurisdiction of the Associate Administrator for Administration. 2/ Its function is the development and administration of the FAA's organizational plans, management systems and controls, administrative standards and procedures, the evaluation of their adequacy, and the promotion of their improvement in terms of the effectiveness and the economy of the FAA program performance. The OMS is headed by a Director, who supervises an Executive Staff and four operating divisions, namely: the Management Analysis Division, the Data Systems Division, the Information and Statistics Division, and the Systems Support Division. The Management Analysis Division is responsible for organizational planning, review, approval and documentation; management development; management engineering and management systems methodology and applications; an agency management improvement program; and an agency staffing standards program. It develops and recommends agency policies, standards, systems, procedures, and program plans. The Data Systems Division is responsible for automated data systems development and automatic data processing, and establishes long-range plans for future development of data systems. It develops,

1/ The record reveals that there is no history of bargaining with respect to the employees in the claimed unit. However, the record discloses that there are three exclusive units within the Headquarters as well as seven exclusive units within the Washington, D.C. Metropolitan Area which are viewed by the Activity as field operations.

2/ These components include also the Office of Personnel.

evaluates and reviews proposed FAA data processing, and information reporting systems, and administers an agency-wide program for the development of standard data classification and coding structures for common use. The functions of the Information and Statistics Division pertain to aviation statistics and agency management information and statistics. It develops and administers programs and systems for the validation, correlation, analyses, and timely presentation and issuance of management information and statistics. The Systems Support Division has responsibility for standards and procedures for agency directives, records, reports, and other paperwork management programs; the application of modern audio-visual technology to agency programs; and library and printing management. It provides editorial, graphics, and publishing services to Headquarters.

The record discloses that the OMS frequently performs studies in collaboration with the various other Headquarters' divisions. As a result, there is a close functional and administrative relationship among both professional and nonprofessional employees of the several components within the OMS as well as with other employees throughout the Headquarters. Thus, where more than one Headquarters' office may be involved in a particular study, a team effort involving OMS and other Headquarters' employees often is required and, occasionally, an OMS employee member of the team may act as the team leader. Further, there is substantial contact on a daily basis between the OMS employees and those of the other divisions throughout Headquarters. The record reveals that the OMS employees, for the most part, work directly under their own component supervisors; however, there are times when, depending upon their work locations, they work under the supervision of a supervisor at the work site who is not an OMS employee. Although there are many varied job classifications within the OMS, with the exception of those relating to editorial functions, all others are duplicated throughout the Headquarters. Moreover, the record indicates that transfer into and out of the OMS, by reassignment and promotion, is not uncommon.

The record discloses that the OMS shares common personnel policies, practices, and procedures with other Headquarters' divisions. Thus, the Personnel Operations Division within the Office of Personnel furnishes all personnel services for Headquarters' employees, implements personnel policies, and issues procedural guidance. Further, personnel activities, such as recruitment, placement, employee relations, and servicing of personnel records, are conducted by the Personnel Operations Division. While the Chief of each division within the OMS has the authority to select employees for his division, the record reveals that such authority is subject to the approval of the Personnel Operations Division. The evidence establishes that FAA Headquarters components operate under the same merit promotion plan, and job vacancies are posted on a Headquarters-wide basis. 3/ Similarly, the

3/ In this regard, the evidence establishes that for classifications of GS-12 and below, the area of consideration may be restricted to the principal organizational segment.

reduction-in-force procedure is Headquarters-wide. Employees of the OMS share common parking, cafeteria, rest rooms, libraries, and credit union facilities with the other Headquarters' employees, are subject to the same conditions of employment and enjoy the same fringe benefits.

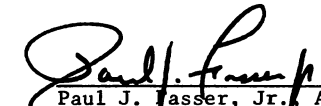
The record discloses also that the Headquarters' labor-management relations are handled by the Employee-Management Relations Branch of the Personnel Operations Division which administers labor relations policies and programs, provides labor relations technical guidance, and assists in the negotiation of agreements. However, authority to negotiate and sign a negotiated agreement has been delegated to office and service heads.

Based on the foregoing, I find that the OMS employees do not possess a clear and identifiable community of interest separate and distinct from the other employees employed at FAA Headquarters. Thus, the record reveals that there are close working relationships between OMS employees and other Headquarters' employees and that the skills and job classifications of the OMS employees are, for the most part, not unique to that particular component. Additionally, all components of the Headquarters operate under the centralized control of the Administrator and are serviced by the central Personnel Operations Office. In this connection, it was noted that the area of consideration for promotions and reduction-in-force actions is, in most instances, Headquarters-wide and that all employees of the FAA Headquarters share the same facilities and have the same fringe benefits and grievance procedures. Moreover, Headquarters labor relations matters are handled centrally at the Activity level. Under these circumstances, I find that the unit petitioned for is not appropriate for the purpose of exclusive recognition and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. 4/ Accordingly, I shall order that the petition herein be dismissed. 5/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-5048(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 20, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

4/ Cf. Department of Health, Education and Welfare (HEW), Health Services and Mental Health Administration (HSMHA), Maternal and Child Health Services and Federal Health Programs Service, A/SLMR No. 192.

5/ In view of this disposition, it was considered unnecessary to decide the eligibility question raised with respect to the secretaries of the division chiefs of the OMS.

June 21, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF THE NAVY,
NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY
A/SLMR No. 400

This proceeding arose upon the filing of three unfair labor practice complaints by the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO (Complainant), against the United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky (Respondent).

In the first complaint, it was alleged, in substance, that the Respondent violated Section 19(a)(1), (2), (5), and (6) of Executive Order 11491 by unilaterally changing the terms and conditions of its negotiated agreement with the Complainant by deleting the classification of Progressman from the bargaining unit without first consulting or negotiating with the Complainant. Because, as found by the Administrative Law Judge, the Progressmen involved had been supervisors within the meaning of Section 2(c) of the Order since 1953, the Assistant Secretary found that the Respondent's refusal to recognize the Complainant as their exclusive bargaining representative was not violative of the Order. In this connection, the Assistant Secretary did not view the Respondent's conduct as an attempt to change unilaterally the scope of the existing bargaining unit but, rather, as an attempt to assure that Progressmen who admittedly were performing supervisory functions would not be included in the bargaining unit. The Assistant Secretary noted, however, that this was not to say that if Progressmen were hired subsequently who did not exercise supervisory functions he would consider them properly to be excluded from the unit.

In its second complaint, the Complainant alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by excluding an observer, representing the Complainant, from participating in the resolution of an employee's grievance filed under the Respondent's grievance procedure. The Assistant Secretary adopted the Administrative Law Judge's finding that the Respondent violated Section 19(a)(1) and (6) by depriving the Complainant of a specific right under Section 10(e) of the Order. In this connection, the Administrative Law Judge found: (1) the Grievance Examiner's inquiry was a formal discussion within the meaning of Section 10(e); (2) in his discussions with employees, the Grievance Examiner was a designated representative of management or agent of management for the purposes of Section 10(e); (3) the subject matter of the inquiry concerned a grievance, personnel policy or practice affecting working conditions of employees in the unit within the meaning

of Section 10(e); (4) the Complainant's right to be afforded the opportunity to be represented in this matter is based upon the express provisions of Section 10(e) and is not merely a contractual right; (5) the parties' negotiated agreement nowhere expressly stated or indicated that the Complainant was foregoing or waiving all rights relative to formal discussions under Section 10(e); and (6) at no time did the Complainant indicate to the Respondent that it was not interested in being present at the subject discussions, the timing of which was a matter particularly within the knowledge of the Respondent.

By its third complaint, the Complainant alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to recognize the Complainant as the representative of an employee involved in an adverse action proceeding. The Administrative Law Judge, although recommending a finding of violation of Section 19(a)(1) based on a supervisor's improper statements to two officials of the Complainant, concluded that neither Section 10(e) of the Order nor the parties' negotiated agreement conferred upon the Complainant the absolute right to represent the employee involved in connection with the adverse action proceeding.

The Assistant Secretary noted that Section 10(e) clearly imposes upon exclusive representatives an affirmative obligation to represent the interests of all unit employees. Given the particular circumstances of this case, involving a unit employee who was the subject of an adverse action proceeding, the Assistant Secretary found, contrary to the Administrative Law Judge, that the Complainant as the employee's exclusive representative had an ongoing obligation under Section 10(e) to represent the interests of the employee until such time as he indicated his desire to choose his own representative pursuant to Section 7(d)(1) of the Order. Contrary to the Administrative Law Judge, the Assistant Secretary further found that none of the provisions of the parties' negotiated agreement constituted a clear and unmistakable waiver of rights or obligations flowing from Section 10(e) of the Order. Nor, in the Assistant Secretary's view, did Section 19(d) of the Order require dismissal of this complaint. Thus, the Assistant Secretary concluded that under the circumstances of this case the issue as to whether, under the Executive Order, the Complainant had the obligation to represent the employee involved by virtue of its exclusive representative status could not be raised properly under the adverse action appeals procedure involved herein.

Accordingly, the Assistant Secretary concluded, contrary to the Administrative Law Judge, that the Respondent's failure to recognize the Complainant as the representative of the unit employee involved in the adverse action proceeding was in derogation of the Complainant's exclusive representative status and, thereby, violated Section 19(a)(6) of the Order. Moreover, in the Assistant Secretary's view, such conduct

had a concomitant coercive effect upon the rights of unit employees assured by the Order in violation of Section 19(a)(1) of the Order. In agreement with the Administrative Law Judge, the Assistant Secretary found that a supervisor's improper statements to two officials of the Complainant also constituted a violation of Section 19(a)(1) of the Order.

Under these circumstances, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Executive Order and that it take certain affirmative actions consistent with his decision.

A/SLMR No. 400

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE NAVY,
NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY

Respondent

and

Cases Nos. 41-3126(CA),
41-3128(CA), and
41-3129(CA)

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
LOCAL LODGE 830, AFL-CIO

Complainant

DECISION AND ORDER

On January 11, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaints in Cases Nos. 41-3128(CA) and 41-3129(CA), and had not engaged in the unfair labor practices alleged in the complaint in Case No. 41-3126(CA). With regard to the complaints in Cases Nos. 41-3128(CA) and 41-3129(CA), the Administrative Law Judge recommended that the Respondent take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation, and that the complaint in Case No. 41-3126(CA) be dismissed in its entirety. Thereafter, both the Complainant and the Respondent filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject cases, including the exceptions and supporting briefs filed by both parties, I hereby adopt the Administrative Law

Judge's findings, 1/ conclusions, and recommendations, 2/ except as modified below.

The complaint in Case No. 41-3129(CA) alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) by failing to recognize the Complainant as the representative of an employee involved in an adverse action proceeding. The Administrative Law Judge, although recommending a finding of violation of Section 19(a)(1) of the Order based on a supervisor's improper statements to two officials of the Complainant, concluded that neither Section 10(e) of the Order nor the parties' negotiated agreement conferred upon the Complainant the absolute right to represent the employee involved in connection with the adverse action proceeding. He noted that Section 10(e) must be viewed in light of Section 7(d)(1) of the Order, and that if a labor organization automatically became a unit employee's representative in this context, then the choice reserved for such an employee under Section 7(d)(1) to choose his own representative would be meaningless. The Administrative Law Judge also found that the Complainant, by the terms of its negotiated agreement, had acknowledged that unless specifically chosen by the individual employee involved, it would not act as his representative in an adverse action proceeding. Moreover, he concluded that, under the circumstances, further proceedings in this matter were unwarranted based on Section 19(d) of the Order.

1/ On page 26 of his Report and Recommendation, the Administrative Law Judge inadvertently misquoted Section 3 of Article 14 of the parties' negotiated agreement. The phrase "appeals the union" should read "appeals the action." This inadvertent error is hereby corrected.

2/ Because, as found by the Administrative Law Judge in Case No. 41-3126(CA), the Progressmen involved have been supervisors within the meaning of Section 2(c) of the Order since 1953, I find that the Respondent's refusal to recognize the Complainant as their exclusive bargaining representative was not violative of the Order. In this connection, the Respondent's conduct herein was not viewed as an attempt to change unilaterally the scope of the existing bargaining unit. Rather, under the circumstances of this case, it is clear that the Respondent merely was seeking to assure that Progressmen who admittedly were performing supervisory functions would not be included in the bargaining unit. However, this is not to say that if Progressmen were hired subsequently who did not exercise supervisory functions I would consider them properly to be excluded from the unit.

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Section 10(e) of the Order 3/ clearly imposes upon exclusive representatives an affirmative obligation to represent the interests of all unit employees. 4/ Under the particular circumstances of this case, involving a unit employee who is the subject of an adverse action proceeding, I find that the Complainant (the employee's exclusive representative) had an ongoing obligation under Section 10(e) of the Order to represent the interests of the employee until such time as he indicated his desire to choose his own representative pursuant to Section 7(d)(1) of the Order. 5/ Further, I find that the provisions contained in Article 14, Sections 2 and 3, of the parties' negotiated agreement do not constitute a clear and unmistakable waiver of rights or obligations flowing from the Order. 6/ Thus, as found by the Administrative Law Judge, by virtue of these agreement provisions the Complainant recognized the role of the individual employee's choice in choosing his own representative in an adverse action proceeding. However, contrary to the Administrative Law Judge, I find no clear indication in these provisions that, until an employee makes a choice, his exclusive representative has no obligation to represent his interests pursuant to Section 10(e) of the Order. Nor do I find that Section 19(d) of the Order is dispositive in this matter. In this regard, it was noted that at the adverse action hearing before the Civil Service Commission, Atlanta Region, both the Respondent and the Complainant took the position that the question of the Complainant's right to represent an employee under Executive Order 11491, as amended, was a separate and distinct issue and should not enter into the Civil Service Commission's hearing. Further, in its decision of October 26, 1971, the Civil Service Commission, Atlanta Region, indicated that with respect to the Complainant's "unfair labor

3/ Section 10(e) of the Order provides, in pertinent part, that "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. . . ." (Emphasis added.)

4/ See U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278.

5/ As noted above, Section 10(e) of the Order provides that an exclusive representative is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. It should be noted, in this regard, that, within the context of this obligation, clearly an exclusive representative retains the discretion to make decisions as to the merits of a particular unit employee's case.

6/ Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223.

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practices claim, alleging that the agency's failure to allow Mr. Seidl, acting in his capacity as an official of the union, to represent the employee . . . that is not at issue here." Under these circumstances, I conclude that the issue as to whether, under the Executive Order, the Complainant had the obligation to represent the employee involved by virtue of its exclusive representative status could not be raised properly under the adverse action appeals procedure involved herein. 7/

Based on the foregoing, I find that the Respondent's failure to recognize the Complainant as the representative of the unit employee involved in the adverse action proceeding was in derogation of the Complainant's exclusive representative status and, thereby, violated Section 19(a)(6) of the Order. Moreover, in my view, such conduct had a concomitant coercive effect upon the rights of unit employees assured by the Order in violation of Section 19(a)(1) of the Order.

THE REMEDY

Having found that the Respondent engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, shall:

1. Cease and desist from:

a. Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the employee's exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

b. Interfering with, restraining, or coercing its employees by failing to provide the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the opportunity to be represented at formal discussions between management and employees or

employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

c. Refusing to allow the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the employees' exclusive representative, to represent the interests of any employee in the bargaining unit who is involved in an adverse action proceeding where there is no indication that the employee has chosen a representative other than the exclusive representative.

d. Informing its employees that an official of the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the employees' exclusive representative, in his official capacity, may not be designated as an employee's representative in making a reply to a notice of proposed adverse action.

e. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

a. Upon request of the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, consider Grievance Examiner Shaw's inquiry and report and recommendation relative to Paul Prince's appeal of his letter of reprimand null and void; rescind the Commanding Officer's approval and adoption of Grievance Examiner Shaw's report and recommendation; and proceed with the processing of Paul Prince's appeal of his letter of reprimand under the formal administrative grievance procedure as though Grievance Examiner Shaw had not yet conducted his inquiry into the matter.

b. Notify the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, of, and give it the opportunity to be represented at, formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

c. Notify the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, that it will be allowed, as the employees' exclusive representative, to represent the interests of any employee in the bargaining unit who is involved in an adverse action proceeding where there is no indication that the employee has chosen a representative other than the exclusive representative.

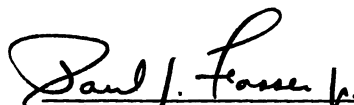
7/ Cf. Veterans Administration, Veterans Benefits Office, A/SLMR No. 296.

d. Post at its facility at the Naval Ordnance Station, Louisville, Kentucky, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, U. S. Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

e. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case No. 41-3126(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 21, 1974


Paul J. Fisser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions concerning employees in the unit without giving International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT inform employees that an official of the employees' exclusive representative, International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, in his official capacity, may not be designated as an employee's representative in making a reply to a notice of proposed adverse action.

WE WILL NOT refuse to allow the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the employees' exclusive representative, to represent the interests of any employee in the bargaining unit who is involved in an adverse action proceeding where there is no indication that the employee has chosen a representative other than the exclusive representative.

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 Executive Order.

WE WILL, upon request of the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, treat as null and void Grievance Examiner Shaw's report and recommendation relative to employee

(Cont'd)

Paul Prince's appeal of his letter of reprimand, and will rescind the Commanding Officer's approval and adoption thereof, and will proceed with the processing of Paul Prince's appeal of his letter of reprimand under the formal administrative grievance procedure as though Grievance Examiner Shaw had not yet conducted his inquiry into the matter.

WE WILL allow the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the employees' exclusive representative, to represent the interests of any employee in the bargaining unit who is involved in an adverse action proceeding where there is no indication that the employee has chosen a representative other than the exclusive representative.

(Agency or Activity)

Dated _____ By _____
(Signature and 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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is 1371 Peachtree Street, N.E., Room 300, Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



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In the Matter of :

UNITED STATES DEPARTMENT OF THE NAVY :
NAVAL ORDNANCE STATION :
LOUISVILLE, KENTUCKY :
Respondent :

and :

LOCAL LODGE 830, INTERNATIONAL :
ASSOCIATION OF MACHINISTS AND :
AEROSPACE WORKERS, AFL-CIO :
Complainant :

.

Case No. 41-3126 (CA)
41-3128 (CA)
41-3129 (CA)

Edward T. Borda, Esquire
Department of the Navy
Office of Civilian Manpower Management
1735 N. Lynn Street
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For the Respondent

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Grand Lodge Representative
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Cleveland, Ohio 44130

Harold Barrett
3133 Braddock Street
Dayton, Ohio 45420

For the Complainant

REPORT AND RECOMMENDATION

Preliminary Statement

This proceeding, heard in Louisville, Kentucky on February 13, 14, 15, and 16, 1973, arises under Executive Order 11491, as amended, (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereafter called the Assistant Secretary), an Order Consolidating Cases and Notice of Hearing on Complaints issued on January 3, 1973, with reference to alleged violations of various sections of the Order as set forth in the above-captioned complaints filed by Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter called the Union or Complainant) against the U.S. Department of the Navy, Naval Ordnance Station, Louisville, Kentucky (hereafter called the Activity or Respondent). 1/

The complaint in Case No. 41-3126(CA), filed on August 23, 1972, alleges that the Activity violated Section 19(a) (1), (2), (5) and (6) of the Order by "...unilaterally changing the terms and conditions of the labor agreement including delimiting (sic) a classification from the bargaining unit and (refusing) to consult or negotiate with the Union in advance on the matter." The complaint in Case No. 41-3128(CA) was filed on August 25, 1972, and amended on September 18, 1972. As amended, the complaint alleges that the Activity violated Section 19(a) (1) and (6) of the Order "...by excluding the Union observer from participating in the resolution of a grievance under the Agency's

2/ At the hearing the parties indicated their desire to have three separate decisions issue on the three complaints which are the subject matter of this proceeding. I agreed to accommodate the parties. However, in Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR, No. 334, which issued on December 4, 1973, the Assistant Secretary held, in similar circumstances, that an Administrative Law Judge does not possess the authority to sever cases which previously had been consolidated for hearing. Accordingly, since it would be improper to sever the cases by issuing three separate Reports, I shall issue one Report which will encompass the allegations of the three above-captioned complaints.

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procedure." Third complaint, Case No. 41-3129(CA) was filed on August 25, 1972, and as amended on September 18, 1972, alleges that the Activity violated Section 19(a) (1) and (6) of the Order by "On or about 3 May 1972...refusing to honor a time extension on an appeal on the ground that the Chief Steward was not authorized to represent the appellant." 2/

At the hearing both parties were represented and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses, and argue orally. Oral argument was waived and comprehensive briefs were filed by the parties.

Upon the entire record in this matter, from my reading of the briefs and my observation of the witnesses and their demeanor, I make the following Findings of Fact and Conclusions of Law:

(1) Introduction

Since 1963, and all time material hereto the Union has been the collective bargaining representative of various of the Activity's employees. The Union and the Activity are parties

2/ All three complaints contain the following "catch-all" phrase:

"By the above and other acts, the above-named Activity has interfered, with restrained, and coerced employees in the exercise of rights guaranteed in Section 1 of Executive Order 11491." At the hearing, counsel for Respondent moved to strike from the complaints reference to "and other." I refused to grant Respondent's motion indicating at the time that if counsel for Respondent felt that Complainant was exceeding the four-corners of the complaints during litigation, he could object. Respondent in its brief renewed its motion to strike the words "and other" on the ground that these words failed to conform to Section 203.3 (a) (3) of the Rules and Regulations of the Assistant Secretary. Although I find the reference to "and others" (acts) superfluous and does not expand the specific allegations in the complaints, this does not warrant striking such language and accordingly the motion is denied.

to a collective bargaining agreement entered into on or about December 5, 1968. The agreement, which was extended in 1970, was still in effect at the time of these proceedings. 3/ The collective bargaining unit encompasses about 133 job classifications and consists of approximately 2,450 employees.

- (2) The Alleged Unfair Labor Practice Conduct - Case No. 41-3126 (CA)

On June 9, 1972, Arbitrator Dr. Louis C. Kesselman issued his decision with regard to a grievance filed by an employee who received a disciplinary warning by an Acting Progressman for refusing to carry out instructions. The basic facts which led up to the dispute were set forth in the Arbitrator's decision as follows: 4/

"...The Station maintains a Progress Branch in the Manufacturing Division of the Industrial Department which is charged with moving materials throughout the plant and has employees located in various buildings. At the time the grievance arose, Mr. Walter P. Simmons was Head, Progress Branch, and Mr. Mural Daniel was Supervisory Production Controller over three work areas. Under him, in each of these areas, was a Progressman and at least one Assistant Progressman. Both of the latter are members of the bargaining unit.

"On 29 November 1971, Progressman Anthony M. Stitch, charged with scheduling and expediting the flow of work in C-Building was absent from the Station. In his absence, Assistant Progressman Harold J. Horlander directed Fork Lift Operator Clarence Wharton to perform a task and, when he failed to do so, informed him that he would "write him up." The following day, although Progressman Stitch had returned to work, Assistant Progressman Horlander preceeded to make an entry on Mr. Wharton's Employee Record Card.

"Originally, Mr. Wharton's grievance was based upon his belief that an Assistant Progressman cannot exercise the supervisory authority of a Progressman and that, therefore, it was not proper for Mr. Horlander to make the entry on his card after Mr. Stitch returned to work. Now the Union has broadened its claim to contend that neither a Progressman, nor an Assistant Progressman acting in his absence, is a first line supervisor."

3/ Complainant Exhibit No. 1.

4/ Joint Exhibit No. 10.

The question before the Arbitrator was whether Progressmen were first line supervisors for the purpose of initiating disciplinary action on their own responsibility and authority. Dr. Kesselman found, inter alia that:

"Progressmen have exercised some first line supervisory responsibility at the Station for many years. Documentary evidence and testimony support management's claim that Progressmen directed the work of bargaining unit members and approved their leaves and rated their performances. However, the evidence is not nearly so clear as far as whether Progressmen have been considered to be first line supervisors for the initiation of disciplinary action on their own responsibility...."

Based upon the evidence submitted to him, Dr. Kesselman concluded:

"The Progressman rating at the Station is a mixed position with staff and some supervisory responsibilities. However, the evidence does not bear out management's claim that it has properly delegated the responsibility of imposing disciplinary penalties upon employees for just cause to Progressmen, in accordance with the Article 32, Section 5 requirement that 'unit employees will be specifically assigned to one (1) first line supervisor, who shall be responsible for...initiating disciplinary actions...employees under his supervision.' Its action is not supported by the Basic Agreement, the pertinent job descriptions, clear past practice or the Navy's definition of the Progressman's major work functions."

Accordingly, Dr. Kesselman recommended that the grievance be sustained.

By letter dated June 26, 1972, 5/ the Activity notified the Union that it was accepting the Arbitrator's recommendation. However, the Activity informed the Union at this time that it intended to have "...the Job Description of all Progressmen having supervisory responsibilities to be rewritten to include 'first line' supervisory authority and responsibility as outlined in Article 32 Section 5 of the Basic Agreement." 6/

5/ Joint Exhibit No. 11.

6/ Article 32 Section 5 of the Agreement (Complainant Exhibit No. 1) provides:

"Section 5. The Employer agrees that unit employees will be specifically assigned to one (1) first line supervisor, who shall be responsible for approving leave, marking performance ratings, initiating disciplinary action, or directing the work of employees under his supervision."

The Activity also notified the Union that "...all Progressmen who exercise supervisory authority will henceforth be excluded from the Bargaining Unit, in accordance with Section 10 of the Executive Order 11491."

The Union's letter in response to the Activity, dated June 29, 1972, 7/ asserted that Progressmen would not be converted into supervisors by simply adding the duty of "initiating disciplinary actions" to their job descriptions. In addition the Union charged that unilaterally changing the job description and excluding Progressmen from the bargaining unit constituted a violation of Section 19(a)(1), (2), (5), and (6) of the Order. The Union requested that further action by the Activity be withheld and suggested that the parties meet in an effort to resolve the dispute.

The parties met on July 20 and discussed the Union's unfair labor practice charge. By letter dated July 24, 1972, 8/ the Activity gave the Union its "final answer" and informed the Union that it had not changed its position on rewriting the Progressmen's job description. The Activity further informed the Union, however, that it would make a study of the situation after the rewritten job descriptions were classified and "If in our opinion retaining them in the Unit would violate Executive Order 11491, as amended, we will submit the question as a Unit Clarification Question with the Assistant Secretary for Labor-Management Relations for final determination."

A subsequent letter from the Activity to the Union, dated September 20, 1972, 9/ restates the Activity's position on the matter. However, after informing the Union of its intention to "study" the situation and possibly submitting the question to the Assistant Secretary as a Unit Clarification determination, the Activity further states: "Management will not unilaterally withdraw Progressmen for the Unit." 10/

7/ Joint Exhibit No. 12.

8/ Joint Exhibit No. 13.

9/ Joint Exhibit No. 14.

10/ At the close of the hearing, counsel for Respondent stated that the Activity would not "henceforth" recognize that Progressmen were included in the bargaining unit since the evidence, in its view, "clearly" established the supervisory status of Progressmen.

The evidence adduced at the hearing 11/ reveals that the Progress Branch is located in the Manufacturing Division of the Activity's Industrial Department and is responsible for maintaining surveillance over the flow of work in and between all production activities in the manufacturing shops of the plant in order to assure delivery of items in accordance with

11/ The Activity filed a Motion to Dismiss dated September 19, 1972, with the Regional Administrator of the Atlanta Region, Labor-Management Services Administration, U.S. Department of Labor on the ground that a reasonable basis for the complaint had not been established and/or a satisfactory offer of settlement had been made to the allegations therein. The Union filed a Motion in Opposition to the Activity's motion but the Regional Administrator did not specifically rule on said motions. At the hearing the motions and supporting briefs were submitted to me and I informed the parties that I would consider the motions in my Report. The Activity's Motion to Dismiss is posited on the belief that the sole issue presented by the complaint is whether the Activity may unilaterally exclude Progressmen from the established unit on the basis that they are supervisors. The Activity argues that it did not exclude Progressmen from the unit, pointing to its decision to submit the matter to the Assistant Secretary via a unit clarification petition if it concluded that Progressmen were supervisors within the meaning of the Order.

The Motion to Dismiss is denied. The question of whether the Activity unilaterally excluded Progressmen from the unit is not the only issue in this case. Whether the Activity was permitted to unilaterally change the Progressmen's job description is also in issue. In any event the question of unilateral exclusion of Progressmen from the unit was put in issue when the Activity indicated, at the conclusion of the hearing, that it would not "henceforth" recognize that Progressmen were included in the bargaining unit.

With regard to the Activity's contention that a satisfactory offer of settlement has been made, under Section 203.7(a) of the Regulations, an offer of settlement must be made to and approved by the Regional Administrator. No approval can be construed on the facts herein.

job order and/or project order requirements. The Progress Branch has approximately 106 employees assigned to it and is headed by Walter P. Simmons, whose official title is Supervisory Production Controller, GS-12. Reporting to Simmons are two Supervisory Production Controllers, GS-11, and one Foreman Rigger. One GS-11 Supervisory Production Controller has three Progressmen reporting to him and the other GS-11 Supervisory Production Controller has four Progressmen who report to him. Each Progressman is assigned to a separate cost center or building and is responsible for the timely completion and movement of the work in his area. Progressmen have from three to fifteen Progress Branch employees permanently assigned to them. These employees are classified as Assistant Progressmen, Production Dispatchers, Forklift Operators, Metal Sawing Machine Operators, Clerk Typists, and Tractor Operators.

The testimony of John R. Fogarty, Sr., a member of the Activity's negotiating team during prior collective bargaining negotiations with the Union, discloses that when the first contract was negotiated in 1963, Progressmen "just accidentally or erroneously" were included in the unit and "have never been picked up since."

Progressmen's duties, responsibilities and authority have remained virtually the same since 1953, at which time the Activity reorganized its operation. In carrying out his responsibility to see that work schedules are met, a Progressman may reassign members of his work group from a regularly assigned job to another job within the group. Such re-assignments are frequent and are occasioned by work-load requirements and employee absences. A Progressman may approve or disapprove requests for annual leave and determines the number of people in his work unit who will be allowed to take leave at any given time (e.g., holiday periods and vacations). This determination is based upon his independent judgment as to the number of employees he needs to assume that the work in his area progresses as scheduled. A Progressman determines, with the approval of supervisors, the number of employees necessary for regularly scheduled week-end overtime work. He independently decides if overtime is required in an emergency situation without prior approval, if the overtime work is to be performed that day. He can initiate a recommendation for a performance or safety award and such awards have been granted. Progressmen may send home intoxicated employees and may excuse tardiness of employees in their work groups for periods up to one-half hour by initialing the employees time card. On a once-a-year basis they rate assigned employees as to whether they perform at a satisfactory unsatisfactory or outstanding

level of competency and discuss with employees their performance including any shortcomings which the Progressman may have perceived. Progressmen have issued to employees assigned to them verbal and written warnings on such matters as performance, attendance and safety. Employee complaints are discussed with the Progressmen, often in the presence of a Union steward prior to filing a written grievance. ^{12/} Progressmen and their assigned employees have been informed that Progressmen are the employees' "supervisors" in their particular work areas. ^{13/}

(3) Discussion and Conclusions - Case No. 41-3126(CA)

Section 2(c) of the Order provides:

"Supervisor' means any employee having authority, in the interest of an agency, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The Federal Labor Relations Council (FLRC) and the Assistant Secretary have both held that Section 2(c) of the Order is written in the disjunctive and therefore if an employee's authority includes even one of the functions described in Section 2(c), he would be a "supervisor" within the meaning of the Order. ^{14/} Moreover, the FLRC held in the United States Naval Weapons Center case that an individual need not have unqualified or unreviewed authority over Section 2(c) functions in order to be found a "supervisor" under the Order. Such interpretation would not be consistent with the realities of the exercise of authority in the Federal sector. Accordingly I find that the record herein establishes that at all times since 1953, Progressmen have been supervisors within the meaning of Section 2(c) of the Order.

^{12/} The contractual grievance procedure provides that an aggrieved employee shall first informally discuss the complaint or grievance with the immediate supervisor. If the matter is not resolved, the grievance shall be reduced to writing and submitted by the Area Steward to the head of the Shop, Office or Department involved "...who, with the lesser ranking supervisors concerned shall meet with and discuss the grievance with the Area Steward, Shop Steward and the aggrieved employee."

^{13/} The record is replete with other evidence of Progressmen's duties, responsibilities and authority but the above will suffice for the purposes of this Report.

^{14/} United States Naval Weapons Center, China Lake, California,

Section 10(b)(2) of the Order provides, in relevant part, "...a unit shall not be established...if it includes...any management official or supervisor, except as provided in Section 24." ^{15/} However, Section 24(d) of Executive Order 11491, prior to the 1971 amendments, provided that, "By no later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition and from coverage by negotiated agreements, except as provided in paragraph (a) of this Section." ^{16/} Therefore it appears that at the time of the Activity's alleged unfair labor practice conduct with regard to the Progressmen, the inclusion of supervisors in a unit with predominantly non-supervisory employees was improper. Accordingly, I find that Respondent's refusal to continue to recognize the Union as the collective bargaining representative of Progressmen, herein found to be supervisors within the meaning of the Order, was not in violation of the Order. I further find that the Activity was not required to bargain with the Union regarding the exclusion of Progressmen from the unit since their continued inclusion in the unit would have been contrary to the dictates of the Order. ^{17/} Moreover, since

Continued

A/SLMR, No. 128, FLRC No. 72A-11; United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR, No. 120.

^{15/} Section 24 indicates that the Order does not preclude the renewal or continuation of certain lawful agreements nor recognition for units of supervisors, under specified circumstances. (Identical to the provisions as set forth in footnote 16 herein.)

^{16/} Section 24(a) of the unamended Order provides as follows:

"Section 24. Savings clauses. (a) This Order does not preclude:

(1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order 10988 (January 17, 1962); or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent the management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the date of this Order.

^{17/} To hold otherwise would conceivably render the Activity vulnerable to an unfair labor practice complaint of violating Section 19(a)(3) of the Order.

Progressmen were supervisors at all times relevant herein, the Activity was privileged under the Order to change their job description by adding the words "initiates disciplinary actions" without consulting, conferring or negotiating with the Union on the matter.

(4) Recommendation

Based upon the above findings and conclusions, I recommend that the complaint in Case No. 41-3126(CA) be dismissed.

(5) The Alleged Unfair Labor Practice Conduct - Case No. 41-3128(CA)

On or about September 30, 1971, Paul Prince, an Ordnance Equipment Mechanic employed by the Activity was involved in a physical altercation with another employee, John Knox. Both employees were members of the bargaining unit represented by the Union. Approximately one week later a meeting was held in the office of General Forman Keuhn, at which time management inquired into the circumstances surrounding the incident. Present at the meeting were Prince, several supervisors, and Shop Steward Raymond Yager. Yager had been invited to the meeting by Edward Edds, Prince's immediate supervisor.

On or about October 14, 1971, another meeting was held in Keuhn's office. This meeting was attended by Prince, various supervisory personnel and Shop Steward Yager who again was invited to attend the meeting by Edds. During this meeting Prince was presented with a typed statement relative to his version of the altercation of September 30, which he had related at the previous meeting. Prince read the statement and upon request of management, signed the document.

Shortly thereafter Prince met with Mr. Gunther, head of the Activity's Manufacturing Division. Gunther asked Prince about the altercation and informed Prince that he would receive a letter of reprimand. Gunther also explained that Prince could appeal the letter of reprimand either through the Navy's administrative grievance procedure or through the negotiated grievance procedure.

On or about November 16, 1971, Prince again met in Keuhn's office with various supervisors and Shop Steward Yager. At this meeting Prince was given a letter of reprimand with regard to his September 30 altercation with employee Knox. Yager did not see nor was he given a copy of the letter.

Shortly after the meeting adjourned Prince informed Yager that he was going to appeal the letter of reprimand but that he did not want the Union "in on it." Thereafter Yager "just dropped it." Sometime thereafter it came to Yager's attention through hearsay that Prince had filed an appeal. Subsequently Prince was approached by Joe Cecil, a Union official who asked Prince why he didn't have the Union represent him on his appeal. Prince replied that he could handle it himself.

Prince elected to pursue his appeal of the letter of reprimand through the administrative grievance procedure as opposed to the negotiated grievance procedure. An appeal through the administrative grievance procedure is initiated by orally informing the industrial relations office of the grievant's intent to appeal. The grievance then enters the formal stage upon filing a written appeal. Without notification to the Union, Prince filed a written appeal of the letter of reprimand sometime in December 1971.

After receiving a copy of Prince's written appeal, the Activity requested the Department of the Navy, Regional Office of Civilian Manpower Management, Norfolk, Virginia to assign a grievance examiner to conduct an inquiry into the grievance. Grievance Examiner L.B. Shaw was selected and on January 27, 1972, Shaw conducted his inquiry by personally interviewing Prince, Knox, and Carrol Schrenger, a management official. 18/

On January 27, 1972, when Grievance Examiner Shaw conducted his interviews he notified the Activity as to what witnesses he wished to see and the Activity called the individuals to a conference room individually. Prince's meeting with Shaw lasted approximately one hour. At the beginning of the meeting, Shaw turned over to Prince a file which contained various documents concerning the case and asked Prince to note any matters with which he disagreed. Prince reviewed the file for about twenty to twenty-five minutes after which time Grievance Examiner Shaw returned. 19/ Thereafter Prince and Shaw discussed the documents which Prince questioned.

18/ Under appropriate regulations (FPM Chapter 771, Subchapter 3-11) the grievance examiner may conduct the inquiry by, at his discretion, securing documentary evidence, conducting personal interviews or a group meeting, conducting a hearing, or through any combination of the foregoing. Thereafter, the examiner must prepare a report of findings and recommendations which he submits to the deciding official, the Activity's Commanding Officer in the instant case.

19/ Prince had been given a copy of the case file prior to this meeting and accordingly was familiar with its contents.

During the conversation, Prince expressed disagreement with the Activity's conclusion that he engaged in horesplay which was "dangerous". Shaw informed Prince that if his appeal had been to remove certain items from his letter of reprimand rather than remove the entire letter, he may have been in a better position in his appeal. On the following day, Grievance Examiner Shaw issued a written report recommending to the Activity's Commanding Officer that Prince's appeal be denied.

The recommendation was accepted and the letter of reprimand remained in effect.

An article concerning the reprimand and the disposition of Prince's appeal was published in an Activity publication entitled, "Management Information Sheet", dated February 7, 1972. 20/ Although the document is published to provide information to supervision, James W. Seidl, the Union's Chief Steward, obtained a copy of it sometime after its distribution. Prior to reading the article, Seidl had not been aware of the Prince matter. After having been advised of the article, Seidl and Area Steward, E.H. Abbott, met around February 23, 1972, with James W. Lechleiter, Labor Relations Specialist with the Activity. Seidl inquired of Lechleiter why the Union was not given an opportunity to be present during Shaw's inquiry. Lechleiter replied that he had informed Grievance Examiner Shaw when he was present at the Activity that Local Lodge 830 was the exclusive collective bargaining representative and gave Shaw a copy of the agreement, and from that point on "it was up to him." Seidl testified that at the meeting Lechleiter indicated the Federal Personnel Manual regulations (FPM Chapter 771, Subchapter 3-11) governed the processing of an appeal under the administrative grievance procedure. Lechleiter testified that he informed Seidl that the reason the Union was not notified of the Shaw inquiry was because a "hearing" was not conducted, and brought to Seidl's attention Article 14 Section 3 of the negotiated agreement. That provision indicates that the Union has the right to have an observer present at a "hearing" on an appeal of a disciplinary action even where it is not selected as the employee's representative. 21/

20/ Complainant Exhibit No. 2.

21/ A specific credibility resolution as to whether the FPM regulations or the contract was referred to in this discussion is not necessary to the disposition of this case.

I find that at no time prior to Grievance Examiner Shaw's inquiry of January 27, 1972, did the Activity notify the Union of Prince's appeal or Shaw's inquiry into the matter. I further find that at no time prior to January 27, 1972, did Prince ever seek the assistance of the Union to represent him in his appeal. To the contrary, Prince had clearly made known to Union representatives that he did not seek their aid, but rather wished to represent himself in appealing his letter of reprimand through the administrative grievance procedure.

On March 7, 1972, the Union filed an unfair labor practice charge with the Activity regarding this matter. By letter dated July 31, 1972, the Activity gave its final answer to the Union's charge. In this correspondence the Activity, inter alia, took the position that no "hearing" under Article 14 of the contract was held which would give the Union a right to be present. The Activity claimed that an "investigation" was conducted by the grievance examiner and the determination to proceed by way of investigation was solely that of the grievance examiner "by Naval Department Regulations."

(6) Contention of the Parties

The Union alleges that the Activity was obliged under Section 10(e) of the Order and under Article 14 Section 3 of the collective bargaining agreement to give the Union an opportunity to be present during Grievance Examiner Shaw's inquiry. The Activity contends that Shaw's inquiry was not a formal discussion within the meaning of Section 10(e) of the Order nor a "hearing" within the meaning of the contract; that Grievance Examiner Shaw was not a representative of the Activity (management) during the inquiry; and that in any event the Union had sufficient opportunity to be represented at the inquiry but failed to make a timely request or make known its interest in the matter.

(7) Discussion and Conclusions - Case No. 41-3128(CA)

Section 10(e) of the Order provides, in relevant part that a labor organization which has been accorded exclusive recognition, "...shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies, and practices, or other matters affecting general working conditions of employees in the unit." From my examination of the facts and circumstances of this case as evaluated within the context of the terms of Section 10(e) of the Order, I find that Respondent deprived Complainant of a specific right accorded by the Order and thereby violated Section 19(a)(1) and (6) of the Order.

Thus, in my view, Grievance Examiner Shaw's inquiry on January 27, 1972, was a formal discussion within the meaning of Section 10(e) of the Order. The FPM regulations 22/ reveal that the inquiry was part of the designated "formal procedures" in processing grievances under the administrative grievance procedure. Moreover, the fact that the inquiry represented Prince's final opportunity to present his case prior to the Commanding Officer's decision attests to its "formality." 23/

In addition, I find that the subject matter of the inquiry concerned a grievance, personnel policy or practice affecting working conditions of employees in the unit within the meaning of Section 10(e) of the Order. A determination that an employee's conduct vis a vis another employee warrants a reprimand affects the working conditions of all unit employees since the Activity's standards of conduct, and the interpretation thereof, are presumably applicable to all. The circumstances wherein the letter of reprimand was given may well have precedential value in other cases which would be of interest and concern to the Union. Further, an understanding of the facts as disclosed by the inquiry and the evaluation thereof would also be of substantial importance to the Union in carrying out its responsibilities as the representative of all unit employees.

I also find that in his discussions with employees, Grievance Examiner Shaw was a designated representative of management or an agent of management for the purposes of Section 10(e) of the Order. While the examiner did not occupy a position under the jurisdiction under the Commanding Officer, the Department of the Navy is unilaterally responsible for both the selection and training of its grievance examiners 24/ and ultimate control over the disposition of the appeal resides within the Department of the Navy. Thus, the Commanding Officer may reject the grievance examiner's recommendation as to the disposition of the matter and appeal to the Secretary of the Navy whose decision would be final. Moreover, regulation CMMI 771.101 provides that when performing their duties, "...the Department of the Navy Grievance and Appeals Examiners are acting as representatives of the Secretary...."

22/ FPM Chapter 771, Subchapter 3-7, et. seq.
23/ Cf. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SIMR No. 242.
24/ Respondent Exhibit No. 1 (Navy Regulation CMMI 771.5 Employee Grievances and Administrative Appeals).

I reject Respondent's argument that in the circumstances of this case:

"The Union had sufficient notification to be made aware of the grievance proceedings; information that should have prompted a reasonably prudent union, exercising a modicum of effort, to fully exercise their rights had they so desired."

While the Union was aware that Prince intended to appeal his letter of reprimand, and through hearsay, might have been alerted that Prince did in fact file an appeal, this does not relieve the Activity from its obligation under Section 10(e) of the Order to provide the Union with "the opportunity to be represented at formal discussions" concerning Prince's grievance. At no time did the Union indicate to the Activity that it was not interested in being present at such discussions, the timing of which was a matter particularly within the knowledge of the Activity. In essence, Respondent contends that through inaction the Union waived any right it may have had to be represented at the Shaw inquiry which I have found to be a "discussion" under Section 10(e). The Assistant Secretary has previously held that "...in order to establish a waiver of a right granted under the Executive Order, such waiver must be clear and unmistakable." 25/ No such "clear and unmistakable" waiver, or indeed even an implied waiver, has been established on the facts in this case.

Respondent argues that only if the grievance examiner had chosen to conduct a "hearing" on Prince's appeal under the administrative grievance procedure would the Union have a right to have an observer present. It relies upon the express language of Article 14 Section 3 of the negotiated agreement which states:

"When a notice of decision to effect a disciplinary or adverse action is issued to the employee, and the employee appeals the action, but does not select a Union representative, the Union shall have the right to have an observer present at the hearing and to make the views of the Union known under the conditions set forth in applicable regulations."

Respondent argues that since no "hearing" was conducted by the grievance examiner, the Union has no right to be present during his inquiry. The Union interprets the word "hearing" in Article 14 so as to include the procedure Grievance Examiner Shaw chose to follow in this case. In my view a resolution of the meaning of the word "hearing" in Article 14 Section 3 of the agreement is not necessary to resolve the issues herein.

25/ NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR, No. 223.

The Union's right to be afforded the opportunity to be represented in this matter is based upon the express provisions of the Executive Order and not merely upon a contractual right. Moreover, from my reading of Article 14 of the agreement I do not conclude that by the terms of that provision the Union's Section 10(e) rights were in any way waived or diminished. While Article 14 Section 3 provides the Union with a contractual right to be present at a "hearing" in a disciplinary or adverse action appeals situation, nowhere in that provision does it expressly state or indicate that the Union is foregoing or waiving all rights relative to "formal discussions" under Section 10(e) of the Order. 26/ While the Union thus may have both a right under the Order and under the contract to be present at a "hearing" on Prince's appeal, they nevertheless have retained their full rights under Section 10(e) of the Order to be given the opportunity to be represented at any proceeding which could reasonably be interpreted to constitute a "formal discussion." Accordingly, I find that Article 14 Section 3 of the negotiated agreement does not excuse the Activity from its failure to follow the express mandate of Section 10(e) of the Order.

In sum I find and conclude that under all the circumstances Respondent's failure to give the Union the opportunity to be represented at Grievance Examiner Shaw's discussions with employees relative to his inquiry into Prince's appeal of his letter of reprimand constitutes a violation of Section 19(a) (1) and (6) of the Order. 27/

(8) Remedy - Case No 41-3128(CA)

Since the Union was not given an opportunity to be represented at the grievance examiner's inquiry with employees relative to Prince's appeal of his letter of reprimand, it is impossible to assess what impact, if any, the Union's presence at the inquiry might have had on the examiner's recommendation. Nor can it be ascertained to what use the Union might have put whatever information it received by virtue of its presence at the inquiry, if it chose to attend. The only way to be assured that the Union's rights are recognized so that it may fulfill what it perceives to be its responsibilities under the Order is to restore the situation to the status quo ante and provide the Union with the opportunity to be represented when the inquiry is conducted. Accordingly, I shall recommend that upon request of the Union, the Activity shall consider Grievance Examiner Shaw's report and recommendation null and void, rescind the Commanding Officer's approval and adoption thereof, and proceed with processing Prince's appeal of his letter of reprimand under the formal adminis-

26/ NASA, Kennedy Space Center, ibid.
27/ Cf. U.S. Army Headquarter, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR, No. 242; and cf. U.S. Department of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR, No. 278.

trative grievance procedure as though Grievance Examiner Shaw had not yet conducted his inquiry into the matter. Only then will the Union be accorded its entitlement under Section 10(e) of the Order "...to act for...all employees in the unit," a right denied it due to Respondent's unfair labor practice conduct found herein.

(9) Recommendation

Having found that Respondent in Case No. 41-3128(CA) has engaged in certain conduct prohibited by Section 19(a) (1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

(10) The Alleged Unfair Labor Practice Conduct - Case No. 41-3129(CA)

By letter dated April 20, 1972, the Activity instituted adverse action proceedings against Ova F. Campbell, an employee and a member of the collective bargaining unit, for the purpose of removing him from Federal employment. The "Notice of Proposed Removal" received by Campbell on Friday April 21, provided, inter alia:

"You may reply to this notice personally or in writing, or both, to the undersigned and you may submit affidavits and/or written material in support of your reply. You will be allowed ten (10) calendar days from receipt of this notice to reply but no later than 3 May 1972. Consideration will be given to extending this period if you submit a request stating your reasons for needing more time. If you reply personally, you may be accompanied by any one person of your choice who is willing to represent you...."

On Monday, April 24, 1972, Chief Steward, James W. Seidl received word from the Area Steward that Campbell had received a Proposed Notice of Removal. According to Seidl he thereupon went to Campbell's supervisor, George Sloan 28/ and informed him that he wished to discuss the adverse action matter with Campbell. Seidl was accompanied by Sloan when he obtained from Campbell a copy of the Notice of Proposed Removal. Seidl read the document in Sloan's presence and told Sloan that they wished to have certain documents made available to them and also make arrangements to use

28/ Neither Campbell nor Sloan testified in this proceeding.

official time. 29/ Sloan informed Seidl that he could make arrangements for the use of official time for Seidl and Campbell but that the request for documents would have to be taken up with B.W. Clayton, the Activity's Industrial Director. Sloan left at this particular point and Campbell and Seidl continued their discussion at which time Seidl had Campbell explain some of the matters that were contained in the Notice of Proposed Removal.

On Wednesday, April 26, 1972, Seidl again went to see Campbell. On the prior day, Campbell had not reported to work and Seidl testified that he was interested in finding out why Campbell was not at work. However, Seidl did not mention this to Sloan but merely informed Sloan that he wanted to discuss with Campbell the Proposed Notice of Removal. After talking to Campbell, Seidl told Sloan that Campbell and he would like to use the two hours of official time on either the following Thursday or Friday, (April 27 or 28), depending upon the availability of Mr. Campbell. Sloan replied that they could have official time any time that they were ready to use it.

On the following Thursday and Friday, Seidl was ill and did not report to work. On the following Monday, (May 1) Seidl learned that Campbell had been hospitalized on the previous Saturday. He apparently remained in the hospital for some time thereafter. Seidl had no further conversation with Campbell until after May 3, 1972.

On May 3, 1972, Seidl and Area Steward E.H. Abbot, met with Industrial Director, B.W. Clayton at approximately 2:00 p.m. Seidl presented Clayton with a letter dated May 2, 1972, which requested an extension of time to reply to the charges against Campbell. 30/ The letter stated:

"This letter is a request for an extension in replying to the charges leveled against Mr. Ova Campbell.

29/ The Notice of Proposed Removal dated April 20, 1972, stated:

"You will be allowed two (2) hours of official time in which to review the investigative material, to prepare your written reply or secure affidavits. You may arrange for use of this official time, by contacting your supervisor, Mr. George Sloan."

30/ Apparently both Campbell and his designated representative were entitled to the two hours of official time. Complainant Exhibit No. 12.

"As Mr. Campbell's designated representative, I believe this extension is necessary since Mr. Campbell has been admitted to the hospital for treatment for his illness. As a result of his illness, I have been unable to complete the preparation of his case to guarantee that he is given the just representation that he is entitled to.

"This notice is intended to notify you that (we) intend to reply to this Notice of Removal in person and in writing as soon as possible; when Mr. Campbell is released from the hospital and able to return to full duty status; and we are able to review the material used to document your case against this employee."

The letter was signed "James W. Seidl, Chief Steward, Local Lodge 830, IAM-AW (for) Ova Campbell." On the bottom of the letter is the notation "received IND. DIR. OFFICE 3 May 1972 1400" and signed "Jeanne Harper".

According to Seidl, Clayton told him at the meeting that Campbell had not designated a representative in writing and therefore he did not recognize Seidl as Campbell's designated representative. Seidl informed Clayton that he had a responsibility to represent the interest of this employee and that he was not there to make any representation on the part of the individual but he was only there to gain an extension of time to reply to the charges since Campbell was hospitalized. Clayton informed Seidl that Campbell would do himself well if he would get himself an outside representative since he was in "bad trouble" and needed "professional help". Seidl responded that the Union felt that it was the representative of Campbell but Clayton insisted that Campbell had not designated a representative.

Abbott testified that after Seidl gave Clayton the request for an extension of time to reply to the charges against Campbell, Clayton told Seidl that the Union had no business representing Campbell and Campbell had not personally designated any one in writing to represent him. The conversation between Seidl and Clayton lasted only a few minutes and was heated. Abbott asked Clayton if he would put his response in writing and Clayton indicated that he would.^{31/}

^{31/} In a memorandum dated May 3, 1972, from Clayton to the Chief Steward, Lodge 830, IAM-AW, Clayton stated:

"Your request for an extension of time in replying to the charge leveled against Mr. Ova Campbell, predicated upon the fact that you are

Seidl indicated that he was the Chief Steward and as such had a right to represent Campbell. While Abbott could not recall the exact words used during this conversation the "gist" of the conversation as recalled by Abbott was that if Campbell would designate Seidl as a personal representative in writing he could represent Campbell, but Seidl could not "do it as a Union representative."^{32/}

Subsequently, on May 24, 1972, the Activity notified Campbell of its decision to remove him from employment. Campbell's removal was effective June 20, 1972. Thereafter upon his request a hearing before a representative of the Civil Service Commission was conducted on September 29, 1972. One of the issues litigated at the Commission hearing was whether Campbell had previously designated anyone to represent him. ^{33/} Apparently the Union took the position that; (1) Seidl was specifically designated by Campbell to represent him in the action and, (2) Under the Order, the Union, by virtue of its status as collective bargaining representative of the employees had the right to represent Campbell even if it was not specifically designated by Campbell to represent him. The Activity took the position that the Union's right to represent an employee under the Order should not enter into the hearing but rather should be resolved in accord with Executive Order 11491. ^{34/} Specific designation was denied.

At the hearing before the Commission's Hearing Examiner, Seidl argued that Campbell had previously designated him

Footnote continued:

designated as Mr. Campbell's representative is hereby denied. The denial is based upon the fact that Mr. Campbell has not designated a representative in the latest action against him as of this date that I can legally acknowledge."

^{32/} Clayton was not called to testify in this proceeding.

^{33/} Seidl represented Campbell at that hearing, having been designated by Campbell, in writing, as his representative.

^{34/} The unfair labor practice charge relative to this matter was filed on June 30, 1972.

as his representative in a prior proposed adverse action proceeding in January of 1972, and that authorization carried through to the latest action against Campbell. Seidl apparently also argued that his contacts with Campbell on the job, within the knowledge of supervisor Sloan, constituted constructive notice to the Activity that Seidl was indeed Campbell's designated representative.

On or about October 26, 1972, the Civil Service Commission, Atlanta Region, issued its decision on Mr. Campbell's appeal 35/ sustaining the Activity's removal of Campbell. With regard to the question of whether Campbell designated a representative to act for him, the decision states in relevant part:

"It is contended that the removal action is procedurally defective because the appellant was denied an extension of time in which to answer. It is also contended that the appellant was denied the right to be represented during the period allowed for answering.

"In support of the contentions, it is alleged that Mr. Seidl was a properly designated representative, on the basis that he had represented the appellant in a previous disciplinary proceeding; that the appellant was mentally incompetent during the time allowed for answering, and that because of the circumstances the appellant did not have sufficient time in which to perfect an arrangement to have Mr. Seidl represent him.

"There is no evidence that the person designated to receive the appellant's answer received any communication from the appellant, either orally or in writing, during the period allowed for answering."

The decision then recites Seidl's request for an extension of time to reply to the charges against Campbell and continues:

35/ After the hearing before me closed, Respondent moved to reopen the record in order to have admitted as part of the record, the Commission's decision on Mr. Campbell's appeal. The motion was opposed by Complainant in that the decision was available at the time of the hearing herein. I denied the motion to reopen the record and ordered the Commission's decision to be

"Under Part 752 of the Civil Service Regulations, an employee has no entitlement to have a representative appear with him or answer for him or advise him as he answers. However, the record shows that the agency extended that right to the appellant, in accordance with its agreement with an employee union.

"No evidence was presented to show that the appellant was mentally or physically incapable of communicating to the agency his desire to have someone represent him....

"We conclude that, in the absence of any communication from the appellant to the designated official which expressed an intention to answer or to be represented by any person and, in the absence of any evidence to show that the appellant was mentally or physically incapable of communicating his intentions to that official, the agency did not act improperly in declining to grant the request of any other person for an extension in which to answer....

"We note that the evidence shows that the employee union has filed an unfair labor practice claim, alleging that the agency's failure to allow Mr. Seidl acting, (in) his capacity as an official of the union, to represent the employee. However, that is not at issue here."

Thereafter Campbell through his representative Seidl appealed the decision of the Civil Service Commission, Atlanta Region Office to the Board of Appeals and Review. The Board of Appeals and Review affirmed the decision of the Commission's Atlanta Regional Office and held, inter alia: 36/

Footnote Continued

placed in the Rejected Exhibit File. However, it is now apparent that this decision is essential to a disposition of the issues posed herein. Accordingly I am herewith rescinding my prior ruling and shall admit in evidence as Respondent Exhibit No. 10, the decision of the U.S. Civil Service Commission, Atlanta Regional, Office of the Director, Atlanta, Georgia, relative to Mr. Campbell's appeal.

36/

Respondent Exhibit No. 9.

"The Board finds, as did the Region, no error on the part of the agency official in declining to grant an extension of time to the union representative to reply to the charge without an expressed intent by the appellant that such person was his designated representative. Even though appellant now contends that the agency official acted arbitrarily in view of the fact that this same representative had represented appellant in a prior adverse action a short time before, the evidence shows that no communication was received by the agency in this particular situation from the appellant either orally or in writing. The appellant was advised in the advance notice that he had 10 calendar days to reply, and that consideration would be given to extending the time if he submitted a request giving his reasons for needing more time. The record reveals that the appellant was in contact with the agency during the time he was granted to respond to the charges, and he did not ask for an extension of time; indicate an intention to answer the charges; or designate a representative. In the absence of any evidence of an attempt by the appellant to designate a representative or to reply to the charges himself during the answering period, and prior to the agency's decision dated May 24, 1972, the board finds that appellant's rights were not violated...."

(11) Positions of the Parties

Complainant contends that it has the right, with or without any overt authorization from an employee, to represent as a Union the interest of any employee in a disciplinary removal action, especially when the Union has knowledge that the employee is temporarily unable to protect his own interests. Complainant argues that the Activity violated Section 19(a)(1) and (6) of the Order; (1) when it refused to acknowledge that the Union had a right under Section 10(e) of the Order to act in the interest of Campbell and, (2) when Clayton informed Seidl that the Union had no business representing Campbell and that Seidl could not represent Campbell as a Union representative. The Union further contends that the Activity "abrogated" rights given to the Union in Article 14 Section 2 of the basic agreement and thereby also violated Section 19(a)(1) and (6) of the Order.

The Activity contends that Section 10(e) of the Order did not give the Union an automatic right to act as Campbell's representative in making his reply to the proposed adverse action; that the instant complaint should be dismissed since the complaint contains issues that were properly raised and litigated under the appeals procedure and, by virtue of Section 19(d) of the Order, cannot be raised under Section 19 of the Order. The Activity further contends that Seidl was not Campbell's designated representative in making a reply to the proposed adverse action of April 1972.

(12) Discussion and Conclusions - Case No. 41-3129(CA)

Section 10(e) of the Order provides, in relevant part:

"When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership...."

However, a union's rights and responsibilities as set forth in Section 10(e) of the Order must be viewed in relationship to other provisions of the Order. Thus, Section 7(d)(1) of the Order provides that:

"Recognition of a labor organization does not preclude an employee, regardless of whether he is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulations; or from choosing his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in Section 13."

Therefore it appears that under Section 7(d)(1) of the Order Campbell had a right to choose "his own representative" relative to the proposed adverse action proceedings. If a union automatically became an appellant's representative as Complainant urges herein, the choice given an employee under Section 7(d)(1) of the Order would be meaningless, or the individual would be placed in the anomalous situation of having two representatives; one based upon his own specific choice, and another by operation of the Order. It is conceivable that the two representatives might wish to handle the appellate action in totally different ways. Indeed a

union's interest may not always be co-extensive with the particular appellant's interest and if the union was a representative by operation of the Order, the appellant would be powerless to order the union to discontinue "representing" him in the matter. In my view the architects of the Order intended to avoid any such situation by giving to the individual employee in an appellate action the right to choose his own representative and such right necessarily precludes a union from exercising any "automatic" right to represent him.

Moreover, the negotiated agreement between the parties appears to espouse this concept. Thus, Article 14 (Adverse Actions and Disciplinary Actions), Section 2 provides, inter alia:

"When the employer contemplates disciplinary or adverse action against an employee, the employee will be notified, in writing, of the proposed action and the reasons therefore. Such actions must be for just cause and the employee shall have the opportunity to reply to the charges, personally and/or in writing to the appropriate management official. In making his reply, the employee may be represented by his Union representative or any person of his choice who is willing to represent him...." (Emphasis supplied.)

Section 3 of Article 14 provides:

"When a notice of decision to effect a disciplinary or adverse action is issued to the employee, and the employee appeals the union, but does not select a Union representative, the Union shall have the right to have an observer present at the hearing and to make the views of the Union known under the conditions set forth in applicable regulations."

Both of the aforementioned Sections of Article 14, when read together, demonstrate that in the negotiated agreement, the Union has recognized the role of the individual employee's choice in picking his representative in an adverse action proceeding. Further the above quoted sections of Article 14 indicate that the Union, by agreement, has acknowledged that unless specifically chosen by the individual employee, it does not act as his representative in an adverse action proceeding which arises as in the case herein.

Accordingly, in view of the foregoing, I find that neither Section 10(e) of the Executive Order nor the parties negotiated agreement conferred upon the Union the absolute right to represent Campbell in replying to or requesting an extension of time to reply to the Activity's Notice of Proposed Removal.

With regard to the applicability of Section 19(d) of the Order to the issues herein, I find that the question of whether Campbell designated the Union or anyone else to represent him with regard to replying to the Activity's Notice of Proposed Removal was an issue which would properly be raised, and indeed was raised under the appeal's procedure and accordingly may not be raised in the unfair labor practice proceeding herein. Section 19(d) of the Order provides in relevant part: "Issues which can properly be raised under an appeals procedure may not be raised under this section...." It is clear from the testimony adduced at the instant hearing, the summary of the hearing before a representative of the Civil Service Commission on September 19, 1972, ^{37/} the decision of the Commission's Atlanta Regional Office and the decision of the Board of Appeals and Review that this question was an integral part of the appeal and litigated at every step of those proceedings. To allow relitigation of that issue in the proceedings herein would, in my view, run directly contrary to the proscription of Section 19(d) of the Order.^{38/}

However, I find that the issue of whether Clayton's statements to Seidl and Abbott on May 3, 1972, constituted a violation of the Order and was an issue which was not considered by the Commission or the Board of Appeals and Review. In my view Clayton's statement to the effect that the Union did not have a right to represent Campbell, and even if Campbell would designate Seidl as a personal representative in writing Seidl could not represent Campbell as a Union representative carried with it the clear implication that the Activity would not recognize Seidl as Campbell's representative in his capacity as Chief Steward of the Union. Clayton was conveying the impression that Campbell could not designate

37/ Respondent Exhibit No. 3.

38/ Cf. Veterans Administration, Veterans Benefits Office, A/SLMR, No. 296.

the Union, in the personage of Seidl, as his representative but rather could only pick Seidl if Seidl was divorced from his role as Chief Steward of the Union.^{39/} Respondent acknowledges that it has been the practice and policy of the Department of the Navy to extend to employees the right to a representative of their own choosing in making a written as well as oral reply to a proposed adverse action. For the Activity to allow an employee to select a representative and at the same time indicate that it would not recognize a representative if he represents the employee as a union official demeans and disparages the Union in the eyes of the employees it represents. Accordingly, I find that Clayton's remarks of May 3, 1972, to Seidl and Abbott, who were employees as well as Union representatives, violated Section 19(a)(1) of the Order. ^{40/}

^{39/} This conclusion is supported in part by the written response Clayton made to Seidl relative to Seidl's request for an extension of time to respond to a prior Notice of Proposed Removal issued to Campbell on the 25th of January 1972. In that matter Campbell designated "James Seidl, Chief Steward of Lodge 830," to be his representative. (Complainant Exhibit No. 7.) Thereafter, on January 31, Seidl requested that he be given an extension of the time limits to respond and signed the request "James W. Seidl, Chief Steward Local Lodge 830, IAM-AW." Clayton returned the request to Seidl, noting inter alia:

"Basic correspondence is returned herewith as unacceptable in view of the fact that official Union correspondence has no place in the Navy's disciplinary action and/or procedures at this stage of the proceeding against Mr. Ova Campbell. It was originally explained to you when Mr. Campbell designated you as his representative that the Union has no place in the proceeding at this stage of the disciplinary action. Further correspondence in behalf of Mr. Campbell will be honored and given consideration only upon request from Mr. Campbell and/or from Mr. Campbell's designated representative." (Complainant Exhibit No. 9.)

While the correspondence with regard to the prior Notice of Proposed Removal is not at issue in the proceeding herein, it may be used to provide background information for the purpose of evaluating Clayton's statements which are alleged to constitute a violation of Section 19(a)(1) of the Order.

^{40/} I do not find a violation of 19(a)(6) in the circumstances of this case. As hereinbefore set forth, I consider myself bound by the findings of the Civil Service Commission and the Board of Appeals and Review with regard to the issue of whether Campbell designated anyone to represent him in the matter of his appeal. Without such designation, no finding of refusal to recognize Seidl as a personal representative of Campbell, or otherwise, can be made.

The Assistant Secretary held that such conduct tends to restrain and discourage employees from exercising rights granted them under Section 1(a) of the Order. ^{41/}

(13) Recommendation

In view of the entire foregoing, I conclude that Complainant has not met its burden of proving by a preponderance of the evidence that Respondent violated Section 19(a)(6) of the Order and accordingly recommend that such allegation in Case No. 41-3129(CA) be dismissed. However, having found that Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Department of the Navy, Naval Ordnance Station, Louisville, Kentucky shall:

- (1) Cease and desist from:
 - a. Conducting formal discussions between management and employees or employee-representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

^{41/} U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR, No. 242.

- b. Interfering with, restraining or coercing its employees by failing to provide Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, the opportunity to be represented at formal discussions between management and employees or employee-representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.
- c. Informing its employees that an official of Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, the employees exclusive representative, in his official capacity, may not be designated as an employee's representative in making a reply to a notice of proposed adverse action.
- d. In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

- a. Upon request of Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, consider Grievance Examiner Shaw's inquiry and report and recommendations relative to Paul Prince's appeal of his letter of reprimand null and void; rescind the Commanding Officer's approval and adoption of Grievance Examiner Shaw's report and recommendation; and proceed with the processing of Paul Prince's appeal of his letter of reprimand under the formal administrative grievance procedure as though Grievance Examiner Shaw had not yet conducted his inquiry into the matter.
- b. Notify Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, of and give it the opportunity to be represented at formal discussions between management and employees or employee-representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

- c. Post at its facility at the Naval Ordnance Station, Louisville, Kentucky, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, U.S. Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.
- d. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.

Salvatore J. Arigo

 Salvatore J. Arigo
 Administrative Law Judge

Dated: January 11, 1974

Washington, D.C.

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee-representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions concerning employees in the unit without giving Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, the employee's exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT inform employees that an official of the employees exclusive representative, Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, in his official capacity, may not be designated as an employee's representative in making a reply to a notice of proposed adverse action.

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 Executive Order.

WE WILL, upon request of Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, treat as null and void Grievance Examiner Shaw's report and recommendations relative to employee Paul Prince's appeal of his letter of reprimand, and will rescind the Commanding Officer's approval and adoption thereof, and will proceed with the processing of Paul Prince's appeal of his letter of reprimand under the formal administrative grievance procedure as though Grievance Examiner Shaw had not yet conducted his inquiry into the matter.

 (Agency or Activity)

Dated _____ By _____

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director of the Labor-Management Services Administration, United States Department of Labor whose address is 1371 Peachtree Street, N.E., Room 300, Atlanta, Georgia 30309.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
YUMA PROJECTS OFFICE,
YUMA, ARIZONA
A/SLMR No. 401

This unfair labor practice proceeding involved a complaint filed by Local 1487, National Federation of Federal Employees, Blythe, California (Complainant), alleging that the Respondent violated Section 19(a)(1), (3) and (6) of the Executive Order by unilaterally changing the established competitive areas governing reduction-in-force and, thereafter, refusing to confer with the Complainant for purposes of discussing the latter's pending complaint without the presence of rival union representatives. The Respondent contended that since the merger between the Lower Colorado River Project Office and the Yuma Projects Office raised a question concerning representation, it was relieved from its obligation to meet at a reasonable time and confer in good faith with respect to any change in the competitive areas and that it refused to meet with the Complainant without representatives of its rival union because it wished to maintain a neutral position.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent's action in changing the areas of competition was violative of the Order. This conclusion was based on his findings, in agreement with the Administrative Law Judge, that the Respondent did not act in accordance with prior decisions of both the Assistant Secretary and the Federal Labor Relations Council which permit a petitioning agency, after the filing of an RA petition in good faith, to remain neutral and await the decision of the Assistant Secretary with respect to that petition, and be given a reasonable opportunity to comply with the consequences which flow from that decision, before risking the commission of an unfair labor practice. The Assistant Secretary found that, rather than remaining neutral, the Respondent chose to establish new competitive areas during the pendency of its RA petition. He also noted that there was no overriding exigency which would have required immediate changes in personnel policies and practices and matters affecting its employees' working conditions. Although the Assistant Secretary agreed with the Administrative Law Judge that the Respondent violated the Order, the Assistant Secretary found that the Respondent's conduct violated only Section 19(a)(1) and specifically rejected the Administrative Law Judge's finding that the Respondent's conduct violated Section 19(a)(6) as he found that, under the circumstances, the Respondent was under no obligation to meet and confer with the Complainant during the pendency of its RA petition, filed in good faith and based on a doubt of the continued appropriateness of the units involved.

The Assistant Secretary also found, contrary to the Administrative Law Judge, that the alleged improper conduct which occurred in connection with

the Complainant's pre-complaint charge did not violate Section 19(a)(6) of the Order as matters relating to the processing of cases under the Assistant Secretary's Regulations are administrative matters to be enforced by the Assistant Secretary and such matters, standing alone, do not constitute unfair labor practices.

Finally, the Assistant Secretary adopted the Administrative Law Judge's finding that there was insufficient evidence to support the Complainant's allegation that the Respondent violated Section 19(a)(3) of the Order.

To remedy the improper conduct herein, the Assistant Secretary ordered, among other things, that the previous areas of competition be reestablished and that any employee incorrectly laid off be reinstated to his position and reimbursed for any loss of pay occasioned by his layoff.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
YUMA PROJECTS OFFICE,
YUMA, ARIZONA

Respondent

and

Case No. 72-4338

LOCAL 1487, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, BLYTHE,
CALIFORNIA

Complainant

DECISION AND ORDER

On January 7, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Report and Recommendations and the Complainant filed an answering brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the exceptions filed by the Respondent and the answering brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The complaint in the instant case alleged essentially that the Respondent violated Section 19(a)(1), (3) and (6) of the Executive Order by unilaterally changing the established competitive areas governing reduction-in-force and, thereafter, refusing to confer with the Complainant for purposes of discussing the latter's pending complaint without the presence of rival union representatives.

The Administrative Law Judge recommended that the Section 19(a)(3) allegation be dismissed; however, he concluded that the Respondent's conduct herein violated Section 19(a)(6) of the Order.

The essential facts in the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

Prior to August 20, 1972, the Lower Colorado River Project Office, Blythe, California, and the Yuma Projects Office, Yuma, Arizona, were two of several sub-regional or field office components of Region 3 of the Bureau of Reclamation of the Department of the Interior. The Complainant was the exclusive representative of the nonsupervisory, nonprofessional employees of the Lower Colorado River Project Office and was party to a negotiated agreement covering such employees. Local 640, International Brotherhood of Electrical Workers, herein called IBEW, was, at all times material herein, the exclusive representative of the nonsupervisory employees, with the exception of those involved with the engineering function, at the Yuma Projects Office and also was party to a negotiated agreement covering such employees. The "competitive areas" for reduction-in-force purposes for these two offices were: (a) Lower Colorado River Project Office, Blythe, California, including Field Offices involved in dredging activity, and (b) Yuma Projects Office, Yuma, Arizona. 1/

On August 20, 1972, the Lower Colorado River Project Office and the Yuma Projects Office were merged. The functions of the Lower Colorado River Project Office and the employees working therein were assigned administratively to the Yuma Projects Office. As a result of the Respondent's concern over the question of employee representation created by the merger, on September 29, 1974, a meeting was held with representatives of the Complainant and the IBEW. At this meeting, the Respondent suggested, among other things: (a) that the Complainant should represent the dredging employees inasmuch as they retained their identity as a distinct identifiable unit, and (b) that other former employees of the Lower Colorado River Project Office, which it contended had been assimilated into the Yuma Field Office, and shop crews located at Yuma, should be considered as an accretion to the existing unit represented by the IBEW. Both the Complainant and the IBEW informed the Respondent that they were not agreeable to these suggestions.

1/ Under the reduction-in-force procedure in effect at the Lower Colorado River Project Office, any employee, including those in the field offices, possessing the requisite seniority and skills, could bump any employee working within the Lower Colorado River Project Office. Similarly, a project-wide reduction-in-force procedure existed with respect to the Yuma Projects Office.

Thereafter, the Respondent unilaterally decided that it would be appropriate to maintain separate competitive areas with regard to the dredging operation and the remainder of the Yuma Project. Thus, in early December 1972, it made a verbal recommendation to this effect to its Regional Office in Boulder City, Nevada. Thereafter, by letter dated December 21, 1972, it made a formal request to the Commissioner, Bureau of Reclamation, Washington, D.C. to establish new competitive areas. Subsequently, on January 4, 1973, the Respondent filed an RA petition. ^{2/} The Respondent's request to change its competitive areas was approved by the Commissioner, Bureau of Reclamation, on January 12, 1973. On January 23, 1973, a "Lower Colorado Region Supplement to the Federal Personnel Manual" was issued establishing the requested new competitive areas with respect to any future reductions-in-force for the Lower Colorado Region. In pertinent part, it set forth the following competitive areas: "(5) Yuma Projects Office, Yuma, Arizona, (all of the Yuma Projects Office, except the dredging function)" and "(6) Yuma Projects Office, Yuma, Arizona (all of the dredging functions assigned to the Yuma Projects Office)."

Thereafter, in February, 1973, the Respondent determined that a reduction-in-force in the dredging program was imminent. In this connection, it held separate meetings with the IBEW and the Complainant on March 1, 1973, and March 2, 1973, respectively, to discuss the impending reduction-in-force. At these meetings the Complainant and the IBEW officially were informed of the changes in the competitive areas. Thereafter, on March 12 and April 26, 1973, respectively, general and specific reduction-in-force notices were issued, specifying the effective dates thereof as May 26 and June 10, 1973.

On May 12, 1973, the Complainant filed an unfair labor practice charge with the Respondent alleging violation of Section 19(a)(1), (2) and (6) of the Order based on the Respondent's unilateral changing of the competitive

^{2/} The Administrative Law Judge inadvertently noted that this petition was filed in November 1972. I hereby take official notice of the fact that the RA petition was filed on January 4, 1973. In its RA petition, the Activity sought an election in an overall unit consisting of all General Schedule and Wage Board employees at the Yuma Projects Office, Lower Colorado Region, Bureau of Reclamation and all Wage Board employees of the Parker-Davis Project, Lower Colorado Region, Bureau of Reclamation. In support of its petition, the Respondent contended that, as a result of the August 20, 1972, reorganization, employees of its Lower Colorado River Project Office, Blythe, California, were merged into the Yuma Project, rendering inappropriate certain previously existing exclusively recognized units. The RA petition was ordered dismissed by the Assistant Secretary on October 24, 1973, on the grounds that it did not raise a question concerning representation because "the reorganization of August 20, 1972 did not substantially or materially change the scope or character of the units involved, and that, therefore, such units remain viable and identifiable..." See United States Department of Interior, Bureau of Reclamation, Lower Colorado Region, A/SLMR No. 318.

areas. After an exchange of letters between the parties, the Respondent on June 1, 1973, denied the Complainant's charges but stated its willingness to meet with the latter to discuss the matter. The Respondent indicated, however, that such meeting would be contingent upon the presence of a representative of the IBEW due to the existing question concerning representation raised by its RA petition. In a letter dated June 12, 1973, the Complainant repeated its charges and agreed to meet with the Respondent without the IBEW, contending that the matter to be discussed in no way involved the IBEW. Thereafter, the Respondent, in a letter dated June 14, 1973, reiterated its denial of the Complainant's charges and again stated its objection to a meeting with the Complainant without a representative of the IBEW being present. On July 12, 1973, the Complainant filed the instant complaint, which was subsequently amended to allege Section 19(a)(1), (3) and (6) violations of the Order.

The Respondent contends that when it became apparent, in the latter part of 1972, that a reduction in the dredging program was a possibility during the first half of 1973, it recognized that a decision had to be made as to the defined competitive areas to be involved should a reduction-in-force be required. In this regard, as noted above, the Respondent, in December 1972, set in motion the administrative procedures to bring about a change in the competitive areas.

After the close of the hearing in this matter, the Respondent advised that the Civil Service Commission's Board of Appeals and Review (BAR) had ruled, upon appeal, that the Respondent had established a competitive area in accordance with Civil Service regulations. In its decision, the BAR acceded to the Respondent's exception to review by the BAR of an appeal of the "labor-management issue" raised in the subject case. The BAR noted, in this regard, that "the testimony developed in connection with the Unfair Labor Practice Complaint pertaining to the reasons for separate competitive areas is not relevant in the adjudication of the propriety of the competitive areas as established." In view of the foregoing, I find that Section 19(d) of the Order would not be dispositive of this matter. Cf. Veterans Administration, Veterans Benefits Office, A/SLMR No. 296.

Under the circumstances of this case, I agree with the Administrative Law Judge's finding that the Respondent's action in changing the areas of competition was violative of the Order. Thus, in prior decisions, both the Assistant Secretary and the Federal Labor Relations Council have indicated that when an RA petition is filed in good faith, the petitioning agency should be permitted to remain neutral and await the decision of the Assistant Secretary with respect to that petition and be given a reasonable opportunity to comply with the consequences which flow from the representation decision before incurring the risk of an unfair labor practice finding. ^{3/}

^{3/} See Headquarters, United States Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 168, FLRC No. 72A-30. See also Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360.

In this regard, I agree with the Administrative Law Judge's conclusion that the Respondent did not act in accordance with the foregoing rationale. Thus, the evidence establishes that it did not remain neutral and await the decision of the Assistant Secretary after the filing of its RA petition but, rather, during this period it chose to establish new competitive areas. In my view, absent evidence (not present in the instant case) of an overriding exigency, which would require immediate changes in personnel policies and practices and matters affecting its employees' working conditions, during the pendency of an RA petition, the petitioning agency has an obligation to remain neutral and maintain the status quo with respect to the personnel policies and practices and matters affecting the working condition of employees who are covered by its RA petition. To allow otherwise would permit a petitioning agency to interfere with its employees' right to a free and untrammelled election which is being sought by the RA petition. Moreover, I concur with the view of the Administrative Law Judge that an agency should not be permitted to engage in conduct during the pendency of its RA petition which could cast suspicion on the appropriateness of the existing bargaining unit or units involved or a union's representative status, and which, in and of itself, possibly could establish a basis for the RA petition. Based on these considerations and as the evidence does not establish that the Respondent's conduct herein was based on an overriding exigency which required immediate action, I find that the Respondent's establishing of new competitive areas during the pendency of its RA petition improperly interfered with its employees' rights assured by the Order in violation of Section 19(a)(1).

Under the particular circumstances of this case, I reject the finding of the Administrative Law Judge that the Respondent's conduct violated Section 19(a)(6) of the Order. Thus, as noted above, the Respondent had an obligation during the pendency of its RA petition to remain neutral and to maintain the status quo with respect to personnel policies and practices and matters affecting the conditions of employment of employees covered by the RA petition. However, in view of the basis for the RA petition -- i.e., that the existing units were inappropriate as a result of a reorganization ^{4/} -- and the fact that the evidence establishes that such petition was filed in good faith, I find that during its pendency the Respondent was under no obligation to meet and confer with the Complainant which may or may not have continued to represent an appropriate unit based on the outcome of the RA petition. ^{5/}

^{4/} See Headquarters, U.S. Army Aviation Systems Command, St. Louis, Missouri, A/SLMR No. 160.

^{5/} Compare Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 155, which did not involve a question regarding the continued appropriateness of an existing unit.

With respect to the alleged improper conduct which occurred in connection with the processing of the Complainant's pre-complaint charge and which was found by the Administrative Law Judge to have violated Section 19(a)(6) of the Order, it has been indicated in previous decisions that matters relating to the processing of cases under the Assistant Secretary's Regulations are administrative matters to be enforced by the Assistant Secretary and that such matters, standing alone, do not constitute unfair labor practices. ^{6/} Accordingly, contrary to the Administrative Law Judge, I find that further proceeding on the Complainant's allegations in this regard are unwarranted.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, shall:

1. Cease and desist from:

(a) Changing the areas of competition for purposes of a reduction-in-force within the Yuma Projects Office during the pendency of its RA petition.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

(a) Reestablish the areas of competition of the Yuma Projects Office to that which existed prior to January 23, 1973, and reevaluate all layoffs made subsequent to such date in accordance therewith.

(b) If, following the action taken in accordance with paragraph 2(a) above, it should develop that any employee was incorrectly laid off, such employee shall be reinstated to his appropriate position and duly reimbursed for any loss of pay occasioned by his layoff. ^{7/}

^{6/} See Long Beach Naval Shipyard, A/SLMR No. 352 and U.S. Department of Defense, Department of the Army, Army Materiel Command, Automated Logistics Management Systems Agency, A/SLMR No. 211.

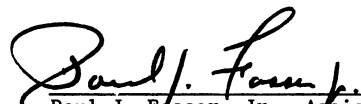
^{7/} An award of back pay pursuant to this remedial order is clearly appropriate under the authority of Section 6(b) of the Executive Order, the Back Pay Act of 1966 (5 U.S.C. 5596), and the Civil Service Commission's implementing regulations at 5 CFR 550.801, et. seq. (subpart H). See also, in this connection, Federal Personnel Manual Chapter 351, Subchapter 9-4, which states, "Reimbursement of pay allowances, or differentials lost as a result of improper reduction-in-force action is

(c) Post at its Yuma Projects Office, Yuma, Arizona, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Project Manager or other appropriate official in charge of the Yuma Projects Office, Yuma, Arizona, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, where notices to employees are customarily posted. The Project Manager or other appropriate official shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations of Section 19(a)(3) and (6) of the Order be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 21, 1974



Paul J. Fisser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

7/ required by law (5 U.S.C. 5596) and regulations of the Commission (part 550, subpart H) upon correction of the action. The correction may be ordered by the agency on its own initiative or by the Commission upon appeal."

-7-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the areas of competition for purposes of reduction-in-force within the Yuma Projects Office during the pendency of an RA petition.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL reestablish the areas of competition for purposes of reduction-in-force at the Yuma Projects Office to that which existed prior to January 23, 1973, and reevaluate all layoffs made subsequent to such date in accordance therewith.

WE WILL, should it develop that any employee was incorrectly laid off, reinstate such employee and make him whole for any loss of pay occasioned by his layoff.

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to an amended complaint first filed on July 12, 1973, under Executive Order 11491, as amended, by Local 1487, National Federation of Federal Employees, (hereinafter called the Union or NFFE), against the Department of the Interior, Bureau of Reclamation, Yuma Projects Office, a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the San Francisco, California, Region on October 12, 1973.

The complaint alleges, in substance, that the Respondent without consulting or conferring, unilaterally changed the established competitive area governing reduction in force and thereafter refused to confer with the Union for purposes of discussing the Union's pending complaint thereon without the presence of rival union representatives, all, in violation of Sections 19(a) (1), (3) and (6) of the Executive Order.

A hearing was held in the captioned matter on November 13, 1973, in Yuma, Arizona. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.^{1/}

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the agreed-upon facts contained in the joint exhibits and other relevant evidence adduced at the hearing, I make the following, conclusions and recommendations:

Findings of Fact

The facts are not in dispute and no credibility issues are involved.

Prior to August 20, 1972, Region 3 of the Department of Interior was composed of a number of sub-regional or field offices, among which were the Lower Colorado River Project Office, Blythe, California, and the Yuma Projects Office, Yuma, Arizona. ^{2/} NFFE, the Complainant herein, was the exclusive

^{1/} Respondent filed a post-hearing brief which has been duly considered.

^{2/} It appears that the prime mission of the Colorado Project was dredging, while the Yuma Project was concerned with irrigation.

..... :
 In the Matter of :
 :
 DEPARTMENT OF THE INTERIOR :
 BUREAU OF RECLAMATION :
 YUMA PROJECTS OFFICE :
 YUMA, ARIZONA :
 :
 Respondent : CASE NO. 72-4338
 :
 and :
 :
 LOCAL 1487, NATIONAL FEDERATION :
 OF FEDERAL EMPLOYEES, BLYTHE, :
 CALIFORNIA :
 :
 Complainant :
 :
 Robert D. Conover, Esquire
 Office of the Field Solicitor
 U. S. Department of Interior
 Riverside, California
 For the Respondent
 Homer R. Hoisington
 Regional Business Agent
 National Federation of Federal Employees
 Post Office Box 870
 Rialto, California
 For the Complainant
 Before: BURTON S. STERNBURG
 Administrative Law Judge

representative of the non-supervisory and non-professional employees at the Colorado project and a party to a collective bargaining agreement covering such employees with Bureau of Reclamation, Region 3, Lower Colorado River Project Office. The non-supervisory employees at the Yuma Projects Office with the exception of those involved in the engineering function, were represented by another union, the IBEW, which was a party to a collective bargaining agreement with the Yuma Projects Office. The employees in the engineering department were unrepresented.

The "competitive areas" for reduction-in-force purposes, prior to August 20, 1972, were (1) Lower Colorado River Project Office, Blythe, California, including Field Offices involved in dredging activity and, (2) Yuma Projects Office Yuma, Arizona. Thus, in accordance with the foregoing, in the event of a reduction-in-force at the Colorado Project any employee, including those in the field office, possessing the requisite seniority and skills, could bump any employee working within the Colorado River Project Office. A similar project-wide situation existed with respect to the Yuma Projects Office.

On August 20, 1972, pursuant to a reorganization involving the merger of the Colorado Project Office and the Yuma Projects Office, the functions of the Colorado Project Office and the employees working therein were officially transferred to the Yuma Projects Office. 3/ The employees performing land-based equipment operations and shop functions at the Colorado Project were assimilated into the Yuma Projects Office field and shop crews at Yuma, Arizona; and the employees in the engineering function of the Colorado Project were assimilated into the engineering organization at Yuma. Administrative personnel were offered positions in the Yuma Projects administrative organization, but they declined to move to the new location. Contrary to the rest of the employees involved, the employees engaged in operation of the dredges for the Colorado Project (comprising "field offices") were transferred as an organizational entity to the Yuma Projects Office, but their work functions and work locations remained unchanged. Thus, this latter group of employees who had been associated with the dredging operations, were not intermingled with any existing Yuma Projects Office personnel and their supervisor-

3/ At this time the Colorado River Project Office ceased to be a viable entity.

employee relationships remained unchanged with the exception that top management direction came from a different Project head.

Subsequently, on September 29, 1972, the Yuma Projects Office, being concerned with the question of employee representation created by the merger, held a meeting which was attended by representatives of both the IBEW and the NFFE. During the meeting the Respondent, after pointing out the existing representation problems created by the merger, proposed (1) that inasmuch as the dredging operation of the former Colorado unit retained its identity as a distinct identifiable unit, such unit should be allowed to be represented by NFFE; (2) that the employees from the Colorado Project Office that had been assimilated into the Yuma field office and shop crews located at Yuma should be considered an accretion to the existing unit represented at Yuma by the IBEW; and (3) that all engineering personnel, including those recently transferred from Colorado to Yuma, should be afforded the opportunity to select or reject a bargaining representative. The meeting ended with the unions agreeing to give their respective positions on the Respondent's proposal in the near future.

By letters dated October 9, and November 22, 1972, the IBEW and NFFE, respectively, informed the Respondent that they were not agreeable to its September 29th proposal, each taking the position that for various specified reasons its respective union should be recognized as the sole bargaining representative for the entire newly consolidated Yuma Project operation.

Thereafter, the Respondent, without any further communication or contact with either NFFE or IBEW, determined that there could be no informal resolution of the representation question. In line with this conclusion, and after unilaterally determining that it was appropriate to maintain separate competitive areas with regard to the dredging operation and the remainder of the Yuma Project, the Respondent in early December 1972, made a verbal recommendation to the Regional Office, Boulder City Nevada, that new competitive areas similar to those existing prior to the merger, i. e. Colorado dredging and Yuma Project, be established. Respondent made a formal request to this effect to the Commissioner, Bureau of Reclamation, Washington, D.C., by letter dated December 21, 1972. Following approval of the aforementioned request on January 12, 1973, a "Lower Colorado Region Supplement to the Federal Personnel Manual" was issued on January 23, 1973, establishing the requested new competitive areas with respect

to any future reduction-in-force for the Lower Colorado Region which reads in pertinent part as follows:

- (5) Yuma Projects Office, Yuma, Arizona (all of the Yuma Projects Office except the dredging function)
- (6) Yuma Projects Office, Yuma, Arizona (all of the dredging function assigned to the Yuma Projects Office)

In the interim, in November 1972, the Respondent filed an RA (Representative Status) petition (Case No. 72-3964) with the Labor-Management Services Administration of the Department of Labor. Also, James Schuster, a former employee, filed a Decertification Petition (Case No. 72-4067) seeking decertification of the IBEW. Both petitions relied on the merger in support of the actions urged therein. On October 24, 1973, the Assistant Secretary of Labor for Management Affairs dismissed the petitions finding that the petition in Case No. 72-4067 was untimely filed and that the petition in Case 72-3964 did not raise a question concerning representation since "the reorganization of August 20, 1972, did not substantially or materially change the scope or character of the units involved . . . , and that therefore, such units remain viable and identifiable." A/SLMR No. 318.

In February 1973, Respondent determined that a reduction-in-force in the dredging program was imminent. To this end, and since the representation question had yet to be resolved, it held separate meetings on March 1 and 2, 1973, with the IBEW and NFFE, respectively, during which the impending reduction-in-force was discussed. Thereafter, on March 12 and April 26, 1973, general and specific reduction-in-force notices, respectively were issued, specifying the effective dates thereof as May 26 and June 10, 1973.

In the interim, NFFE filed its complaint underlying the instant proceedings. Subsequently, NFFE and the Respondent exchanged a number of letters concerning the pending complaint, among which were letters dated June 1 and 14, 1973, wherein the Respondent made it clear that in view of "the existing question of unit determination" no meeting would be held with NFFE unless representatives of the IBEW were allowed to be present.

Subsequently, some 20-25 dredging employees were laid off without being allowed the opportunity to exercise seniority, etc. and bump other employees employed in the Yuma Projects

Office, designated, as noted above, a separate "competitive area" from that of the dredging operation. While the record is silent as to how many of the laid-off dredging employees might have retained jobs within the Yuma Projects Office had they been included in such "competitive area," Respondents representatives conceded at the hearing that had the dredging employees been accorded bumping rights in the Yuma Projects Office, some may have been able to retain employment.

DISCUSSION AND CONCLUSIONS

Section 11(a) of the Executive Order provides, in pertinent part, that an agency and an exclusive representative shall meet at reasonable times and confer in good faith on matters affecting working conditions. A reduction in force "is a matter affecting working conditions". ^{4/} Accordingly, an agency is obligated to bargain with the exclusive representative with respect to the procedures which management will utilize or observe in effecting its decision to reduce its forces. ^{5/} The agency's initial decision to effectuate a reduction-in-force, however, by virtue of Sections 11(b) and 12(b) of the Executive Order falls outside the purview of Section 11(a). Thus, Section 11(b) provides that "the obligation to meet and confer does not include matters with respect to the mission of the agency;...the number of employees; and the numbers, types and grades of positions or employees assigned to an organizational unit, work project or tour of duty...;" and Section 12(b) provides that an agency retains the right "to relieve employees from duties because of lack of work or for other legitimate reasons."

In the instant case, the Respondent, following the merger of the Colorado and Yuma, Arizona, projects, determined that the dredging operation should constitute a separate competitive area for purposes of any future reduction-in-force. To this end, it unilaterally and without notice to NFFE, changed the then existing single competitive area for reduction-in-force by dividing same into two separate areas, i. e., dredging and Yuma Projects Office. Thereafter, it appears that no communications whatsoever with regard to the unilateral change in the procedures to be followed with respect to reduction-in-force was had with NFFE until such time as a reduction-in-force

4/ United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois. A/SLMR 289

5/ See footnote 4 supra.

became inevitable.

Subsequently, following the filing of the complaint by NFFE attacking the aforescribed unilateral action with respect to the competitive areas, the Respondent refused to meet with NFFE unless representatives of the IBEW were allowed to attend any scheduled meeting.

Respondent does not contend that the unilateral change in competitive areas falls within the protection of Sections 11(b) and 12(b) of the Executive Order. Nor does it contend that the procedures, i. e., competitive area, to be utilized in order to effectuate decisions to reduce forces are not matters affecting working conditions within the meaning of Section 11(a) which it is obligated to meet and confer in good faith thereon with NFFE, the exclusive representative. ^{6/} Rather, Respondent appears to justify its actions solely on the ground that the merger raised a question concerning representation and that in such circumstances it was relieved from its obligation to "meet at reasonable times and confer in good faith" with respect to any change in the competitive areas, a matter found herein to affect working conditions. In support of its position in this latter regard Respondent cites the decision of the Federal Labor Relations Council in Headquarters, United States Army Aviation Systems Command, FLRC No. 72A-30.

Headquarters, United States Army Aviation Systems Command, was an appeal from a decision of the Assistant Secretary (A/SLMR No. 168) wherein the Assistant Secretary found the Activity to be in violation of Section 19(a)(6) of the Order by virtue of its action in refusing to sign a previously negotiated agreement and ordered, as part of the remedy, that the Activity post a notice to all employees concerning the refusal to sign the agreement. The Activity appealed only the posting provisions of the Assistant Secretary's decision, contending that the remedy was inappropriate since its action was predicated solely on the existence of a question concerning representation caused by a reorganization which it had timely attempted to resolve by filing an election petition. In affirming the Assistant Secretary's decision, the Council stated:

^{6/} Under all the circumstances here disclosed, such contentions, if made, would be, and are hereby found, on the basis of applicable decisions of both the Assistant Secretary and the Council cited supra, to be without merit.

"...where an agency has acted in apparent good faith and availed itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit, and where no other evidence of misconduct is involved, and agency should not be forced to assume the risk of violating either section 19(a)(3) or section 19(a)(6) during the period in which the underlying representation issue is still pending before the Assistant Secretary.

"Rather, we believe that procedures can and must be devised which will permit an agency to file a representation petition in good faith, to await the decision of the Assistant Secretary with respect to that petition, and to be given a reasonable opportunity to comply with the consequences which flow from the representation decision, before that agency incurs the risk of an unfair labor practice finding. Since it does not violate the Order to raise a question concerning representation in good faith, the procedures employed to effectuate the purposes of the Order must permit an agency to do so without risking an unfair labor practice.

"In so holding, we point out that representation proceedings should be given priority only where appropriate. For example, if other evidence of misconduct is involved, or, if after the representation decision has been issued, an agency still refuses to accord a labor organization the representative status to which it is entitled, it is, of course appropriate to proceed with an unfair labor practice complaint. We hold only that where related representation and unfair labor practice cases involve the same underlying issue, and where there is no other evidence of misconduct, the Order requires that the agency be permitted to remain neutral during the pendency of the representation petition without incurring the risk of an unfair labor practice finding."

While I appreciate the Respondent's dilemma, I can find no solace for its unilateral actions in the above cited Council decision. The decision, as I read it, calls for no sanctions to be imposed upon an Agency pursuant to Section 19(a) of the Executive Order for any inaction on its part pending decision on a timely filed petition seeking resolution of a question concerning representation. Thus, the Council notes that "an agency should not be forced to assume the risk of violating Section 19(a)(3) and (6)" and should be "permitted to remain neutral during the pendency of the representation petition." Indeed, this is precisely what occurred in the

case then being reviewed by the Council, i.e., the agency took no action with respect to signing the previously negotiated agreement. Here, the Respondent did not remain neutral or inactive, but on the contrary, irrespective of the pending petition designed to resolve the question concerning representation, it unilaterally took action which had a substantial impact on the employees' working conditions. While hindsight reflects the wisdom of such action since a reduction in force did subsequently occur, no evidence, whatsoever, appears in the record justifying the timing of the action. In the absence of any evidence indicating some business exigency for the action, I am constrained to find that the Respondent's action in changing the area of competition without first conferring with NFFE was violative of Section 19(a) (6) of the Order. 7/

As to Respondent's refusal to meet with NFFE relative to its pending complaint without the presence of IBEW representatives, I conclude that Respondent committed a further violation of Section 19(a) (6) of the Order. The obligation to meet and confer in good faith is not satisfied by any meeting, but only those held in an atmosphere conducive to settlement of the pertinent matters and where meaningful discussions may occur. While either party is free to select its own bargaining representative and consultants, neither may insist upon the attendance of outsiders, particularly a rival union, as a condition precedent to a meeting. Attendance of a rival union might well prevent the usual give and take normally underlying the settlement of matters affecting working conditions.

Moreover, while it may be true, as contended by Respondent, that the refusal was predicated on a desire to remain neutral pending the outcome of the representation petition as provided in the Council decision cited supra, the fact remains, however, that but for the Respondent's prior unilateral action no meeting would have been necessary. In these circumstances, to allow Respondent to now stand behind the skirts of neutrality on an issue which it, and it alone, created, would defeat the purposes of the Executive Order. Additionally, while it is highly possible or probable that any discussions would by necessity involve issues of interest to the IBEW, no such fact has been established. Accordingly, until such time as issues involving the IBEW develop, Respondent is not free to insist prematurely upon IBEW representation at any meeting to be held

7/ A contrary conclusion might well allow an agency to escape the obligations under the Executive Order by unilaterally creating a condition or situation which could cast suspicion on the appropriateness of the bargaining unit or a union's representative status and establish a basis for a representation petition. Thereafter, irrespective of the merits of such pending petition, the agency could freely without meeting and conferring in good faith as required by the Order, institute

with NFFE.

Lastly, as Respondent's actions in this latter respect do not appear to constitute assistance to the IBEW within the meaning of the Executive Order, I conclude that Respondent did not violate Section 19(a) (3) of the Order and hereby recommend dismissal of the allegation to this effect contained in the complaint.

RECOMMENDATIONS

Having found that Respondent has engaged in conduct which is violative of Section 19(a) (6) of the Order by virtue of its actions in unilaterally changing the area of competition and refusing to meet with NFFE, I shall recommend to the Assistant Secretary that he adopt the following recommended order designed to re-establish the status quo and effectuate the purposes of Executive Order 11491.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, shall:

1. Cease and desist from:

(a) Unilaterally changing the area of competition for purposes of reduction in force within the Yuma Projects Office without conferring or negotiating with Local 1487, National Federation of Federal Employees, the exclusive representative of its employees engaged in the dredging function.

(b) Insisting that IBEW representatives be invited to attend all meetings between the Yuma Projects Office and NFFE.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

7/ (continued) unilateral changes in matters affecting working conditions.


(a) Re-establish the area of competition at the Yuma Projects Office to that which existed prior to January 23, 1973, and re-evaluate all lay-offs made subsequent to such date in accordance therewith.

(b) If, following the action taken in accordance with paragraph 2(a) above, it should develop that any employee was incorrectly laid off, such employee or employees shall be reinstated to his appropriate position and duly reimbursed for any loss of back pay occasioned by his lay-off.

(c) Upon request confer and negotiate with Local 1487, National Federation of Federal Employees with respect to any changes in the area of competition for purposes of reduction in forces.

(d) Post at its Yuma Projects Office, Yuma, Arizona, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Project Manager or other appropriate official in charge of the Yuma Projects Office, Yuma, Arizona, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. The Project Manager shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(e) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: January 7, 1974
Washington, D. C.

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR - MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change the area of competition for purposes of reduction in force within the Yuma Projects Office without negotiating or conferring with Local 1487, National Federation of Federal Employees.

WE WILL NOT insist that representatives of the International Brotherhood of Electrical Workers be invited to attend all meetings between the Yuma Projects Office and Local 1487, National Federation of Federal Employees.

WE WILL re-establish the area of competition for purposes of reduction in force at the Yuma Projects Office to that which existed prior to January 23, 1973, and re-evaluate all layoffs made subsequent to such date in accordance therewith.

WE WILL should it develop that any employee was incorrectly laid off, reinstate such employee or employees and make him whole for any loss of back pay occasioned by his layoff.

WE WILL upon request confer and negotiate with Local 1487, National Federation of Federal Employees with respect to any changes in the area of competition for purposes of reduction in forces.

(Agency or Activity)

By: _____
(Signature)

Dated: _____

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 its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF INTERIOR,
NATIONAL PARK SERVICE,
JEFFERSON NATIONAL EXPANSION MEMORIAL,
ST. LOUIS, MISSOURI
A/SLMR No. 402

This case involved an unfair labor practice complaint filed against U.S. Department of Interior, National Park Service, Jefferson National Expansion Memorial, St. Louis, Missouri (Respondent), by the National Federation of Federal Employees (Complainant), alleging that the Respondent, during a union membership drive, harassed and intimidated an employee for exercising her legal rights in assisting a labor organization in violation of Section 19(a)(1) and (2) of the Order.

The Administrative Law Judge recommended that the complaint be dismissed. Thus, he found that the Respondent's treatment of the employee involved, insofar as job assignments were concerned, did not constitute harassment and intimidation in violation of the Order. Further, he concluded that the alleged discriminatee's lack of rotation among jobs was fully explained by the physical restrictions imposed by herself and her doctors. In connection with the allegation that an offer of promotion was withdrawn improperly, the Administrative Law Judge found that even if the Respondent had offered and then withheld the promotion with respect to the alleged discriminatee, there was insufficient evidence to establish that such action constituted a violation of the Order.

Based on his credibility resolutions and the lack of evidence of anti-union motivation, the Administrative Law Judge further concluded that other acts of alleged misconduct, such as a supervisor's request that an employee obtain for the supervisor "an application to join the union," a statement to the alleged discriminatee that she could not take personal belongings into the projection room, and a supervisor's recording of his own remarks at a regular meeting held with employees, were not violative of the Order.

Noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF INTERIOR,
NATIONAL PARK SERVICE,
JEFFERSON NATIONAL EXPANSION MEMORIAL,
ST. LOUIS, MISSOURI

Respondent

and

Case No. 62-3658(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On March 22, 1974, Administrative Law Judge Thomas W. Kennedy issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, 1/ conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-3658(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 24, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180, at footnote 1.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



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: :
In the Matter of :
: :
U. S. Department of Interior, :
National Park Service, :
Jefferson National Expansion Memorial :
St. Louis, Missouri :
: :
Respondent :
: :
and :
: :
National Federation of Federal Employees: :
: :
Complainant :
.....

Case No. 62-3658 (CA)

John D. Trezise, Esq.
Office of the Solicitor,
Department of the Interior
Washington, D. C. 20240

Mr. Karl H. Hanna
National Park Service,
Room 4141, 1100 L Street, N. W.
Washington, D. C. 20240

For the Respondent

Ms. Billie Werking
National Representative,
National Federation of Federal Employees
2818 Hollywood Blvd.
Clarksville, Indiana 47130

Mr. George R. Stewart
House Springs, Missouri

For the Complainant

Before: THOMAS W. KENNEDY
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on August 16, 1973, by the Acting Regional Administrator for Labor-Management Services Administration, Kansas City Region, based on a complaint filed by National Federation of Federal Employees (herein called the Complainant or the Union) against U. S. Department of Interior, National Park Service, Jefferson National Expansion Memorial, St. Louis, Missouri (herein called the Respondent). The complaint alleges that Respondent violated Section 19(a), subsections (1) and (2) of the Order. Specifically, the complaint states that "[d]uring a membership drive at the activity starting January 30, 1973, and continuing for 10 working days Ms. Norma Morgan an employee was harrassed and intimidated for exercising her legal rights in assisting a labor organization...."

A hearing was held before the undersigned duly designated Administrative Law Judge on October 23 and 24, 1973, in St. Louis, Missouri. All parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Opportunity to file briefs was granted, but none was received.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

Background

Norma Morgan was first employed by the National Park Service in the latter part of 1969. She was first employed as an Information Receptionist, but was later reclassified to a Park Technician GS-4. She was assigned to the Jefferson National Expansion Memorial in St. Louis, Missouri. Action was taken by Respondent to transfer Ms. Morgan to a different location, namely, Wilson Creek, but this action was aborted through the processing of an adverse action appeal by Ms. Morgan. The adverse action consisted of Respondent's notification of intent to remove because of failure to report at the new location, Wilson's Creek. A determination was made that the adverse action was taken prior to the reporting date, and as a result Respondent was ordered to reinstate Ms. Morgan to her position at the Jefferson National

Expansion Memorial in St. Louis. She returned to this position in August of 1972. 1/

The alleged unfair labor practices

On January 30, 1973, Ms. Billie Werking, a national representative of the Union, arrived at Respondent's activity in St. Louis, for the purpose of engaging in an organizational drive among the employees. Respondent had notice of this drive and had notified its employees. Shortly after Ms. Werking's arrival, Supervisory Park Technician Edwin F. Eckert introduced her to Ms. Norma Morgan, at which time he asked Ms. Morgan to take Ms. Werking to the area assigned for her use. Ms. Morgan and Ms. Werking had never met before that time. The Union alleges in its complaint that Respondent for the next ten days harassed and intimidated Ms. Morgan because she assisted the Union. While the complaint is not specific, evidence adduced at the hearing indicates that the alleged harrassment and intimidation relates to (1) job assignments; (2) refusing to promote after promising such promotion; and (3) other conduct designed to demean Ms. Morgan or the Union. While not all occurrences apparently relied on by Complainant took place during the 10-day period set out in the complaint, they will nonetheless be discussed below:

1. Job assignments

Respondent is responsible for the operation of the Jefferson National Expansion Memorial, located on the west bank of the Mississippi River in St. Louis, Missouri. The memorial consists chiefly of the Arch, a stainless steel hair-pin-shaped structure rising some 640 ft and housing several areas open to the public, including a projection room in the lower area and an observation area at the very top of the structure. Also included in Respondent's operations is a nearby old courthouse, open to the public as a sort of museum and housing displays relating to the development of the West. The Arch is sometimes referred to as the Gateway to the West.

Respondent's operations involved herein were at all times material under the general supervision of Superintendent Ivan Parker. The day-to-day operations involved herein were the responsibility of Charles A. Ross, Chief, Interpretation and

1/ None of these matters is alleged to constitute an unfair labor practice under the Order. They are related here only as background, since it is uncontested that during this period Ms. Morgan assisted union representatives in an organization drive at the Jefferson National Expansion Memorial. Respondent admittedly had knowledge of this union activity by Ms. Morgan.

Resources Management, Jefferson National Expansion Memorial. Assisting him was Edwin F. Eckert, who during the times material herein was classified as Supervisory Park Technician, GS-5, and who supervised a cadre of Park Technicians, one of whom was Norma Morgan. Park Technicians are assigned to various locations, including four locations at the street level of the Arch, the observation area at the top, the projection room, and various locations in the museum area of the Old Courthouse. These employees wear uniforms and come in contact with the public, specifically those visiting the Jefferson National Expansion Memorial. Duties include guided tours of the area, explanations and interpretations of the exhibits and the history involved in the theme presented. They also operate movie projectors and assist in other audio-visual programs. In addition there is also a cadre of Volunteers in Parks (VIPs), most of whom are assigned to locations in the Old Courthouse.

Respondent rotated assignments among the Park Technicians in order to add variety to the job and thus reduce boredom and also to give wide experience to all, so that all positions would always be covered. This mobility is particularly important since the facilities are open to the public seven days a week and the normal tour of duty for the Park Technicians is 40 hrs. per week.

From the time Norma Morgan was reinstated to her position in August 1972, she kept detailed notes of what transpired at her place of work, particularly as it related to her. This was done at the suggestion of the Union, and during the hearing herein Ms. Morgan referred often to these notes during her testimony. One of her complaints was that she was not rotated as others were, and it is the Union's contention that this disparate treatment was accorded Ms. Morgan because of her union activity. Respondent admits that Ms. Morgan was not rotated as much as others but points to the fact that there were certain assignments she could not perform. Thus, after working awhile in the Wool Room, a display in the Old Courthouse where wool is made from the fleece of sheep in a demonstration to the public, Ms. Morgan complained that she was allergic to the wool and produced a doctor's certificate to that effect, which suggested she not be assigned to that location. Respondent complied. While Ms. Morgan was never assigned to the Fur Room, a room in the Old Courthouse displaying furs of the type carried by fur traders in the early days when St. Louis was developing as a trading center, there is some suggestion that Norma Morgan's allergy and sinus condition would have contraindicated such assignment, at least on any regular basis. Ms. Morgan was assigned to other areas, including the observation room at the top of the Arch, until she complained of a problem with her inner ear. Such assignments ceased when doctors' statement were obtained to the effect that Ms. Morgan suffered from vertigo and Meniere's disease.

Thus it was that Ms. Morgan was not rotated in assignments as much as others, for none other had such medical restrictions. And so as a natural consequence of the system of assignment with rotation she found herself in certain locations, such as the projection room or entrance to the ramps, more often than others. But insofar as the projection room assignment was concerned, Ms. Morgan sought such work and was eager to learn and hoped for a permanent assignment in that area, albeit at a higher grade. And as for the assignment to the location at the entrance to the ramps, in answer to a question as to whether she considered it a good or bad assignment, Ms. Morgan replied:

Well, unlike many of the other employees, I don't think there is any bad job there. (tr. 55)

Although Ms. Morgan complained of not being rotated, she also complained of too much movement. Thus the following colloquy took place at the hearing:

Q. (by Ms. Werking, Union representative) - Have you ever been asked to go to the courthouse from the Arch to work, walked up and been told to return, that it was a mistake?

A. (by Ms. Morgan) - On one day I went up and back six times, and in passing Mr. Wilkerson remarked to me, "this is a goddammed race track here."

Q. When you reported to the courthouse, who approached you and told you to return to the Arch, or vice versa?

A. Mr. Ross had told them, I had just gotten there, I hadn't even take my coat off, and Mr. Ross had called the girl and told her to send me back to the Arch and I no more got back to the Arch than they told me not to take my coat off, Wilkerson told me not to take my coat off, but that I was to go back up to the courthouse. When I got back to the courthouse they send me back down to the Arch. (tr. 181-182)

Although no brief was submitted and oral argument was waived, presumably the Union would argue that Respondent's treatment of Ms. Morgan insofar as job assignments were concerned constituted harassment and intimidation in violation of Section 19(a) Subsections (1) & (2) of the Order. But the lack of rotation is fully explained by the physical restrictions imposed on

Ms. Morgan, not by Respondent but by herself and her doctors. And the instances of erratic movement, seemingly unexplained and perhaps inefficient, are insufficient to establish a violation of the Order, particularly in the absence of any cogent evidence to establish any illegal motive. I find and conclude, therefore, that Complainant has failed to establish that Respondent violated any provisions of the Order insofar as job assignments were concerned.

2. The refusal to promote

Although the complaint makes no specific reference to a promise or refusal to promote, Ms. Werking, Union representative, stated at the hearing:

In our charge we have attempted to prove that Norma Morgan was promised a GS-5 and denied it. (Tr. 159)

Evidence was allowed on this point, since a refusal to promote after a promise could conceivably constitute harrasment and intimidation as alleged in the complaint. There is evidence that Respondent sought an allocation of a GS-5 or GS-7 position as projectionist, and in this connection Mr. Ross had indicated to the Park Technicians that he thought the position should go to a Park Technician. According to Norma Morgan, Mr. Ross stated to her around October 1972:

...I'm going to put you in the projection booth. I have already put in for a GS-5 and GS-7...I would like for you to have the GS-5 up there. I think you deserve it. All you have to do is to learn how to run those 35 mm machines. Now, Eckert is going to go down with you tomorrow and he is going to show you how to run the machine. If you can learn to run the machine, the job is yours.

The following day, Mr. Eckert, who had had only four hours of training himself, taught Morgan presumably all he knew. "From there on in," testified Ms. Morgan, "I just read the manuals and worked on it as best I could. I did get the machines running well. I never was trained on how to maintain those machines."

Mr. Ross did not deny that he held out hope for a GS-5 projectionist rating, but stated it was open to anyone who could qualify. "It did not only pertain to Norma Morgan," he testified. "It pertained to all people in the division." This is supported by the testimony of Complainant's witness, Brent Allen, who testified that Ross mentioned this higher rating for a

projectionist "at every meeting...when we asked him about it." The position was eventually filled by the hiring of a Wage Board employee (blue collar) who was trained in the maintenance of the projection room equipment.

There was some suggestion by Complainant at the hearing that jobs were not properly posted or that preselection was engaged in. Respondent, however, adduced testimony and introduced documents attesting to the fact that positions in which Norma Morgan indicated an interest were properly posted and selection was made in accordance with prescribed rules and procedures. This evidence was not contradicted except by bare assertions of belief of irregularities. Thus, reliable evidence shows that Ms. Morgan applied for promotion from Information Receptionist, GS-4, to Park Technician, GS-5, under a vacancy announcement issued and open during the period January 26, 1970, through February 9, 1970, and reopened during the period March 17, 1970, through March 27, 1970. Ms. Morgan was not qualified for the promotion at that time. The Civil Service Commission's qualification standards for Park Technician, GS-5, required 12 months of specialized experience, and Ms. Morgan had to her credit only 4 months of such experience.

Ms. Morgan's name was certified on a promotion certificate issued October 30, 1972, as eligible for Supervisory Park Technician, GS-5, at Jefferson National Expansion Memorial. Her name was included with the names of three other National Park Service employees. Mr. Edwin F. Eckert was selected from the certificate for the promotion.

Ms. Morgan later applied for promotion to Supervisory Park Technician, GS-7, under a vacancy announcement issued and open during the period July 16, 1973, through July 30, 1973. The Civil Service Commission's qualification standards for Park Technician, GS-7, require that the incumbent have at least one year of specialized experience at the GS-6 level or at least 2 years at the GS-5 level. Ms. Morgan had no specialized experience at either the GS-6 or GS-5 level. Her specialized experience had been at the GS-4 level, and, therefore, she was not qualified for the promotion.

Considering all the evidence, then, I find and conclude that the record does not support a finding that Respondent violated any provisions of the Order by promising and/or refusing or withholding any promotion from Norma Morgan. Indeed, assuming, *arguendo*, that Respondent promised Ms. Morgan a promotion and then reneged on that promise, there is insufficient evidence to warrant a finding that such action constitutes a violation of § 19, subsections (1) and (2) of the Order as alleged

in the complaint.

3. Other conduct by Respondent

Much was made at the hearing, both by Complainant and Respondent, about an incident wherein Mr. Ross, an admitted supervisor, asked Ms. Morgan to procure for him an application for membership in the Union. Apparently, it is this incident which the complaint refers to when it states, "...She [Morgan] was intimidated by Mr. Ross in the presence of her fellow workers when he referred to the union as 'your union'."

According to Morgan's testimony, at the conclusion of a staff meeting, presided over by Ross, Ross stated to Morgan in the presence of other employees, "Now, Norma, I want to talk to you about your union...I want you to get me an application. I want to know what I have to do to join your union...." (tr. 13)

At the hearing, when asked why he sought a membership application from Norma Morgan, Mr. Ross testified:

I think one simple statement can cover that. I sincerely wanted the application to join the union. I would have got it back that day and completed with \$25 check if she would have done it. I was sincerely earnest in the request. I sincerely regret that it has somehow been twisted. (tr. 76-77)

By way of further explanation, Mr. Ross testified that joining the union would have been a good move; that if his employees were interested in the union, he didn't want to be on the outside; and that one of the best ways, in his opinion, to let the employees know he did not disapprove of their joining was to announce publicly that he was interested in joining.

Whatever may be said of the wisdom of Mr. Ross' attempt to join the union, I credit his explanation and find that his conduct in this respect did not constitute harrassment and intimidation in violation of the Order. Indeed, if anything, it would more nearly tend to prove a violation of Section 19, subsection (a) (C) of the Order rather than subsections (a) (1) and (a) (2) as alleged, particularly since the record is devoid of any evidence of anti-union animus on the part of Respondent.

Although I doubt they merit much, if any, attention, two other incidents will be discussed, since apparently the evidence was adduced as proof of harrassment and intimidation in violation

of the Order. One of these incidents involved a statement to Morgan that she could not take personal matter into the projection room. This statement was made by Supervisor Eckert, who, while standing with Ross, observed Morgan about to enter the projection room carrying a large shopping bag. When Ross reminded Eckert of the rule against personal belongings in the projection room, Eckert told Morgan she could not take the shopping bag with her. There was ample credible testimony to the effect that the projection room, because it contained expensive and sensitive equipment, was kept at constant temperature and free of dust. There was a rule against carrying personal items into the projection room and this rule applied to all who entered. While there was evidence that Eckert, who appeared as a friendly and sympathetic individual, relaxed that rule on many occasions, his own supervisors apparently did not know that, and there is nothing to indicate that the incident in question was motivated by any desire or intent to intimidate or harrass.

The other incident involved the recording of remarks at a staff meeting. Ross had placed a recorder in open view of the employees present and recorded his own remarks. The meeting was not related in any way to the Union or its attempt to organize the employees, but was one periodically called for the purpose of exchanging ideas. After speaking, Ross invited questions or remarks, but shut off the recording device before anyone spoke. It is this refusal or declination to record the employees' remarks which the union apparently considers as harrassment and intimidation or conduct which interfered with employees' rights under the Order. But Ross' testimony, I think, puts the matter to rest. When asked to explain his conduct, he replied, "How can I have a free meeting for them if I'm going to record what they say. I wanted to record what I was saying." I find that this incident did not constitute harrassment or intimidation, nor did it interfere with, restrain or coerce employees in the exercise of the rights assured by the Order.

Conclusions

The incidents related above are those which I consider to be mainly relied upon by Complainant to prove the allegations set out in the complaint. However, I have considered all the evidence presented in this case. If some of it has not been set out here in detail, it is because I have considered it too insignificant to warrant discussion, such as the incident which led Norma Morgan to question Charles Ross concerning the identity of her supervisor, or the incident relating to the restriction on use of carbon paper in the projection room. Much of Norma Morgan's testimony was subjective, and she was quick to utter her conviction that she was being harrassed because of her union activity. But a finding of a violation of the Order must be based on the preponderance of the evidence (see Sec. 203.14,

Rules and Regulations; 29 CFR § 203.14). Such evidence must be objective, and in that category I view the record as sadly lacking.

Here we have a case where an employee was assisting a union and where there was no question that management was aware of the activity. But management was not opposed. Indeed the top two management officials with whom Norma Morgan had frequent contact had previously held positions where they represented employees in dealing with management. While such a position in the past does not insulate or immunize a management representative from unfair labor practices, the evidence in this case shows cooperation rather than opposition to the organizational drive involved. As a matter of fact, while perhaps a bit naive and self-serving, management here proposed a resolution to the complaint of unfair labor practices that a new organizational drive be initiated by the Union, during which management would supply a better headquarters location for the union and otherwise cooperate fully in the drive. With such a background more evidence than is found in this case is required to support a violation of the Order. (Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334)

In summary, considering all the evidence in this case, I find and conclude that the record does not support a finding that Respondent violated the Executive Order as alleged in the complaint.

Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against Respondent be dismissed in its entirety.


THOMAS W. KENNEDY
Administrative Law Judge

Dated: March 22, 1974
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

CHARLESTON NAVAL SHIPYARD,
PRODUCTION DEPARTMENT,
CHARLESTON, SOUTH CAROLINA
A/SLMR No. 403

This proceeding arose upon the filing of separate unfair labor practice complaints by a unit employee and a steward of the exclusive representative alleging that the Respondent Activity had violated Section 19(a)(1) of Executive Order 11491 by denying each of them their rights accorded by Section 7(d)(1) of the Order. In this connection, the unit employee alleged, in substance, that the Respondent Activity violated the Order by refusing to allow him the right to have the steward represent him at an investigative discussion which could have resulted in disciplinary action being taken against him. The steward alleged, in substance, that the Respondent Activity violated the Order by compelling him to use two hours of annual leave rather than granting him official time in order to resolve the unfair labor practice charge filed by the unit employee against the Respondent Activity.

The Administrative Law Judge recommended dismissal of the complaints. In this regard, he noted that Section 7(d) of the Order confers no rights upon employees, organizations, or associations enforceable under Section 19 of the Order, but merely delineates those instances in which employees may choose a representative other than their exclusive representative in certain grievance or appellate actions. With regard to the unit employee's allegations, the Administrative Law Judge found that a supervisor conducted a preliminary private discussion with the employee in accordance with the negotiated agreement's procedure which specified that an employee was not entitled to representation at such discussions. Moreover, the Administrative Law Judge found, consistent with Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, that the exclusive representative had no right under Section 10(e) of the Order to be present at such a discussion as the discussion was informal in nature and involved merely the alleged shortcomings peculiar to the employee and not general working conditions.

With regard to the steward's allegations, the Administrative Law Judge noted that while the Assistant Secretary's Regulations provide for granting official time to certain employees who testify at hearings held under the Executive Order, there is no provision in the Assistant Secretary's Regulations or under the Order granting official time to union representatives in order to investigate unfair labor practice charges. Accordingly, the Administrative Law Judge concluded that requiring the steward to take annual leave, without more, did not constitute interference or restraint under the Order.

Noting that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge. Accordingly, he ordered that the complaints be dismissed.

A/SLMR No. 403

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CHARLESTON NAVAL SHIPYARD,
PRODUCTION DEPARTMENT,
CHARLESTON, SOUTH CAROLINA

Respondent

and

Case No. 40-4911(CA)

ISAIAH G. GILLINS (INDIVIDUAL)

Complainant

CHARLESTON NAVAL SHIPYARD,
PRODUCTION DEPARTMENT,
CHARLESTON, SOUTH CAROLINA

Respondent

and

Case No. 40-4971(CA)

ORA MAUK (INDIVIDUAL)

Complainant

DECISION AND ORDER

On April 30, 1974, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject cases, and noting that no exceptions were filed, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaints in Cases Nos. 40-4911(CA) and 40-4971(CA) be, and they hereby are, dismissed.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



Dated, Washington, D.C.
June 24 1974

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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In the Matter of      :
                       :
CHARLESTON NAVAL SHIPYARD :      Case No. 40-4911 (CA)
PRODUCTION DEPARTMENT   :
CHARLESTON, SOUTH CAROLINA :
Respondent               :
                       :
and                       :
                       :
ISAIAH G. GILLINS        :
Complainant              :
                       :
CHARLESTON NAVAL SHIPYARD :      Case No. 40-4971 (CA)
PRODUCTION DEPARTMENT   :
CHARLESTON, SOUTH CAROLINA :
Respondent               :
                       :
and                       :
                       :
ORA MAUK                 :
Complainant              :
                       :
.....

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Edward T. Borda, Esq.
Office of Civilian Manpower Management
Department of the Navy
Labor Relations Disputes & Appeals Section
Washington, D. C. 20390
For the Respondent

Ora Mauk
207 Michael Drive
Summerville, South Carolina 29483

and

Joseph D. Speller
Area Administrator
Metal Trades Council of Charleston
P. O. Box 2722, Station A
Charleston, South Carolina 29404
For the Complainants

Before: WILLIAM NAIMARK
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

These cases arose under Executive Order 11491, as amended (herein called the Order) pursuant to a Notice of Hearing on Complaint and Order Consolidating Cases issued on November 6, 1973 by the Assistant Regional Director of the United States Department of Labor, Labor-Management Services Administration, Atlanta Region.

On June 7, 1973 Isaiah G. Gillins (herein called Gillins), filed a complaint against Charleston Naval Shipyard, Production Department, Charleston, South Carolina (herein called the Respondent). The complaint alleged that Respondent violated Sections 19(a)(1) and 7(d)(1) of the Order by refusing, on April 2, 1973, to allow Gillins the right to have Ora Mauk represent him at an investigative discussion which could result in disciplinary action being taken against this Complainant.

On August 2, 1973 Ora Mauk, (herein called Mauk) filed a complaint against said Respondent, Charleston Naval Shipyard. This complaint alleged that Respondent violated Section 19(a)(1) of the Order by compelling Mauk, on May 24, 1973, to use two hours of annual leave to properly represent Gillins under Section 7(d)(1) of the Order.

A hearing was held before the undersigned on January 29, 1974 at Charleston, South Carolina. Both parties were represented and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Briefs filed were duly considered.

Complainant Gillins contends he was wrongfully denied the right to have a representative present during an investigative discussion of his actions, as an employee, which management conducted on April 2, 1973. It is maintained that this right is accorded him under the Order - 7(d)(1) - and its denial is violative of 19(a)(1) of the Order.

Complainant Mauk insists he was entitled to use two hours official time on May 2, 1973 to listen to a tape recording of a meeting held on that date to resolve an unfair labor practice charge filed by Gillins against Respondent. Instead, Mauk was compelled by the employer herein to use annual leave, and he insists management was motivated by a desire to prevent Gillins from obtaining representation under 7(d)(1) of the Order. It is further urged that, in violation of 19(a)(1) of the Order, Respondent's representative F. G. Cain, indicated to employees that management viewed their union with disdain.

Respondent, in denying a violation of 19(a)(1), asserts as follows: (1) Section 7(d)(1) of the Order creates no rights

enforceable under 19(a)(1); (2) in the private sector the courts have held the employee is not entitled to union representation during an investigative discussion; (3) under Article 16 of the contract between Respondent and the union representing the unit employees herein Gillins was not entitled to representation on April 2, 1973; (4) no provision exists under the contract, nor is there any regulation, permitting an employee to use official time to prepare a complaint against an employer.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At all times material herein, and during 1973, Federal Employees Metal Trades Council of Charleston was the exclusive bargaining representative of all ungraded employees at the Respondent's shipyard at Charleston, South Carolina. Both Gillins and Mauk were included as employees in the unit.

2. Article XVI, Section 1, entitled "Disciplinary Action", provides in pertinent part as follows:

"Prior to initiating a formal disciplinary action such as a letter of reprimand or suspension of 30 calendar days or less against an employee, a preliminary investigation will be made by the immediate supervisor or other management official to document the facts and to determine whether a prima facie case exists. This preliminary investigation will normally include a private discussion with the employee if he is in a duty status. If the findings of the preliminary investigation indicate that formal disciplinary action may be warranted, an informal investigative discussion will be held with the employee if he is other than a temporary or probationary employee prior to issuance of a disciplinary action or proposed disciplinary action. If the employee so desires he may have a fellow employee present at this discussion..."

3. Gillins, an apprentice electronic mechanic, has been employed by Respondent for about two years. On four occasions prior to March 15, 1973 1/ Ernest A. Rhodes, who was Gillins' day shift supervisor, talked to Gillins regarding the wearing of a comb by Gillins in his hair while at work. Rhodes explained that this was a safety hazard, and stated the employee could get hurt if the comb caught in some equipment. In each instance Rhodes told Gillins not to wear the comb, but the latter continued to do so.

1/ All dates hereinafter mentioned, unless indicated otherwise, are in 1973.

The last occasion at which Rhodes spoke to Gillins regarding the comb took place on March 14. Gillins commented it was not a safety hazard, and Rhodes thereupon informed Gillins he intended to "write him up." On that same day Rhodes notified F. G. Cain, General Foreman II, supervisor in charge of Module Maintenance Facility (Electronics), of the fact that Gillins refused to discontinue wearing the comb after having been admonished not to wear it during working hours.

4. On March 8 Gillins worked on the grave yard shift and was supervised by Thomas Murray. Having misplaced his badge, Gillins telephoned Murray before reporting for duty on that date and notified the supervisor he could not find it but would be in shortly. Gillins did not report to work that evening. When he appeared the following evening, Murray told Gillins he had violated the leave regulations which he read to the employee. The supervisor then remarked he would consider the matter and advise Gillins later as to what action would be taken. Shortly thereafter Murray notified Cain of the occurrence, and the latter said he would conduct a preliminary investigation of the incident.

5. As a result of the several admonishments concerning the wearing of a comb in his hair while at work, Gillins filed a grievance on March 15 against Rhodes for harassment. A meeting to discuss this particular grievance was held on April 2 and was attended by Ora Mauk, union steward, Gillins, Cain, and Harris Deets, Production Superintendent.

6. On Friday, March 30, in accordance with instructions from Cain, Murray told Gillins to report to the day shift on the following Monday, April 2 for a private discussion with Cain. Gillins was informed that Cain would discuss the alleged infraction of leave regulations, as well as disobedience of a direct order from a supervisor, by this employee.

7. Upon being so informed, Gillins returned later in the day and explained to Ora Mauk, union steward, the two "charges" management had against him. It was feared by Gillins that management would declare his production to be insufficient. Therefore Mauk and Gillins went to the shop planning area on March 30 to check Trouble Figure Reports which showed Gillins' work records. As they were examining the records, Cain left his office and confronted both Complainants. Mauk explained that Gillins anticipated a charge might be levelled against him for low production and they were looking at the figures. During the discussion between Mauk and Cain the former stated he would be there on Monday, April 2 to represent Gillins. Whereupon Cain replied that Gillins would not be allowed a representative at that discussion.

8. At 4:00 p.m. on April 2, subsequent to the meeting regarding the Gillins' grievance, Rhodes came to Gillins' work

area and told the employee that Cain wanted to see him. Gillins then stated he would like Mauk to be there with him but Rhodes replied this was not permitted. When Gillins arrived at Cain's office he asked if he could have a representative present. Cain refused, attempting to explain this was a private discussion, which differed from an investigative discussion, and that under the contract no representation was provided for. Cain informed the employee that he wanted to discuss two matters: (a) the wearing of a comb by Gillins despite instructions not to do so, which constituted disobedience and (b) infraction by Gillins of leave regulations based on his failure to report on March 8.

Complainant Gillins told Cain that, in respect to the wearing of a comb in his hair, he did so from habit with no intention of disregarding instructions. Gillins remarked that women wear combs in their hair and he felt he should be allowed to do so also. In respect to the possible infraction by him of leave regulations, Gillins refused to discuss this matter without a representative being present on his behalf. Cain stated he would continue with the investigation, and that he would thereafter decide whether sufficient reason and basis existed for proceeding further.

9. After the investigation was completed and an evaluation made by Cain, no further proceedings were taken. No disciplinary action was pursued against Gillins.

10. On May 2, a meeting was held with management to resolve the unfair labor practice charge filed by Gillins. A tape recording was made of this meeting. On May 24, as the representative of Gillins, Mauk requested official time to investigate this charge. Respondent refused to grant official time, but granted, upon request, two hours leave time to Mauk to listen to the tape recording of the May 2 meeting.

11. Cain testified, and I find, that management has followed a procedure consistent with the contractual provisions in Article XVI when an employee is accused of misconduct. In accordance therewith a preliminary investigation is made by a supervisor and then a report made to the next level of supervision. As part of the preliminary investigation to determine whether a prima facie case exists, a private discussion is held with the employee involved. This is done to determine whether there is sufficient reason to proceed further with the matter. Moreover, the employee is given an opportunity to give any information which will aid management in concluding whether there is reason to proceed further. The discussion would be between the employee and a particular supervisor designated by Cain, or, in some instances, the General Foreman would discuss the matter with the individual. In the event a prima facie case is found to exist, an investigative discussion takes place, and the employee is entitled to have a representative thereat if he so requests. No disciplinary action toward the employee is taken until the

shop head conducts his investigation.

12. Mauk testified, and I find, that he represents employees at times as the union steward, and on other occasions he represents individuals as a fellow employee. Since Mauk did not know what action management might take against Gillins, he could not state which would have been the better way to represent him. The record does reveal that Mauk told Cain on March 30 he would be at the discussion on April 2 as a representative of Gillins' own choice.

13. On the basis of the foregoing and the record testimony, I find and conclude that Mauk requested management to appear at the private discussion set for April 2 as Gillins' personal representative and not in his official capacity as union steward; further, that Gillins did not request union representation at that discussion but merely asked to have "a representative" present at the private discussion on April 2.

Conclusions

Denial of Representation to Gillins
As Allegedly Violative of 19(a)(1)

The contention by Complainants herein that Respondent violated Section 7(d)(1) of the Order by denying Gillins representation on April 2 is rejected. While there is no dispute that management refused to permit a representative to attend the discussion on that date, that section does not provide any basis for finding a violation of Section 19 of the Order. It is now clearly established that Section 7(d) confers no rights upon employees, organization or associations enforceable under Section 19. Rather is it viewed as delineating those instances in which an employee may choose a representative, other than his exclusive representative, in certain grievances or appellate actions. Charleston Naval Shipyard, Charleston, S. C., A/SLMR No. 304; Internal Revenue Service, Chicago District, A/SLMR No. 279.

(1) In the case at bar the union and Respondent have, under Article XVI, Section 1 of the contract, set forth at which stage an employee may have a fellow employee present during discussions between management and the employee. This section pertains to discussions concerning misconduct on the part of employees, and I am not convinced the contract derogates from the language in 7(d)(1) relating to the choice of a representative in a grievance or appellate action. Apart from whatever rights are created by the contract - the violation of which may possibly result in the enforcement thereof under the Order - the record reflects that the contractual procedure with respect to selecting a fellow-employee representative at discussions with employees was in fact followed. Thus, Gillins was called to a preliminary discussion, described as "private" in the agreement, conducted to determine whether a prima facie

case existed for further investigation. It is expressly provided that the employee is entitled to have a fellow employee present at the next step, i.e., the informal investigative discussion prior to any proposed disciplinary action being taken. The clear implication of the language in Article XVI, Section 1 of the contract is that no employee, as Gillins, is entitled to a representative at the earlier stage involving a private session with the supervisor. Accordingly, Respondent's refusal to permit Mauk to represent Gillins, as his personal representative, at the April 2 discussion with Cain was in conformity with the agreement. Since Respondent's conduct herein was consistent with the negotiated agreement, I conclude it did not interfere with, restrain, or coerce employees in the exercise of rights assured by the Order. See Charleston Naval Shipyard, supra. I therefore conclude that management's denial to Gillins of his request for a representative at said discussion does not warrant finding a violation of 19(a)(1) of the Order.

(2) Assuming, arguendo, that Gillins requested Mauk's presence in the latter's official capacity, and that the steward asked to be present as a union representative, I am not persuaded that Respondent's denial thereof would nevertheless be violative of the Order.

Section 10(e) of the Order confers a right on an exclusive bargaining representative to be present at formal discussions regarding grievances, personnel policies and practices or matters affecting general working conditions of employees, and a concomitant right flows to the employees in the unit. See U. S. Department of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR No. 278. The right is thus restricted so as not to exist with respect to informal meetings or sessions between an employee and a supervisor. In the recent case of Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336 "counselling" sessions took place with an employee to discuss his use of abusive language as well as the employee's failure to follow a uniform requirement on the job. The Assistant Secretary concluded these were discussions concerning an employee's shortcomings and were peculiar to that individual. As such, those sessions did not pertain to general working conditions and were not deemed to be formal in nature. Hence no violation of 19(a)(1) was found by virtue of a denial of representation thereat.

In the case at bar the discussions between Gillins and Cain on April 2 likewise involved shortcomings peculiar to this employee, and were held prior to the investigative discussions. It is apparent this type session was never intended to be formal but designed to constitute a preliminary meeting before any disciplinary considerations. To this extent the discussion was strikingly similar to the counselling sessions called in the Texas Air National Guard case, supra. Accordingly, I would

conclude that the discussion on April 2 was informal in nature, and a denial of union representation thereat would not sustain a violation of 19(a) (1) based on Section 10(e) of the Order.


On the basis of the foregoing and the record as a whole, I conclude that Section 7(a)(1) affords no basis for finding a violation herein; that Respondent's actions in denying Gillins a fellow representative on April 2 were consistent with the contract between Respondent and the Union herein; and that, in any event, the discussion was informal rather than a formal one- which is necessary to sustain a right under 10(e) of the Order- and a denial of union representation to Gillins would thus not support a violation under Section 19(a) of the Order.

Refusal to Grant Official Leave to Union Steward Mauk to Investigate an Employee's Unfair Labor Practice Charge

While the Regulations now provide for granting official leave to certain employees who testify at a hearing, there is no provision therein, nor under the Order, awarding such leave to union representatives to investigate employees' charges. 2/ Neither do I conclude that requiring such representative to take annual leave, without more, constitutes interference or restraint under the Order.

Recommendations

Upon the basis of the foregoing findings and conclusions the undersigned recommends that complaints in Case No. 40-4911(CA) and Case No. 40-4971(CA) against Respondent herein be dismissed.


WILLIAM NAIMARK
Administrative Law Judge

DATED: April 30, 1974
Washington, D. C.

2/ See also Dept. of the Treasury, Internal Revenue Service, Fresno Service Center, Fresno, Calif., A/SLMR No. 309.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGION 6, PUBLIC BUILDINGS SERVICE,
KANSAS CITY, MISSOURI
A/SLMR No. 404

This case involved an unfair labor practice complaint filed by Isaiah Mitchell and Charles F. Brooks, Jr. (Complainants) against the General Services Administration, Region 6, Public Buildings Service, Kansas City, Missouri (Respondent) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order. Specifically, the Complainants alleged that the Respondent refused to meet with Brooks, who was the shop steward or representative of certain of the Respondent's employees exclusively represented by the American Postal Workers Union, Local 308; and refused to allow Brooks to have union representation when two of the Respondent's supervisors attempted to serve two notices of infraction upon Brooks. The Respondent contended that the complaint lacked merit and, further, that dismissal was warranted because Mitchell, who was not an employee of the Respondent and was a steward of another labor organization, had no standing to file the complaint in the instant proceeding.

The Administrative Law Judge found that under the circumstances Mitchell had standing to file the complaint in this matter. With respect to the merits, the Administrative Law Judge found that the Respondent had not refused to meet with Brooks but, rather, was unwilling to interrupt its operations in order to meet with Brooks and the entire crew of the night shift. The Administrative Law Judge noted that the Activity had demonstrated its willingness to bargain in good faith by shortly thereafter arranging a meeting with the exclusive representative's Local President and several other employees. He further found, based upon his credibility resolutions, that the Respondent had not denied Brooks union representation when the two supervisors attempted to give Brooks two notices of infraction.

Noting that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge.

UNITED STATES DEPARTMENT OF LABOR


BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the complaint in Case No. 62-3666(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 24, 1974

GENERAL SERVICES ADMINISTRATION,
REGION 6, PUBLIC BUILDINGS SERVICE,
KANSAS CITY, MISSOURI

Respondent


Paul J. Yassef, Jr., Assistant Secretary of
Labor for Labor-Management Relations

and

Case No. 62-3666(CA)

ISAIAH MITCHELL and
CHARLES F. BROOKS, JR.

Complainants

DECISION AND ORDER

On April 4, 1974, Administrative Law Judge Thomas W. Kennedy issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge.

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.



REPORT AND RECOMMENDATION

I. Statement of the Case

..... :
In the Matter of :
General Services Administration, :
Region 6, Public Building Services, :
Kansas City, Missouri :
Respondent : Case No. 62-3666 (CA)
and :
Isaiah Mitchell and :
Charles F. Brooks, Jr. :
Complainants 1/ :
..... :

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For the Complainants

Before: THOMAS W. KENNEDY
Administrative Law Judge

1/ By ruling on Motion for Intervention, discussed *infra*, caption was amended to name Charles F. Brooks, Jr., as Co-Complainant. The two Co-Complainants are referred to *infra*, sometimes individually by name, and at other times jointly as Complainants.

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on August 6, 1973, by the Regional Administrator for Labor-Management Services Administration, Kansas City Region, based on a complaint filed on April 24, 1973, by Isaiah Mitchell (herein called Mitchell or Complainant Mitchell) against General Services Administration, Region 6, Public Building Services, Kansas City, Missouri (herein called Respondent). The complaint alleges violations of Section 19, subsections (a)(1) and (a)(6) of the Order, in that Respondent; (1) denied union representation to Charles Brooks, Jr., an employee, when Respondent attempted to serve on Brooks two forms entitled "Record of Infraction"; (2) refused to consult, confer or negotiate with Local 308, APWU, during the incident in (1) above; and (3) refused to consult, confer, or negotiate with Local 308, APWU, by refusing to recognize Charles Brooks as an authorized representative of Local 308 APWU, when Brooks attempted to act on behalf of 18 other employees.

A hearing was held before the undersigned duly designated Administrative Law Judge on November 27, 1973, in St. Louis, Missouri. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Opportunity was also afforded the parties to argue orally and to file briefs. At the end of the hearing, Claimants' attorney argued orally, and following the close of the hearing, Respondent filed a brief. Both the oral argument and the brief have been duly considered by the undersigned.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

II. Preliminary Matters

A. Motions filed by Respondent

1. Motion to Dismiss

Prior to the hearing Respondent filed with the Regional Administrator for Labor-Management Services Administration, Kansas City Region, a Motion to Dismiss. The filing was so close to the hearing date that service on the parties was not accomplished before the hearing opened, although the Office of Administrative Law Judges was advised telephonically by the Regional Administrator's office that the motion was referred to

the Administrative Law Judge for ruling. At the time the hearing opened, Respondent renewed the motion and filed a copy with the undersigned and served a copy on Complainants' attorney. (ALJ Exh. 1) Respondent argued in its motion that the complaint was defective in that Isaiah Mitchell, named as Complainant, was not an employee of Respondent but was a representative of a labor organization different from that which represented Respondent's employees. Respondent's motion further argued that rights asserted in the complaint are rights of parties not parties or signatories to the complaint and that the issues involved could not be resolved by dealing with a labor organization other than the exclusive representative of its employees. Finally, although no evidence had yet been presented in the case, Respondent's motion argued that the complaint lacked merit. The undersigned denied the Motion to Dismiss on all points except point 1, on which ruling was reserved. My ruling follows on that remaining part of the motion.

Charles F. Brooks, Jr., was an employee of Respondent during the time of the occurrences alleged to constitute unfair labor practices under the Order. He was directly involved in those occurrences and attempted to file a charge against Respondent pursuant to the provisions of the Order. He was told that he could not file such a charge since he was no longer an employee of the United States Government, having been discharged by Respondent. 2/ Brooks then sought the aid of Isaiah Mitchell, an employee of a different agency of the U. S. Government, the Department of Defense. Mitchell, who at his place of employment was a Shop Steward for a local of American Federation of Government Employees, (herein AFGE), filed a charge against Respondent in behalf of Brooks and later filed the complaint herein. 3/

The fact that Mitchell identified himself in the complaint as Shop Steward, Local 900, AFGE, does not, in my opinion, disqualify him as a filing party. It is clear that he was filing in

2/ Brooks' discharge is not alleged as an unfair labor practice. Consequently no evidence was adduced at the hearing concerning the circumstances or events leading to the termination of his employment by Respondent.

3/ The charge, filed January 17, 1973, showed Brooks as "Employee" and Mitchell as "Designated Representative" (attachment to Asst. Secretary's Exh. 1(b)). See also Respondent's Exh. 1, a document dated October 28, 1972, giving Mitchell authorization to represent Brooks in matters concerning "grievances and/or appeals," a designation I consider broad enough to include filing of charges under the Order.

behalf of Brooks, for the underlying charge shows him as "designated representative" of Brooks. But even assuming Mitchell to be a representative of AFGE, a labor organization different from the exclusive representative of Respondent's employees, I see nothing in either Section 2 of the Order or Section 203.1 of the Assistant Secretary's Rules & Regulations which would prevent or preclude such a filing. Nor do I view it inconsistent, contradictory or inimical to the purposes of the Order that under such circumstances an agency in resolving a charge of unfair labor practices would be "dealing" with a labor organization other than the exclusive representative of its employees. But we need not dwell on such matters, for it is clear, and I so find, that Mitchell was acting as a designated representative of Brooks. Mitchell, in my opinion, could qualify to file the complaint herein as "an employee of an agency...of the United States," as set out in Section 2(b) of the Order and referred to in Section 203.1 of the Rules and Regulations. But even that is immaterial, for if Mitchell filed as an agent of Brooks, which I have found, then we must look to the status of Brooks himself. Respondent in effect argues that Brooks could not file the complaint because he was not an employee of Respondent, and Mitchell could not file for him because neither was Mitchell an employee of Respondent. But to hold that an individual cannot lodge a complaint concerning matters which took place when he was an employee simply because he was not an employee at the time he was filing would do great harm to the purposes and policies of the Order. Under such a holding an employee discharged because he engaged in activity or exercised rights assured by the Order would be unable to file a complaint in an attempt to redress the discrimination. And if a short answer is that he can get a labor organization to file for him, then what of the employee who is fired because he refuses to join the union? To whom does he turn? While a literal or strained reading of the definition of "employee" under Section 2(b) of the Order might lead to a holding that such an individual would have no standing to file a complaint, the resultant absurdity when viewed in context with the overall provisions and purposes of the Order commands a different conclusion.4/

4/ While not controlling in the instant case, a somewhat analogous situation arose under the National Labor Relations Act (49 Stat. 449, 29 U.S.C. §151 et seq.). In Phelps Dodge Corporation, 19 NLRB, 547, the National Labor Relations Board, in interpreting the definition of "employee" together with the unfair labor practice provisions of the Act, ordered reinstated two individuals who were refused employment on application because they were union members. Granted the definition of "employee" under the National Labor Relations Act is considerably broader than that in the Order, the rationale employed by the Supreme Court in upholding the Board's decision is applicable here, particularly as it relates

I find, therefore, that Brooks could have filed the charge, and later the complaint, in this matter and consequently Mitchell could so file, either as the agent of Brooks or as an "employee." Accordingly, for the reasons stated above, that portion of Respondent's Motion to Dismiss taken under advisement at the hearing is hereby dismissed.

2. Motion to Correct Transcript

Respondent also filed Motion for Correction of the Official Report of Proceedings, setting out certain required changes in the transcript. No response was filed by the Complainants. Having carefully reviewed the transcript and notes taken at the hearing, the undersigned on March 26, 1974, issued Order Correcting Transcript, setting out the changes incorporated in Respondent's motion, together with other changes deemed by the undersigned to be necessary and appropriate. Copies of that Order were served on the parties and have been attached to the Official Report of Proceedings in this matter.

B. Motions filed by Complainants

Following the hearing, the attorney for Complainant Mitchell, signing as "Attorney for Intervenors", filed a document entitled "Motion for Intervention," through which he purported to represent, and sought, pursuant to §203.11 and 203.18 of the Rules and Regulations, to have named as parties and intervenors, Charles F. Brooks, Jr., and a group not identified by name but described as a group of 18 employees comprising the maintenance crew and referred to in the motion as "Crew."

1. Motion for Intervention - Charles F. Brooks, Jr.

As to that part of the Motion for Intervention dealing with Charles F. Brooks, Jr., I find that Charles F. Brooks, Jr., is the real party in interest in this proceeding, and for the reasons stated above in the discussion of Respondent's Motion to Dismiss, Brooks could have filed as Complainant. Accordingly, that portion of the Motion for Intervention is hereby granted, and I have amended the caption to show Charles F. Brooks, Jr., as a Co-Complainant.

4/ (Con't) to interpretation of definitions to avoid doing violence to underlying policies and overall provisions. (See Phelps Dodge Corporation v. National Labor Relations Board, 313 U.S. 177, 61 S.C. Rept. 845, 847-850)

2. Motion for Intervention - The Crew

Turning now to the second portion of the Motion for Intervention, I find that the Crew, as described therein, does not have sufficient interest to warrant intervention in this proceeding. Although mentioned in the testimony at the hearing, more fully described below, the individuals were never identified by name, with the exception of Brooks, who was the only one of the group to testify and who described himself as the representative of the group while he was employed by Respondent. The interest of that particular group of employees in the outcome of these proceedings is no more apparent than the interest of any employees of any respondent involved in an unfair labor practice proceeding. Accordingly, that portion of the Motion for Intervention relating to the "Crew" is hereby denied.

III. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated §19(a)(1) and (6) of the Order, and the evidence adduced to support the allegations involves two incidents; one where Charles Brooks sought a meeting with management personnel to discuss conditions affecting the night maintenance crew, and one where management personnel attempted to serve on Brooks two Record of Infraction forms. At the time of these two incidents there was in effect a collective bargaining agreement between Respondent and Local 308, National Association of Post Office and General Services Maintenance Employees. 5/ That contract (Resp. Exh. 4) grants exclusive recognition to local 308 in a unit described in Section 2 thereof, which reads as follows:

The Employer recognizes the employee organization [local 308] as the exclusive representative under the provisions of Executive Order 10988 of all employees in the Building Management Division, Public Buildings Service, General Services Administration, St. Louis, Missouri, commuting area, except the incumbents of the following positions previously identified in the letter from the Regional Administrator granting exclusive recognition:

- Clerical and administrative employees
- Any managerial executive
- Any person engaged in GSA personnel work in other than a purely clerical capacity.
- Both supervisors who officially evaluate performance of employees and the employees whom they supervise (exclusion of rating supervisors allows inclusion of employees)

5/ This organization, a labor organization within the meaning of §2(e) of the Order, is presently known, and at all times

Both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in the unit

In the event of organizational changes affecting positions in the unit, the Employer is authorized to identify additional positions the incumbents of which shall be excluded from the unit in accordance with Section 6a of Executive Order 10988.

A. The meeting incident

Charles F. Brooks, Jr., worked as a maintenance man on the night shift at 1520 Market Street, St. Louis, Missouri. He was employed under a special program designed to promote the hiring of mentally handicapped individuals. He was the Sergeant-at-arms of Local 308 and was one of a crew of 19 working on the night shift. Manuel Brown and Robert Frazier were the supervisors responsible for the work of the night crew at 1520 Market Street. Over them was the Night Building Manager, Albert Falcon, and over him was Earl Kordick, Building Manager for the Downtown Crew.

During the period of time involved herein there was no Shop Steward at 1520 Market Street. The nearest Shop Steward of Local 308 at night time was located in a building located a few blocks away at 1114 Market Street.

On October 11, 1972, during a break period, the night crew at 1520 Market Street met and discussed among themselves problems they were having in understanding certain disseminated regulations which affected their work. At that meeting they elected Charles Brooks, Jr., to act as, and serve as, Shop Steward and/or their representative to arrange a meeting with management to discuss the working conditions and supervisory instructions. On the following night, at Brooks' request, Supervisor Brown arranged a meeting between Brooks and Night Building Manager Falcon. At that meeting, which took place in Falcon's office at 1520 Market Street around 9:30 p.m., Brooks told Falcon about the election the night before and requested that management representatives meet with the night crew. Falcon refused to meet with the crew, and it is this refusal which is alleged to be an unfair labor practice under the Order.

There is little dispute about the meeting, but Falcon's version, which I credit, is more detailed. According to him, Brooks wanted to hold the meeting with the entire night crew at that very moment. Brooks was vague, stating only "general

5/ (Con't) material herein was known, as American Postal Workers Union (APWU). It is referred to herein as Local 308 or the Union.

conditions" as the subject matter for the requested meeting. Falcon protested that he could not shut down the entire operations for such a meeting and suggested to Brooks, "Well, if some people have a complaint, I'm willing to sit down and talk with you or any one of the 18 people you want. Go out in the corridor, help yourself to one and bring him in, we'll sit down and talk about it." (tr. 105) Brooks would not agree with that procedure, insisting instead that the meeting be held then with the entire crew. After the short meeting with Brooks, Falcon advised Building Manager Kordick about his conversation with Brooks, and Kordick contacted William Henderson, President of Local 308, and arranged a meeting to discuss any problems which might exist concerning members of the night crew at 1520 Market Street. That meeting took place the following Monday, October 16, and was attended by management officials, Union President Henderson, and several members of the night crew. Brooks was excluded from the meeting, but there is no evidence that Respondent had anything to do with the exclusion. On the contrary, the evidence is clear and undisputed that Brooks was excluded from the Monday meeting by Union President Henderson.

Section (19)(a)(6) of the Order makes it an unfair labor practice to "refuse to consult, confer or negotiate with a labor organization as required by this Order." And §11 states, inter alia, "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions...." (Emphasis supplied)

At the time Brooks requested the meeting, he was Sergeant-at-Arms of Local 308 and as such was listed as one of the elected officials in a document sent to Respondent in March of that year. (Joint Exhibit 1) When Brooks requested the meeting, he announced that on the previous night he had been elected Shop Steward of the night crew at 1520 Market Street. Falcon had received no other notification of such election and might reasonably have questioned it, particularly since the established procedure called for such notifications to come from the Union President. But that is not the point, for whether as Sergeant-at-Arms or as the newly elected Shop Steward, Falcon did not refuse to "consult and confer" with Brooks. Indeed, he indicated a willingness to discuss any problems and even suggested that Brooks bring in anyone who had any problems. Apparently he was willing to recognize Brooks as an "appropriate representative." What he was not willing to do was to meet with the entire crew of 19 workers at that time. Since Brooks was vague and general about any problems that existed, and particularly since calling a meeting of the entire crew at 9:30 p.m. would have closed down the entire operations of the night crew, it

was not, in my opinion, a "reasonable time" for such a meeting. The good faith of Respondent was clearly shown, I think, by its action in immediately arranging a meeting with the Union President to discuss any problems which might exist. Respondent's actions, therefore, were not inconsonant with the provisions of the Order.

B. The Form 225 incident

On October 16, 1972, Supervisors Brown and Frazier approached Brooks at his place of work and attempted to deliver to him two forms, which they requested Brooks to read and sign. The forms, designated as Form 225, are used to record infractions of rules or instructions and provide a space for the employee's comments and signature.

Brooks testified that when the two supervisors proffered the forms, Brooks requested that a Union representative be present, stating that he was not refusing to sign, but wanted a Union representative to explain the forms to him before he signed. At this point, according to Brooks, the supervisors stated, "This is personnel management and you don't need no union representation." (tr. 61) The matter was not pursued, and the supervisors left.

The two supervisors involved in the incident testified, and their testimony differs from that of Brooks in one material respect. According to Supervisors Brown and Frazier, Brooks refused to accept or sign the Forms 225 unless he had witnesses, specifically requesting two fellow employees, Freddie Jenkins and Rockefeller Smith. Neither of these two employees held any position in Local 308 at that time, except possibly that of member, and according to Brown and Frazier, Brooks referred to them as "witnesses" and never during the incident mentioned the Union. When Brooks was adamant about his request, even after the supervisors offered to read the contents of the forms, Brown and Frazier abandoned their task and left with the forms undelivered. 6/ I credit Brown's and Frazier's version of the incident, finding it to be more probable, particularly in light of the fact that at that time Brooks held himself out to be the

6/ The actual forms involved in the incident were not put in evidence by either party, but there was received in evidence Respondent's Exhibit 6, a blank Form 225. There is evidence that Brooks was discharged about two weeks after this incident, but that discharge is not in issue in this case. I consider, therefore, the contents of the Forms 225 proffered to Brooks to be immaterial to the issues presented here.

Union representative of the night crew, having been elected Shop Steward just five days before. This is not to say, as suggested by Respondent, that had the circumstances warranted, Brooks would not be entitled to a union representative simply because he himself was one. But I find that Brooks was not denied union representation; he was denied his request that two fellow employees be brought from their places of work to witness the incident.

Section (10) (e) of the Order states, in pertinent part: "When a labor organization has been accorded exclusive recognition, it... shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (Emphasis supplied) It could be argued that Brooks was entitled to have a representative (or two) present during any discussion of a rule infraction and that it was immaterial whether he used the term "union representative" or "witnesses." Whether or not the "opportunity to be represented" should have been accorded Brooks under the circumstances would then depend on whether the aborted discussion at the time of the presentation of the Forms 225 could be considered a "formal discussion," as contemplated by §10(e) of the Order.

Building Manager Kordick, when asked to describe how a Form 225 is used, testified as follows:

- A. When there is a reasonable basis for an infraction, we complete this form, put all the facts that we know on it, give it to the employee, he has a chance to make a statement whether he agrees with it, whether it's totally wrong, he can say anything he wants to on that form.
- Q. What happens to the form then?
- A. Once we get a statement or lack of a statement, there is another section in it which we list previous infractions, then there is an item for action taken and a supervisor will recommend an action, and a higher level supervisor will indicate the action taken, to recommend. This becomes the basis for a warning letter or whatever disciplinary action that might be taken.
- Q. Is the form itself intended as any disciplinary action?

- A. No, it isn't. As a matter of fact, if the employee's statement is a satisfactory explanation of the supervisor's report, the form would be destroyed.
- Q. Is this a fact-gathering device on an incident that has been reported to you, is that what you're saying?
- A. Well, we try to gather as many facts as we can to put on the form to start with. Then we give all of the facts that we have to the employee to read and make any statement he might have. (tr. 86-87)

The use of the Form 225 in the instant case is not unlike the use of "counselling sessions" involved in a case recently decided by the Assistant Secretary. In that case (Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, decided January 8, 1974), the Assistant Secretary, in answer to an argument that the employee was entitled to have a union representative present, stated:

Thus, the sessions involved did not relate to the processing of a grievance. [footnote omitted] Moreover, the matters discussed at the sessions did not involve general working conditions and work performance. Rather they were related...to an individual employee's alleged short-comings... In my judgement, both incidents had no wider ramifications than being limited discussions at a particular time with an individual employee... concerning particular incidents as to him. [footnote omitted] [slip opinion pp 3-4]

The "sessions" in that case were held not to be "formal discussions" under §10(e), and thus the denial of union representation did not constitute a violation of the Order. I find in the instant case, for the reasons stated above, that the discussion with Brooks at the time of the delivery of the Forms 225 did not constitute a "formal discussion" under the provisions of §(10)(e) of the Order, and Brooks, therefore, was not entitled to union representation at the incident.


IV. Conclusions

On October 11, 1972, when Brooks attempted to arrange a meeting between management officials and the entire night crew, Falcon did not question Brooks' newly acquired status as Shop

Steward. All he did was to refuse to interrupt the scheduled work of the employees to hold a meeting. This refusal was neither unreasonable nor counter to the provisions of the Order. And on October 16, 1972, when Brown and Frazier attempted to deliver to Brooks two forms and to discuss with him the infractions noted thereon, they did not deny Brooks or the Union any rights accorded either of them by the Order. It follows, therefore, and I conclude, that Respondent's actions in denying the request for the meeting on October 11, and in denying the request for witnesses or representatives on October 16, did not constitute violations of §19(a)(6) of the Order. Moreover, these demials did not interfere with any rights accorded Brooks under the Order, nor did Respondent's actions interfere with, restrain or coerce employees in the exercise of the right assured by the Order, and, therefore, did not constitute violations of §19(a)(1) of the Order.

V. Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against Respondent be dismissed in its entirety.


 THOMAS W. KENNEDY
 Administrative Law Judge

Dated: April 4, 1974
 Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTION
 OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
 NATIONAL CAPITAL AIRPORTS
A/SLMR No. 405

The Petitioner, International Association of Fire Fighters, Local F-91, AFL-CIO (IAFF), and the incumbent Intervenor, National Federation of Federal Employees, Local 1709 (NFFE), sought to represent a unit of firefighters, including those classified as Crew Chiefs (Lieutenants), Training Officers and Fire Inspectors, at the Washington National and Dulles International Airports located in Virginia. The Activity, in opposition to the IAFF and the NFFE, sought to exclude Crew Chiefs, Training Officers and Fire Inspectors as supervisors.

The facts involved in this case had been brought before the Assistant Secretary previously in Federal Aviation Administration, Bureau of National Capital Airports, A/SLMR No. 91, involving the same parties. In that case, the Assistant Secretary found that the Crew Chiefs, Training Officers and Fire Inspectors were not supervisors. In the instant case, the parties stipulated that the transcript and exhibits in the prior case would constitute the basis for the resolution of the alleged supervisory status of the three employee categories in question. The Activity contended, in essence, that while the facts as to the supervisory functions of the employees in question had not changed since the time of the hearing in the previous case, several subsequent decisions of the Assistant Secretary and the Federal Labor Relations Council would justify a different conclusion than that reached by the Assistant Secretary in the prior proceeding.

The Assistant Secretary reaffirmed his finding in A/SLMR No. 91, and concluded that the Crew Chiefs were not supervisors within the meaning of the Order. In this regard, he noted that Crew Chiefs spend a substantial portion of their work time performing duties identical to those performed by other nonsupervisory firefighters; have no authority to hire, transfer, suspend, lay off, recall, promote or discharge employees; and do not assign work on other than a routine basis. Moreover, he noted that, while some Crew Chiefs have evaluation functions, the evidence was insufficient to establish that such evaluations were effective.

The Assistant Secretary also concluded that Training Officers and Fire Inspectors were not supervisors within the meaning of the Order and shared a sufficient community of interest with the other firefighters to warrant their inclusion in the unit sought.

In these circumstances, the Assistant Secretary directed that an election be held in a unit of all firefighters, including employees classified as Crew Chiefs (Lieutenants), Training Officers and Fire Inspectors.

FEDERAL AVIATION ADMINISTRATION,
 NATIONAL CAPITAL AIRPORTS

Activity

and

Case No. 22-5041(RO)

INTERNATIONAL ASSOCIATION OF
 FIRE FIGHTERS, LOCAL F-91, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
 LOCAL 1709

Intervenor

FEDERAL AVIATION ADMINISTRATION,
 DULLES INTERNATIONAL AIRPORT

Activity

and

Case No. 22-5063(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
 LOCAL 1709

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Madeline E. Jackson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, including the parties' briefs and, as discussed below, the transcript and exhibits in Case No. 22-1981, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In Case No. 22-5041(RO), the International Association of Fire Fighters, Local F-91, AFL-CIO, herein called IAFF, seeks an election in a unit of all firefighters, including Crew Chiefs (Lieutenants), Training Officers (Captains) and Fire Inspectors (Captains) at the Washington National and Dulles International Airports. The Intervenor, National Federation of Federal Employees, Local 1709, herein called NFFE, agrees that the claimed unit is appropriate. 1/

Contrary to the IAFF and the NFFE, the Activity contends that employees classified as Crew Chiefs, Training Officers and Fire Inspectors are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

In 1970 the NFFE filed a petition in Case No. 22-1981 for a unit of all firefighters at Dulles and National Airports, including Crew Chiefs, Training Officers and Fire Inspectors. The IAFF intervened in that proceeding. As in the instant case, the Activity contended that the Crew Chiefs, Training Officers and Fire Inspectors were supervisors and should be excluded from the unit. A representation hearing was held during which testimony was elicited concerning the alleged supervisory status of the employees in the three categories in question. Based on the record developed in that case, the Assistant Secretary found in Federal Aviation Administration, Bureau of National Capital Airports, A/SLMR No. 91, that the Crew Chiefs, Training Officers and Fire Inspectors were not supervisors within the meaning of Section 2(c) of the Order and that, therefore, they should be included in the unit of firefighters at National and Dulles Airports. Subsequently, an election was conducted in the appropriate unit and the NFFE was certified as the exclusive representative.

In the instant proceeding, the parties stipulated that the transcript and exhibits in the earlier proceeding constituted the basis herein for the resolution of the question of the alleged supervisory status of the Crew Chiefs, Training Officers and Fire Inspectors. Essentially, the Activity contends that while the facts as to the supervisory functions and duties of the employees in question have not changed since the time of the hearing in the previous case, several subsequent decisions by the Assistant Secretary and the Federal Labor Relations Council, hereinafter called the

1/ In Case No. 22-5063(RO), the NFFE initially sought an election in a unit of all firefighters at Dulles International Airport. However, at the hearing in this matter the NFFE requested that its petition be withdrawn. I am advised administratively that the NFFE's withdrawal request was approved by the Assistant Regional Director for Labor-Management Services on January 18, 1974.

Council, would justify a different conclusion than that reached by the Assistant Secretary in the prior proceeding. 2/

The record reveals that each Airport's fire prevention and fire protection branch employs 1 Chief, 2 Assistant Chiefs, 1 Training Officer, 1 Fire Inspector, 8 Crew Chiefs, and 31 Driver-Operators and Privates. Further, each Airport is provided with fire protection on a 24-hour basis, and a typical shift complement at each location would consist of 1 Assistant Chief, 4 Crew Chiefs, 1 Training Officer, 1 Fire Inspector, and 13-15 Driver-Operators and Privates. The record reveals that if the Assistant Chief were absent, a Crew Chief would act as Assistant Chief. However, an individual Crew Chief would act in that capacity only once every four months, for four or five days in that month. The record discloses also that some Crew Chiefs have opted not to act as Assistant Chief. Thus, it appears that only in isolated instances would an individual Crew Chief be the senior officer in charge of a shift. 3/

As noted above, in A/SLMR No. 91 the Assistant Secretary found that the Activity's Crew Chiefs were not supervisors. In reaching this conclusion, it was noted particularly that Crew Chiefs spend a substantial portion of their work time performing duties identical to those performed by other nonsupervisory firefighters, and that they have no authority to hire, transfer, suspend, lay off, recall, promote or discharge employees. With respect to their ability to make job assignments, it was noted that such assignments are made on a rotation basis or are so routine as to require no independent judgment. The Assistant Secretary also found that while the Crew Chiefs are assigned certain duties such as acting as timekeeper, maintenance officer, supply officer and procurement officer, the performance of these duties is clerical in nature and does not require the use of independent judgment.

The Activity takes the position that the Crew Chiefs have the authority to evaluate effectively Driver-Operators and Privates. The record reveals, in this regard, that at Dulles Airport all Crew Chiefs are responsible for preparing Employee Appraisal Reports (EAR's). 4/ Further, all ratings are

2/ See, in this regard, Department of the Navy, United States Naval Weapons Center, China Lake, California, FLRC No. 72A-11; Department of the Navy, Mare Island Naval Shipyard, FLRC No. 72A-12; and Atomic Energy Commission, Idaho Operations Office, Idaho Falls, Idaho, A/SLMR No. 299.

3/ Compare Atomic Energy Commission, Idaho Operations Office, Idaho Falls, Idaho, cited above, where Lieutenants were found to be supervisors. In that case, 6 of the 7 Lieutenants were stationed at facilities where there were no officers of higher rank than Lieutenant.

4/ The EAR's at National Airport which are not prepared by the Crew Chiefs are prepared by an Assistant Chief or the Training Officer.

subject to review by the Assistant Chief and the Chief who, because of the close interaction required by the nature of the work performed, are able to observe directly the firefighters in the work situation and, thus, make an independent assessment of their performance.

Under the circumstances of this case, I find that the evidence is insufficient to establish the existence of supervisory authority with respect to the Crew Chiefs. Thus, as noted above, and as indicated in A/SLMR No. 91, Crew Chiefs do not have authority to hire, transfer, suspend, lay off, recall, promote or discharge employees; they spend a substantial portion of their time performing work identical to that performed by other nonsupervisory firefighters; and they do not assign work on other than a routine basis. Nor, in my view, does the evidence establish that the Crew Chiefs effectively evaluate the performance of other employees. As stated by the Council in its China Lake decision, cited above, in determining the effectiveness of an alleged supervisor's recommendation, "the question is whether that recommendation, even though reviewed at a higher level, results in the promotion or refusal to promote an employee to a higher grade level." In the instant case, I find that the evidence does not establish that the EAR's "result in the promotion or refusal to promote an employee to a higher grade level," or that such appraisals, standing alone, are effective for any other purpose. Accordingly, I find that Crew Chiefs are not supervisors within the meaning of Section 2(c) of the Order and should be included in any unit found appropriate for the purpose of exclusive recognition.

The Activity also contends that 2 Training Officers and the 2 Fire Inspectors should be excluded from the unit sought. The record reveals, in this regard, that the Training Officers are responsible for developing, directing and implementing a training program for firefighters and that such training consists of classroom instruction and fire drills occupying several hours each day. The evidence establishes that Training Officers do not exercise any supervisory authority over other employees. While the Training Officer at National Airport does evaluate employees upon occasion, the evidence does not establish that such evaluations are effective. Each Airport also employs a Fire Inspector who is responsible for the detection and prevention of fire hazards. The record reveals that both Fire Inspectors function in a staff capacity and exercise no supervisory authority over other firefighters. Under these circumstances, I find that neither Training Officers nor Fire Inspectors possess the indicia of supervisory status as provided in Section 2(c) of the Order. Accordingly, and noting that Training Officers and Fire Inspectors share common working conditions and have substantial daily contact with other firefighters, I conclude that Training Officers and Fire Inspectors should be included within the petitioned for unit.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the

-4-

meaning of Section 10 of Executive Order 11491, as amended:

All firefighters, including Crew Chiefs (Lieutenants), Fire Inspectors and Training Officers at the Washington National and Dulles International Airports, Virginia; excluding Chiefs, Assistant Fire Chiefs, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period, because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the International Association of Fire Fighters, Local F-91, AFL-CIO; or by the National Federation of Federal Employees, Local 1709; or by neither.

Dated, Washington, D.C.
June 24, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE,
 ARMY MATERIEL COMMAND,
 TOOEELE ARMY DEPOT,
 TOOEELE, UTAH
 A/SLMR No. 406

This proceeding arose upon the filing of an unfair labor practice complaint by the National Federation of Federal Employees, Ind., Local 862 (NFFE), which alleged that the Army Materiel Command (AMC) violated Section 19(a)(1), (5) and (b) of the Order by issuing a memorandum to the Tooele Army Depot (Tooele) stating that Mr. J. Hunt, a guard, must be replaced as the President of the NFFE because of the apparent conflict of interest involved where a guard serves as an official of a labor organization which admits to membership employees other than guards. The Complaint also alleged that Tooele committed an additional violation by refusing, in accordance with the AMC memorandum, to consult with Hunt as the appropriate representative of the NFFE. The case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties had submitted a stipulation of the facts and exhibits to the Assistant Regional Director for Labor-Management Services.

The Assistant Secretary found under the circumstances there was no violation of the Order. In this regard, he noted that in Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21, it was held that it was inconsistent with the intent of Sections 1(b), 10(b)(3) and 10(c) of the Order for a guard to serve as the president of a nonguard labor organization. In the Assistant Secretary's view, these considerations were applicable to the instant case wherein the nonguard labor organization: (1) represents a unit of guards; and (2) represents two units of nonguards at Tooele, all of which were in existence prior to the effective date of Executive Order 11491. He concluded that, in this context, for a guard to participate in the management of such a labor organization would give rise to a conflict or apparent conflict of interest and would be incompatible with the official duties of the employee within the meaning of Section 1(b) of the Order. Accordingly, the Assistant Secretary ordered that the instant complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
 ARMY MATERIEL COMMAND,
 TOOEELE ARMY DEPOT,
 TOOEELE, UTAH

Respondent

and

Case No. 61-2171(CA)

NATIONAL FEDERATION OF
 FEDERAL EMPLOYEES, IND.,
 LOCAL 862

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Assistant Regional Director for Labor-Management Services Cullen P. Keough's Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of the facts, accompanying exhibits, and a brief filed by the Complainant, 1/ the Assistant Secretary finds:

The instant complaint alleges that the Army Materiel Command, hereinafter called AMC, violated Sections 19(a)(1), (5) and (6) of the Order by issuing a memorandum to the Tooele Army Depot, hereinafter called Tooele, stating that Mr. J. Hunt, a guard, must be replaced as the President of the Complainant, the National Federation of Federal Employees, Ind., Local 862, hereinafter called NFFE, because of the apparent conflict of interest involved where a guard serves as an official of a labor organization which admits to membership employees other than guards. The complaint alleges that Tooele committed an additional violation of the Order by refusing, in accordance with the above noted AMC memorandum, to consult with Hunt as the appropriate representative of the NFFE. 2/ It was stipulated, in this latter regard, that on January 25, 1972, Hunt was informed by Tooele of the content of the January 18, 1972, AMC memorandum, and that, since January 25, 1972, it has refused to recognize Hunt as the president of NFFE Local 862.

1/ The Respondent submitted an untimely brief which was not considered.

2/ The Assistant Regional Director dismissed that portion of the complaint which alleged a violation of Section 19(a)(5). No request for review of this action was submitted.

Background and Facts

Under Executive Order 10988 the Complainant was granted exclusive recognition as the representative of the employees in three separate units at Tooele: (1) all guards of the Security Division, Directorate of Administration (October 7, 1965); (2) all firefighters of the Fire Protection and Prevention Branch, Facilities Division, Directorate for Services (November 21, 1966); and (3) all General Schedule (GS) employees in the Procurement Division, Directorate for Services (November 21, 1966). Sometime in the fall of 1971, the President of NFFE Local 862 retired and J. Hunt, a guard, was selected to fill the unexpired term which ended January 20, 1972. At that time, Tooele management indicated its view that there was an apparent conflict of interest in having a guard serve as the president of a labor organization which represented guards and nonguards, but it agreed to let Hunt serve out the unexpired term.

In response to an inquiry from Tooele, the AMC issued a memorandum dated January 18, 1972, which concluded that "an apparent conflict of interest exists when a guard becomes an official of a labor organization which admits to its membership employees other than guards,...[and] accordingly,...[Hunt] must be replaced as the President of the [NFFE]." On or about January 20, 1972, Hunt was elected President of NFFE Local 862 and on January 25, 1972, he was informed by Tooele of the contents of the January 18, 1972, AMC memorandum. As noted above, in compliance with that memorandum, Tooele refused, and has continued from that date to refuse, to recognize Hunt as the president of NFFE Local 862. On July 24, 1972, the parties signed a multi-unit negotiated agreement, but Hunt was not involved in the negotiations leading to execution of such agreement.

The NFFE maintains that the January 18, 1972, memorandum issued by the AMC does not justify the removal of Hunt from his position of leadership as the NFFE is the exclusive representative for units of both guards and nonguards at Tooele and has been recognized as such since Executive Order 10988. As the guard unit "was and remains part of" the NFFE, and as Executive Order 11491 allows those units of representation which contain both guards and nonguards which were recognized under Executive Order 10988 to continue as they were, the NFFE contends that if guards are to benefit from their full rights granted under the Order they must of necessity be allowed to participate in the management of those labor organizations which represent both guards and nonguards.

The AMC, on the other hand, contends that the participation by a guard in the management of a labor organization which represents both guards and nonguards constitutes a conflict of interest within the meaning of Section 1(b) of the Order, and that Tooele therefore would be violating the Order were it to recognize Hunt.

All of the facts and positions set forth above are derived from the parties' stipulation of facts and accompanying exhibits and the NFFE's brief.

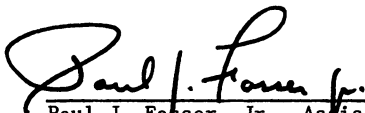
Conclusion

In Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21, the Assistant Secretary held that it was inconsistent with the intent of Sections 1(b), 10(b)(3) and 10(c) of the Order for a guard to serve as the president of a nonguard labor organization and, in this capacity, co-sign a petition. In this connection, it was stated that: "...to effectuate the purposes and policies of the Order, guards should not be permitted to participate in the management of nonguard labor organizations. Such participation, in my view, 'result[s] in a conflict or apparent conflict of interest...' and is also '...incompatible with...the official duties of the employee.'" Under the circumstances herein, I find that the above noted considerations are applicable to the instant case, where the nonguard labor organization involved: (1) represents a unit of guards by virtue of the fact that such representation was in existence prior to the effective date of Executive Order 11491; and (2) represents also two nonguard units at the facility involved. In this context, for a guard to participate in the management of such a labor organization gives rise to a conflict or apparent conflict of interest and is incompatible with the official duties of the employee within the meaning of Section 1(b) of the Order. Accordingly, I find that the conduct of the AMC and of Tooele was not violative of the Order. Therefore, I shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-2171(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 25, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

June 27, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION ON OBJECTIONS OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ARMY AND AIR FORCE EXCHANGE SERVICE,
FORT POLK, LOUISIANA
A/SLMR No. 407

The subject case involved objections to an election held on May 14, 1973, filed by the Intervenor, American Federation of Government Employees, AFL-CIO, Local 3441. The Petitioner, National Association of Government Employees, Local R5-169, won a majority of valid votes cast in the election.

One of the objections filed by the Intervenor which was the subject of the hearing in this matter alleged that the Petitioner had engaged in conduct improperly affecting the results of the election by distributing a handbill on May 12, 1973, two days before the date of the election. The evidence revealed that the handbill was a reprint of an article appearing in the April 1972 issue of Naval Affairs, a monthly publication of the Fleet Reserve Association. The objection alleged that the handbill was distributed at such a late hour that the Intervenor did not have sufficient time to respond to certain unfounded and damaging statements made in the handbill.

A second objection filed by the Intervenor on which evidence was adduced at the hearing alleged that the Petitioner had engaged in conduct improperly affecting the results of the election by the distribution of a handbill on May 11, 1973, containing false, misleading and unfounded information regarding the Petitioner's dues structure and the ability of employees to withdraw from the Petitioner.

With regard to the first objection, the Administrative Law Judge concluded, based upon his credibility findings, that the handbill referred to in the objection was promulgated and distributed to unit employees on May 6, 1973, and thereafter, and that such timing of the distribution of the handbill did not prevent the Intervenor from making an effective reply thereto had it so desired. The Administrative Law Judge further concluded that the fact that a copy of the handbill did not come into the possession of the Intervenor until the day before the election is not controlling, and that with the exercise of reasonable diligence the Intervenor should have been able adequately to have rebutted, refuted, explained or clarified any of the statements by the Petitioner in the handbill. Accordingly, the Administrative Law Judge recommended that the first objection be overruled.

With regard to the second objection, the Administrative Law Judge concluded that the Petitioner's statements regarding its dues structure was not a misrepresentation of fact, and that, in fact, the statements made by the Petitioner with regard to its dues structure were true. In addition, the Administrative Law Judge concluded that the statement made by the Petitioner as to the ability of employees to withdraw at any time was not a

misleading statement because the evidence did not show that the policy of the Petitioner was otherwise, or that a withdrawal made at any time was in any way restricted. The Administrative Law Judge rejected the contention of the Intervenor that the statement was misleading since an employee cannot "at any time" revoke a properly executed dues withholding authorization. In the Administrative Law Judge's view, this misconstrued the express language of the Petitioner's statement. Accordingly, the Administrative Law Judge recommended that this objection also be overruled.

Upon review of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, and noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's recommendation that the objections be overruled. Accordingly, he returned the case to the appropriate Assistant Regional Director for final action.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the objections to the election in the above-entitled proceeding be, and they hereby are, overruled and that the case be returned to the appropriate Assistant Regional Director for final action.

ARMY AND AIR FORCE EXCHANGE SERVICE,
FORT POLK, LOUISIANA

Activity

Dated, Washington, D.C.
June 27, 1974

and

Case No. 64-2111(R0)


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-169

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3441

Intervenor

DECISION ON OBJECTIONS

On April 23, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation on Objections to Election in the above-entitled proceeding, recommending that the Intervenor's objections to the election be overruled. No exceptions to the Administrative Law Judge's Report and Recommendation were filed by the Intervenor.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, 1/ conclusions, and recommendation of the Administrative Law Judge.

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



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For the Petitioner

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For the Intervenor

Before: SALVATORE J. ARRIGO
Administrative Law Judge

REPORT AND RECOMMENDATION ON OBJECTIONS TO ELECTION

Preliminary Statement

This proceeding, heard at Fort Polk, Louisiana on February 19, 1974, arises under Executive Order 11491, as amended, (herein called the Order), pursuant to a Notice of Hearing on Objections issued on January 21, 1974, by the Assistant Regional Director for Labor-Management Services, United States Department of Labor, Kansas City Region. At the hearing all parties were represented and were afforded full opportunity to adduce evidence, call, examine, and cross examine witnesses and argue orally. Briefs were filed by both Petitioner and Intervenor.

.....
In the Matter of

ARMY AND AIR FORCE EXCHANGE SERVICE,
FORT POLK, LOUISIANA

Activity

and

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R5-169

Petitioner

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3441

Intervenor

Case No. 64-2111 (RO)

John W. Bowlin, Esquire
Associate General Counsel
Army and Air Force Exchange Service
Headquarters Air Force and Exchange
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Dallas, Texas 75222

Dale W. Woods
Chief Personnel
Alamo Exchange Region
San Antonio, Texas

For the Activity

Michael Riselli, Esquire
Regional Counsel
National Association of Government
Employees
1341 G Street, N.W.
Washington, D.C. 20005

Upon the entire record 1/ in this matter and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

A. Background

Pursuant to an Agreement for Consent or Directed Election approved on April 27, 1973, a secret ballot election was conducted on May 14, 1973, in accordance with the provisions of the Order among certain employees of Army and Air Force Exchange Service, Fort Polk, Louisiana (herein called the Activity). The results of the election were as follows:

Approximate number of eligible voters.....	334
Void ballots.....	3
Votes cast for NAGE, Local R5-169.....	89
Votes cast for AFGE, AFL-CIO, Local 3441.....	67
Votes cast against exclusive recognition.....	10
Valid votes counted.....	166
Challenged ballots.....	0
Valid votes counted plus challenged ballots....	166

Thereafter on May 21, 1973, American Federation of Government Employees, AFL-CIO, Local 3441 (herein called AFGE or Intervenor) filed timely objections to the election alleging that National Association of Government Employees, Local R5-169 (herein called NAGE or Petitioner) engaged in conduct which improperly affected the results of the election. The objections were investigated and subsequently the Assistant Regional Director issued the instant Notice of Hearing having found that two of the objections raised "relevant issues of fact which may have affected the results of the election, and substantial questions of policy exist..." 2/

1/ By letter dated March 26, 1974, Petitioner indicated that the transcript of the hearing was incorrect in certain respects. I agree with Petitioner. Accordingly, the transcript is hereby amended as follows:

- Page 88, line 22 - "error" should read "arrow."
- Page 97, line 19 - "letter" should read "local."
- Page 108, line 12 - "NAGE" should read "AFGE."
- Page 108, line 16 - "AFGE" should read "NAGE."
- Page 176, line 22 - "NAGE Exhibit 3" should read "NAGE Exhibit 4."

2/ The Regional Administrator dismissed other objections filed by Intervenor.

Intervenor's objections which are the subject matter of this proceeding are based upon two handbills distributed by Petitioner. The first objection states:

"On May 12th, 1973, the Association (NAGE) distributed unidentified handbills (Exhibit No. 1). Refused to give one to the Union (AFGE). On May 13th, 1973, a National Representative (for the Union) (AFGE) found a handbill (Exhibit No. 1) at the entrance of the Main PX, South Fort; contents of this handbill was (sic) insulting and degrading to the Union (AFGE) and unfounded. Paragraph marked "A" was changed to read, "to be effective 1st June." Paragraph marked "B" states, "Endorsed by AFGE, AFL-CIO." All entries made were damaging, unfounded and pointed out by the National officers and National Representative that AFGE sponsored this action. At the late hour that the union received this handbill, there was not sufficient time to clarify the unfounded accusations." 3/

The Assistant Regional Director found that:

"...this objection raises a relevant question of fact as to the dates the referenced handbill was distributed and the ability of the AFGE to counter the handbill. In addition, based on the content of the handbill, a substantial question exists as to the affect this piece of literature may have had on the free choice of voters."

Intervenor's second objection states as follows:

"Exhibit No. 2 an unidentified handbill that was given to employees by the National Officers, National Representative and distributed to eligible (sic) voters May 11th, 1973, was misleading and unfounded, therefore contradictory to the Federal Personnel Manual and the Executive Order 11491 as amended, Section 21." 4/

With regard to this objection, the Assistant Regional Director concluded that:

"...this objection raises a relevant question of fact as to the dues structure of NAGE at the time the handbill was distributed and the date of distribution. In addition,

3/ A reproduction of the handbill referred to in this paragraph is attached hereto and designated "Appendix A."

4/ A reproduction of the handbill referred to in this paragraph is attached hereto and designated "Appendix B."

a substantial question exists as to the affect on the free choice of voters and the ability of the AFGE to counter the handbill."

Further, Intervenor contends in its brief that the material contained in the NAGE handbills (Appendix A and B) contained "insulting, misleading, damaging and unfounded statements..." and "...it did not have ample opportunity nor the devices to rebut or refute the contents..." of the handbills.

B. The Alleged Objectionable Conduct

1. The "retiree" handbill (Appendix A)

The text of the "retiree" handbill is a reprint of an article which appeared in the April 1972 issue of Naval Affairs, a monthly publication of the Fleet Reserve Association. According to the document, it is published for "personnel of the NAVY, MARINE CORPS and COAST GUARD, Active, Fleet Reserve and Retired." The notations "AFL-CIO" and other marginal comments, arrows and encirclements on the "retiree" handbill were, prior to distribution, supplied by Harry Breen, National Vice-President, National Association of Government Employees. Mr. Breen actively participated in the election campaign at Fort Polk.

Mrs. Jimmie F. Griffith, National Representative of the American Federation of Government Employees, AFL-CIO, was Intervenor's only witness to testify in this proceeding. Mrs. Griffith, actively participated in the election campaign on behalf of Intervenor for approximately three to four weeks prior to the election. Mrs. Griffith testified that the first time she saw the "retiree" handbill was on May 13, 1973, the day before the election. She testified, and Intervenor contends, that Intervenor was not aware of its existence until May 12. On that day Mrs. Griffith met with a group of about 10 unit employees who expressed concern over losing privilege if they voted for NAGE. At the time, Mrs. Griffith was perplexed over the employees concern since she did not know of the existence of the "retiree" handbill but further discussion of the matter was aborted for reasons not material hereto. Mrs. Griffith also testified that two or three days prior to the meeting of May 12, above, a retiree asked her and another NAGE representative why he should vote for NAGE when Intervenor was trying to take privileges away from retirees. Further, Mrs. Griffith acknowledged that she was not personally

aware of the scope of distribution of the "retiree" handbill nor did she seek to determine, after the election, when or how many employees received the handbill.

Witnesses on behalf of Petitioner testified that the "retiree" handbill was distributed to unit employees at various times and at various locations every day between May 6 and May 12, 1973. Further, Harold Wayne Jean, a NAGE supporter whose testimony I credit 5/ testified that during this period, in addition to distributing the handbill to employees he posted this handbill on four separate bulletin boards at the Activity.

2. The "dues" handbill. (Appendix B)

During their April 1973 convention, the National Association of Government Employees increased general membership dues from 90 cents a week to \$1.25 a week. Upon receiving this information Intervenor issued two campaign leaflets 6/ which, among other things made note of the dues increase. 7/ Thereafter, on May 9, 10, and 11 Petitioner distributed the "dues" handbill to unit employees.

At the hearing Intervenor indicated that it was not contending it did not have adequate time to respond to the "dues" handbill 8/ but rather it was contending that the handbill contained untruths and was misleading, specifically attacking items 1, 5, and 6 in Appendix B. 9/

5/ Another employee, Eddie Garris, testified on behalf of NAGE in this proceeding. I do not find him to be a credible witness and accordingly do not rely on any portion of his testimony in reaching my findings herein.

6/ Petitioner Exhibit Nos. 1 and 2.

7/ Intervenor's dues were then \$1.25 a pay period (2 weeks).

8/ In its brief Intervenor apparently seeks to again raise this as an issue.

9/ No specific allegation or evidence was submitted relative to the other items encompassed by the handbill.

The testimony reveals that while dues for NAGE members was increased in April 1973, the National union agreed that the increase would not apply to units which were, like Fort Polk, involved in an election campaign at the time of the dues increase. Dues for employees in these units would remain at the \$.90 a week level for one year after the election before being raised since numerous dues deduction forms to support the petitions for elections had been signed at the \$.90 level. Prior to the distribution of the "dues" handbill, unit employees attending various NAGE election campaign meetings were notified of Petitioner's decision to retain dues at the lower level for the one year period.

Discussion and Conclusions

With regard to the "retiree" handbill, I find that it was promulgated and distributed to unit employees on May 6, 1973, and thereafter and such timing of the handbill's distribution did not prevent Intervenor from making an effective reply thereto. The fact that a copy of the handbill did not find its way into the possession of an AFGE representative until the day before the election is not controlling herein. Intervenor, exercising reasonable diligence should have been timely alerted to the existence of the handbill and thereupon obtained a copy of it. Moreover, I find nothing either in the text of the handbill or the notations thereon which could not have been adequately rebutted, refuted, explained or clarified by AFGE in a timely fashion if it so desired. ^{10/} Accordingly, I conclude that Intervenor's objection relative to the "retirees" handbill should be overruled. ^{11/}

Further, I do not find that Petitioner's "dues" handbill improperly affected the results of the election. The statement that "NAGE dues are \$.90 a week" was not a misrepresentation since the testimony reveals that it was in fact what Petitioner, in April 1973, decided would be the dues at Fort Polk for the following year. In addition, I conclude that NAGE's statement in the handbill that "You can withdraw from the union ANY time you want" was not a misleading statement which improperly affected the results of the election. Intervenor offered no evidence to

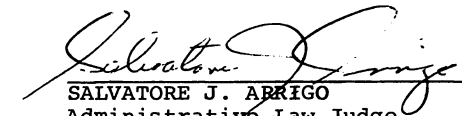
^{10/} In view of the disposition herein it is unnecessary to evaluate what effect, if any, this handbill might have had on employees ability to vote intelligently in the election.

^{11/} Non-Appropriated Fund Activities, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, A/SLMR No. 284, and cases cited therein.

show that this was not the policy of Petitioner nor did it allege or show that such withdrawal was otherwise restricted. ^{12/} Intervenor contends however that the statement was misleading since an employee cannot "at any time" revoke a properly executed dues withholding authorization. ^{13/} This misconstrues the express language of Petitioner's statement. Moreover, Intervenor itself made mention of limitations of revocations in a handbill it distributed to employees during the week of May 6 (Petitioner Exhibit No. 2). In that leaflet AFGE brought to the employees attention that the dues deduction form used by NAGE "clearly states" that it can only be cancelled twice a year. Accordingly I find, in all the circumstances, that employees could properly evaluate the NAGE statement.

Recommendation

I recommend that Intervenor's objections to the election be overruled and the case be returned to the Assistant Regional Director for the Kansas City Region for final action consistent herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: April 23, 1974
Washington, D.C.

^{12/} Cf. Graphic Arts International Union, Local 4 B, A/SLMR No. 359 and Local 1858, American Federation of Government Employees, (Redstone Arsenal, Alabama), A/SLMR No. 275.

^{13/} Section 21 of the Order provides:

"Allotment of dues. (a) When a labor organization holds exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provisions for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when--

- (1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or
- (2) the employee has been suspended or expelled from the labor organization."

AFL-CIO

FEDERAL UNION ATTACKS MILITARY RETIREES IN GOVERNMENT JOBS

Union study protests the hiring of "Double Dippers" and the "Militarizing" of Civil Service thru the "Buddy System".

AFL-CIO

EXCHANGE JOBS TO BE CUT?

UNION WANTS TO ELIMINATE 50% OF PURCHASING POWER.

The National Capitol Area Department of the AFL-CIO American Federation of Government Employees, which represents all AFGE members in the Washington, D.C. area, had a committee conduct a year-long study of military retirees employed in the Federal government. The results of the study were published in a 39-page report released in late February. The report contains so many basic inaccuracies it borders on the ridiculous! But the report has received widespread publicity and support throughout federal employee unions. If the report's erroneous assumptions, statements and conclusions are not proven to be false, they could contribute to the enactment of additional inequitable provisions to the present Dual Compensation Act.

The report states there are presently 300,000 retired military personnel with the "mean retired rank of Lieutenant Colonel" holding "the mean Civil Service Grade of GS-14." The report charges that the federal civilian work force is being "militarized" through the practice of the "buddy system" whereby military retirees become "double-dippers" who are hired in choice federal positions and are allowed to continue to receive their military retired pay.

The "buddy system" is the name given to the alleged practice whereby a military retiree employed as a federal employee assists another military retiree in gaining government employment "in violation and disregard of existing civil service laws and regulations."

The union study concludes that military retirees are being hired in increasing numbers in both defense and nondefense government agencies and this practice:

- flaunts the normal competitive hiring system
- prevents "first career" employees from being rightfully promoted, and
- hampers government efficiency by putting military retirees with "their obsolete thinking and archaic business practices into key government positions. The report boldly states, "We maintain that government agencies hire retired military because they are conditioned to obeying orders from higher authority without question."

The obvious ridiculousness of the report becomes startlingly clear when it states:

- The average civilian salary of the military retiree
- The average civilian salary of the military retiree employed by the federal government is \$20,000 annually! And

- The average military retirement income of these same retirees is \$12,000 annually!
- Using the union group's new math the report concludes that it is the receipt of this \$12,000 annual retirement income that is costing the American taxpayer \$3.6 billion a year!

The union study states that all of these evils can be eliminated by adopting the following recommendations:

- Require that ALL military retirees must wait twelve months before becoming eligible for federal civilian jobs in ALL government agencies.
 - Effective July 1, 1973 eliminate ALL military retired pay, medical benefits, exchange and commissary privileges to those employed in civilian federal jobs.
 - Abolish the policy of allowing military retirees to combine their military and civilian federal service for purposes of retiring under civilian federal recruitment laws.
 - Tighten civil service hiring procedures to prevent the "buddy system" practice in hiring military retirees.
 - Provide for stiff fines and prison sentences for any "buddy system" malpractices in the hiring, promotion or retention of military retirees.
 - During a reduction-in-force (RIF) action FIRE ALL MILITARY RETIREES FIRST before firing any civilian employee.
 - Require an annual General Accounting Office audit identifying the numbers, job locations, grades, classifications and ages of all military retirees employed in the civilian federal work force.
 - Require certification of an independent review board composed of representatives from recognized professional groups (such as the American Medical Association, the American Bar Association, etc.) that a military retiree is more qualified than any civil service careerist to fill any vacancy in grade GS-12 and above.
- The 39-page report has been endorsed by the National Capitol Area Department of the AFGE and forwarded to the national offices of the American Federation of Government Employees. The AFGE's national offices has made no public comment on the study. However, the National Capitol Area Department's President, Mr. Major Travis, was quoted by a Washington, D.C. newspaper as saying, "We feel that basically the report is a sound one. We are leaving it up to the national AFGE and its legislative department to use whatever of the report that they feel is necessary in their testimony before the House Subcommittee."

THE F.R.A.'S POSITION ON THE UNION'S REPORT

The National Committee on Legislative-Service does not feel that it has to rebut the ridiculous statements and errors in the union's report. Each F.R.A. member, whether or not he is militarily retired and employed by the federal government, knows the correct answers and rebuttals to the report.

Honorary Shipmate John Slinkman, Editor of "Navy Times," did a masterful job of dissecting the union's report and publicizing its obvious errors and rebutting the report's erroneous conclusions in his editorial "Retirees As Whipping Boys" in the 15 March edition of "Navy Times." In calling attention to the fact that the AFGE had not commented on the local union's report Shipmate Slinkman wrote,

"AFGE itself has not commented in the month since publication. There are reports it thinks the report goes too far.

"It does that. It is full of lies."

Your National Committee on Legislative-Service will assure that the appropriate Congressional Committees are apprised of the report's fallacies and the F.R.A.'s position. U.S. Representative David N. Henderson (D-N.C.), Chairman of the House Subcommittee on Manpower and Civil Service, has stated that he "hopes to hold hearings on H.R. 4540 during the Spring session." National Executive Secretary Robert W. Nolan has requested and received permission to testify.

To assure that the F.R.A. has accurate facts on which to base its testimony we have included in this magazine a postal survey card. This survey is to be answered by those F.R.A. members who are retired from the military and are presently employed by the Federal government. The postal card has prepaid postage for your convenience. Please answer all questions completely, sign your name and address and mail the postcard. It is that simple!

Your cooperation will give us the true facts on which to base our rebuttal and fight the federal employees' union's endeavors to destroy your second career. This information will also aid us in our fight to correct the present inequities of the Dual Compensation Act (Public Law 88-448) by the passage of H.R. 225, H.R. 4540 and H.R. 9054.

TO BE EFFECTIVE 1ST JUNE

THIS PROPOSAL COULD SERIOUSLY EFFECT THOUSANDS OF EXCHANGE JOBS

ENDORSED BY AFGE AFL/CIO

"APPENDIX A"

**DONT BE MISLED BY LIES AND
RUMORS THE AFGE IN AN ATTEMPT TO
CONFUSE THE AAFES EMPLOYEES HAVE
STARTED A VICIOUS CAMPAIGN OF LIES.**

The Truth Is:

- 1. NAGE Dues are \$.90 a week (\$1.80 Ea. pay day)**
- 2. No one has to become a union member**
- 3. Membership is voluntary**
- 4. No extra fees, fines or assessments**
- 5. You can withdraw from the union ANY time you want**
- 6. NAGE dues, are 90 cents per week**

449

**Dont Be Misled With AFGE Lies
Dont Be A Forgotten Govt Employee
Think Before You Vote! Think Right
Vote Right Vote NAGE**

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ALBANY METALLURGY RESEARCH CENTER,
U.S. BUREAU OF MINES,
U.S. DEPARTMENT OF THE INTERIOR,
ALBANY, OREGON
A/SLMR No. 408

This unfair labor practice proceeding involved a complaint filed by the National Federation of Federal Employees, Local Union No. 1141, Albany, Oregon (Complainant), alleging that the Albany Metallurgy Research Center, U.S. Bureau of Mines, U.S. Department of the Interior, Albany, Oregon (Respondent), violated Section 19(a)(5) and (6) of the Order by not consulting with the Complainant with regard to proposed interpretations of Public Law 92-392 which affected unit employees; by failing to consult with the Complainant concerning the procedure to be used to notify the affected employees; and by the Respondent's Research Director's equating "announce" and "inform" with consultation.

The Administrative Law Judge concluded that the promulgation of National Office policy involving interpretations as to applicability of certain provisions of the law was not an act of the Respondent nor one over which it had control. He noted that upon receipt of instructions and information from higher management as to the above matter, the Respondent immediately informed the Complainant. The Administrative Law Judge concluded also that the Respondent had committed no act, nor had it any information about which it could consult with the Complainant prior to the time it received the instructions and information. Under these circumstances, he found that the Respondent was not obligated to meet and confer over the adoption of interpretations of Public Law 92-392 and, consequently, did not violate Section 19(a)(6) of the Order.

With regard to the allegation that the Respondent failed to consult regarding the procedures for notifying affected employees, the Administrative Law Judge found that the Complainant's Chief Steward was notified immediately upon receipt of the interpretations which were discussed in "great detail" with him and which he reported on at the Complainant's Executive Council meeting. He concluded that the Respondent complied with the request of the Labor-Management Committee that the Respondent call a meeting of the employees involved to explain the matter to them and noted that no request was made by the Complainant to attend such meeting. Thus, the Administrative Law Judge reasoned that the Complainant was in no position to complain that its representative was not present in the absence of having made a request to attend any meeting held. Under these circumstances, the Administrative Law Judge concluded that the Respondent did not violate Section 19(a)(6) of the Order.

With regard to the allegation that the Respondent had equated "announce" and "inform" with consultation in a memorandum by the Respondent's Research Director to the Complainant, the Administrative Law Judge found that the Respondent had informed the Complainant adequately by promptly apprising it of the material information as it became available. He noted that one of the essential elements of consultation is that a party that has been adequately informed respond to matters with which it is in disagreement, and that the "Complainant's silence fostered neither a bargaining relationship or consultation of the type it demands of Respondent." Under these circumstances, the Administrative Law Judge concluded that the Respondent did not violate Section 19(a)(6) of the Order in this regard.

Lastly, the Administrative Law Judge found that the record did not establish that the Respondent refused to accord proper recognition to the Complainant, and that, therefore, the Respondent's conduct was not violative of Section 19(a)(5) of the Order.

Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, including the Complainant's exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



ALBANY METALLURGY RESEARCH CENTER,
U.S. BUREAU OF MINES,
U.S. DEPARTMENT OF THE INTERIOR,
ALBANY, OREGON

Respondent

and

Case No. 71-2708

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL UNION NO. 1141,
ALBANY, OREGON

Complainant

DECISION AND ORDER

On April 8, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, including the Complainant's exceptions, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-2708 be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 27, 1974

Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

In the Matter of:

Albany Metallurgy Research Center
U.S. Bureau of Mines
U.S. Department of the Interior
Albany, Oregon,

Respondent

and

National Federation of Federal Employees,
Local Union No. 1141
Albany, Oregon,

Complainant

Case No. 71-2708

James H. Russell, President
Local Union No. 1141
National Federation of Federal Employees
325 Northwest Armstrong Way
Corvallis, Oregon 97330
For the Complainant

Rollien R. Wells
Research Director
Albany Metallurgy Research Center
P.O. Box 70
Albany, Oregon 97321,
For the Respondent

BEFORE: RHEA M. BURROW
Administrative Law Judge

Statement of the Case

This proceeding arose upon the filing of an unfair labor practice complaint on August 22, 1973, by the National Federation of Federal Employees, Local Union No. 1141, Albany, Oregon (hereinafter referred to as Complainant and/or Union) against Albany Metallurgy Research Center, U.S. Bureau of Mines, U.S. Department of the Interior, (hereinafter referred to as the Respondent) alleging that the Respondent engaged in certain conduct violative of Section 19(a)(5) and (6) of Executive Order 11491 (hereinafter called the Order). Essentially the complaint charges that: (1) the Western Administrative Office, Bureau of the Mines, (hereinafter called WAO) did not consult with the Complainant regarding proposed interpretations of Public Law 92-392, which affected janitorial employees represented by the Complainant at the Albany station. The proposed interpretations were alleged to have been submitted prior to December 8, 1972, but did not become available to the Union until January 17, 1973, a week after the janitors had received notice of the change in pay; (2) the management at the Albany Metallurgy Research Center failed to consult with Complainant concerning the procedure to be used to notify the affected employees of the interpretation. It is alleged that agency management agreed at a Labor-Management Committee meeting on January 24, 1973, to try and hold a meeting to explain to the janitors why their pay raise was less than anticipated but no meeting was held and the Union was unaware any action had been taken to inform them until it received the memorandum from R.R. Wells on April 2, 1973; and, (3) Mr. R.R. Wells, Respondent's Research Director, in a memorandum dated February 22, 1973, equated "announce" and "inform" with consultation.

A hearing was held in the above-captioned matter on January 22, 1974, in Albany, Oregon. The parties were without counsel but through their representatives were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues herein. Oral arguments were heard. There were no briefs submitted for consideration by the undersigned.

Upon the entire record herein, including my observation of the witnesses and their demeanor and upon the relevant evidence adduced at the hearing, I make the following findings, conclusion and recommendation.

Findings and Conclusions

I

The material facts as herein reported were not in essential dispute and are found to be as follows:

Public Law 92-392 and Congress approved August 19, 1972, set forth among other things the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is

consistent with the public interest in accordance with prevailing rates and be based on principles that: "(1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area; (2) there will be relative differences in pay within a local wage area when there are substantial or recognizable differences in duties, responsibilities and qualification requirements among positions; (3) the level of rates of pay will be maintained in line with prevailing levels of comparable works within a local wage area; and (4) the level of rates of pay will be maintained so as to attract and retain qualified prevailing rate employees."

In addition 5343(f) of the Act provided that a prevailing rate employee is entitled to pay at his scheduled rate plus a night differential amounting to 7-1/2 percent of that scheduled rate for regularly scheduled non-overtime work a majority of which is performed between 3:00 p.m. and midnight and 10 percent where a majority of the hours of such work occurs between 11:00 p.m. and 8:00 a.m. The Act also specified that night differential under this subsection is a part of basis pay. Under Section 15(a), the provisions of this Act became effective on the first day of the first applicable pay period which began on or after the ninetieth day after the date of enactment of the Act.

There were six janitors employed at the Albany Metallurgy Research Center when the law became effective on November 26, 1972; when the janitors received their pay checks on or about January 9, 1973, for the pay periods after application of the shift differential increase became effective, they were dissatisfied with the amount they received.

A memorandum ^{1/} dated January 3, 1973, from Chief, Division of Compensation and Labor Relations, Office of the Secretary, U.S. Department of the Interior to the Personnel Officer, Bureau of Mines, related to questions on the Implementation of the Federal Wage System that had previously been asked by the Bureau of Mines Personnel Office in a memorandum dated December 11, 1972. The memorandum stated in part that as to Case No. 4: "we understand that the employee alternates monthly on the second and third shifts and does not work on the first shift. In this case the new second and third shift rates of \$3.97 and \$4.06 will be applicable." A copy of this memorandum was forwarded by the Chief, Division of Personnel Bureau of Mines to the Chiefs, Branch of Personnel, Western Administrative Office, Denver, Colorado on January 9, 1973, and thence to Opal G. Burch, ^{2/} Personnel Assistant, Albany Metallurgy Research Center on January 12, 1973.

^{1/} Joint Exhibit No. 1(b). At the hearing the Complainant and Respondent by stipulation, agreed to submit joint exhibits in this proceeding and each hereafter is referred to by appropriate number as joint exhibit.

^{2/} Joint Exhibit No. 1.

A memorandum 3/ dated January 18, 1973, concerning a grievance over janitor's pay was forwarded to the Respondent and on February 3, 1973, there was a grievance memorandum over application of shift differential forwarded through the Respondent's Research Director and the Chief, Western Administrative Office, Denver, Colorado, to the Director of the Bureau of Mines, Washington, D.C. An appeal from the final agency determination that the shift differential computation provided in the memornadum of January 3, 1973 was the correct one and that the decision is predicated on the provision of PL-92-392 (5USC 5343(f)) which states that shift differential pay is applied to the employees scheduled rate of pay was later taken to the Comptroller General.4/

A memorandum dated February 3, 1973, relating to an unfair labor practice charge was sent to Respondent's Research Director alleging 19(a)(5) and (6) violations of the Order in the matter of determining the appropriate shift differential rates for janitors because of failure to recognize Complainant's Local 1141 as the exclusive representative of the janitors; also for failing to consult with the Local about the special application of the shift differential law before the janitors received notification of the action; and that Respondent failed to consult with Local 1141 concerning the method of informing the janitors of the decision that had been made. The matter was also the subject of a subsequent memorandum from Complainant dated March 27, 1973. 6/

II

One of the Respondent's contentions as to Complainant's first alleged violation was to the effect that it was not obligated to bargain with AFFE Local 1141 as to implementation of the new law, Public No. 92-392, because it was merely following policy directed and promulgated at higher agency level to achieve conformance and equality in pay of all similarly situated employees including those in the Western Administrative Office Region wherein the Respondent Agency at Albany, Oregon, is located.

The Complainant has been the exclusive representative at Respondent's installation at Albany, Oregon, at all times material to this proceeding but does not represent the Western Administrative Office at Denver.

The oral testimony and documentary records reveal that a response to questions on behalf of the Western Administrative Office that were submitted on December 11, 1972, was dispatched back to that office from the Chief, Division of Personnel Bureau of Mines on January 9, 1973, and to the Albany installation on January 12, 1973. It was received at Albany on January 17, 1973. Even before the submission on December 11, 1972 the Respondent's Personnel Specialist, Opal Burck had learned by telephone that the Bureau of Mines planned to refer the request to the Department of the Interior for interpretation and Complainant's President was notified of the pending ruling by the Department. Respondent's

- 3/ Joint Exhibit No. 4.
- 4/ Joint Exhibit No. 22, dated August 16, 1973.
- 5/ Joint Exhibit No. 9.
- 6/ Joint Exhibit No. 14.

Personnel Director met with the President of NFFE Local 1141 on December 18, 1972, and informed him that the changed wage differential under Public Law 92-392 would not be reflected on the janitors pay checks to be distributed the following day due to lack of decision by the Department; he was also informed that he would be immediately notified of any information reviewed concerning the wage decision and implementation.

On or about January 4, 1973, the Western Administrative Office acting on information relayed by telephone from Washington headquarters to expedite the payroll process, prepared retroactive pay change slips which were sent to individual janitors with their January 8, 1973, pay checks. The day after the janitors were paid the President of the Complainant's Union met with Respondents and Administrative Officer and Research Coordinator to report the disappointment of the janitors over the increase caused by the differential shift rate. The agency at that time had received no information as to the procedure for calculating the janitors differential rates. When it was received on January 17, 1973, the Union Steward was called the same day to review the information with the Personnel Specialist. A copy of the information received and salary calculations for all wage grade employees was given to the Local Union President. The Union President testified that it was not until after the janitors were paid in early January 1973 that he learned that the questions that had been submitted for interpretation did not originate from the Albany installation.

In Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, A/SLMR No. 322, an unfair labor practice proceeding alleging violation of Section 19(a) (6) of the Order by the Respondent based on an alleged unilateral implementation of Defense Language Institute Regulation 690-2, the Assistant Secretary found that:

"...the Respondent was not obligated to meet and confer with the Complainant over the adoption of DLI Regulation 690-2. In this connection, the Assistant Secretary noted that in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15, the Federal Labor Relations Council stated that 'higher level published policies and regulations that are applicable uniformly to more than one activity may properly limit the scope of negotiations...' thus, he found that DLI Regulation 690-2 was not inconsistent with Section 11(a) of the Order since it was issued to achieve a desirable degree of uniformity and equality... common...to employees in more than one subordinate activity;

he further found that while, in his opinion in the circumstances of the instant case, it would have been better practice for agency headquarters, prior to the issuance of DLI Regulation 690.2, to have notified the Complainant of its intention to issue a new regulation and to have sought the views of the Complainant with respect thereto, once the Agency headquarters issued the Regulation applicable to employees of other branches of DLI as well as those DLIEL employees at Lackland Air Force Base, the matters contained therein in effect were removed from the scope of negotiations at the local level. Accordingly, the Assistant Secretary found that the Respondent was not obligated to meet and confer with the Complainant concerning the issuance of DLI Regulation 690-2."

The evidence in this proceeding does not reveal that the promulgation of national office policy pursuant to Public Law No. 92-392 including interpretations as to applicability of certain provisions of the law was an act of the Respondent Activity or one over which it had any control. In fact, the receipt of instructions and information as to the proper amount that the janitors should be paid was received by Respondent more than a week after each of the janitorial employees had gotten their pay checks. The Respondent had committed no act or had any information about which it could consult with Complainant prior to January 17, 1973. Thus, I find that the Respondent was not obligated to meet and confer over the adoption of interpretations of PL 92-392; consequently; the Respondent did not violate Section 19(a)(6) of the Order which precludes agency management from refusing to consult, confer, or negotiate with a labor organization as is required by this Order, since this was not a matter required by the Order. Further, the Complainant had no agreement with the Western Administrative Office requiring that office to negotiate with it.

I11

A second alleged violation and contention of the Complainant is that the Respondent failed to consult with it as to the procedure to be used to notify the affected janitorial employees of the Department of Interior, Bureau of Mines interpretation received by Respondent's office on January 17, 1973.

NFFE Local 1141 Chief Steward James Hendricks testified that the first knowledge he had of the janitors' confusion and bitterness regarding their shift differential increase was when they were paid on January 8, 1973, there was a slip attached to their checks which stated what the differential was to be and it was not as much as they anticipated. Hendricks stated that he talked to Respondent's Administrative Officer at that time but he did not know then how the interpretations on calculations had been made. On January 17, 1973, the Administrative

Officer called him to the Office of Opal Burck and she went over the matter with him "in great detail exactly how they had computed this shift differential and how it related to the saved pay status of these janitors. At the time, I felt I understood it, and it seemed fair to me based on the history. She went back and explained how they got on this saved pay in the first place...." When asked as to whether there was any discussion of how the situation might be explained to the janitors he stated:

"Well, they explained it to me so that, hopefully, I understood what the--how the computations were made, and then I was to go back to the Union and try to explain it to the Union of how the computations were made."

Mr. Hendricks stated that a day or so later he explained the matter at a union executive meeting. NFFE Local 1141 President Russell testified that he was furnished copies of the information reflected in Joint Exhibit No. 1(a), (b) and (c) on January 17, 1973. A day or so previously one of the janitors pay slips had been brought to his attention and he had gone to management and was told that most of the janitors had come up individually and discussed the matter with Mrs. Burck and she had given them what information she had. An executive meeting of the Union was later held and it was decided to ask that a labor-management meeting be called to salve the conscience and mood of the janitors who were quite upset. The Labor-Management committee meeting 7/ was held on January 24, 1973, 8/ and the minutes of the meeting reflect that management agreed that it would try to arrange a meeting with the janitors to more fully explain the reasons behind the pay decision application of the shift differential for janitors effective November 26, 1972. The Respondent's Research Director testified in effect that meetings were held in the personnel office with the six janitors, one at the end of the shift on January 24, 1973, and another at the end of the shift the following morning. An explanation was made to them concerning the basis for the differential wage rate they were receiving.

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- 7/ The Labor-Management Committee consisted of three persons selected by the Union and three by management who met to consider mutual agency and union problems or, situations that arose. It had no binding authority but could recommend and refer suggestions and proposals for consideration.
 - 8/ Joint Exhibit No. 6.

Separate meetings were held because of difficulty of getting the janitors together at one time because of their different shifts. There was no union representative at the meeting ^{9/} and the Respondent's Research Director stated that his office had not received any request from the Union expressing a desire to attend the meetings recommended by the Labor-Management Committee.

The testimony of Complainant's own witnesses refutes the allegation that Respondent failed to consult with the Union as to the procedure to be used in notifying the affected employees. The Union was notified immediately upon receipt of the interpretations and the matter according to Chief Steward Hendricks was discussed with him in "great detail" and he was to explain it to the Union. He presented it at a Union Executive Council meeting and the Council referred the matter to a Labor-Management Committee which requested the Respondent's agency to call a meeting and explain the situation to the janitors. The Respondent called a meeting of the janitors the same day it received the request and followed through the next morning with another meeting for those unable to attend the first session. There had been no request made by the Complainant to have one of its representatives attend the meeting of the janitors.

Thus, I find this case analogous to those holding that notwithstanding the fact that there is no obligation to meet and confer on a particular management decision, an exclusive representative should be afforded the opportunity to meet and confer, to the extent consistent with the law and regulations, as to the procedures management intended to observe in effecting its decision, and as to the impact of such decision on those employees adversely affected. ^{10/} Even assuming that Respondent had the responsibility to bargain in some form as to how it would explain the effect of the interpretations of the law as

^{9/} I discredit that part of the testimony of Philip Niebuhr that the Labor-Management Committee requested a representative of the Union to be present at the meeting for the janitors. Mr. Niebuhr was quite evasive to direct questions throughout his testimony; even to one question asked by the Administrative Law Judge, his answer was so far out of line it was corrected by the Union President; his remark that a union representative was to be present is not substantiated by the minutes of the meeting or by other substantive evidence of record.

^{10/} See, United States Department of Navy, Bureau of Medicine and Surgery Great Lakes Naval Hospital, Illinois, A/SLMR, No. 289, and Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR, No. 329; see also Veterans Administration Research Hospital, Chicago, Illinois, FLRC, No. 71 A-31, and Naval Public Works Center, Norfolk, Virginia FLRC, No. 71 A-56.

it applied to its janitorial employees, I find that the Complainant Union never requested to bargain on the matter after it was promptly notified of all the information that the Respondent possessed; that the failure by the Complainant to request the Respondent to meet and confer in this regard after having been timely notified of the interpretations regarding the applicability of provisions of the new law as it applied to the Respondent's janitorial employees was such as to relieve the employer of its obligation. Even if not relieved, Respondent's action in meeting with the janitors commencing on January 24, 1973, was to aid and complete the undertaking of Complainant's Chief Steward on January 17, 1973, to explain the differential pay rates to employee janitors. Regardless of whether the recommendations to Respondent to make an appropriate explanation of the effect of the differential wage rates to the janitors be considered or requested from the Union or the Labor-Management Committee, the Union is in no position to complain that its representatives was not present, in the absence of having made a request to attend any meeting or meetings that the Respondent agreed to schedule and hold. I find that the Respondent did not fail to consult with the Complainant regarding the procedure to be used to advise the affected employees of the interpretation of Public Law 92-392.

IV

The last violation alleged that the Respondent's Research Director in an memorandum dated February 22, 1973, equated announce and inform with consultation. More important than word characterization is whether the Respondent adequately informed the Complainant of the information available to it regarding the issues in controversy. The memorandum enumerated the meetings that had been held with the Complainant and its officers. The testimony at the hearing even that from the Complainant substantiated the matters referred to in the memorandum. The record reveals that the Complainant was promptly apprised of the material information regarding the interpretations as to the janitor's differential wage rates as it became available. One of the essential elements of consultation is that a party that has been adequately informed respond to matters with which it is in disagreement. Complainant's silence fostered neither a bargaining relationship or consultation of the type it demands of Respondent. It suffices to say neither the contents of the memorandum or the evidence of record establishes a violation of Section 19(a)(6) of the Order.

On the basis of the foregoing and the entire record, I find:

(1) That the promulgation of interpretations pursuant to Public Law No. 92-392 was not an Act of the Respondent, or one over which it has control, and it could not nor was it required to consult regarding this matter with the Complainant; the Complainant had no collective bargaining agreement with the Western Administrative Office requiring that office to consult in any form with NFFE Local No. 1141;

(2) The Respondent did not fail to consult with the Complainant concerning the affected janitorial employees as to procedure to be

utilized to notify the affected employees of the interpretation;

(3) Neither the contents of Respondent's February 22, 1973 memorandum or the evidence of record establishes a violation of Section 19(a)(6) of the Order; and,

(4) That the Respondent did not violate Section 19(a)(5) of the Order by refusing to accord proper recognition to NFFE Local No. 1141, a labor organization qualified for such recognition.

Conclusion

In view of the entire record, I conclude that the Complainant has not substantiated its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(5) and (6) of the Order. 12/

Recommendation

Upon the basis of the above findings, conclusion and the entire record, I recommend to the Assistant Secretary:

That the complaint in Case No. 71-2708 be dismissed.


Rhea M. Burrow
Administrative Law Judge

Dated: April 8, 1974
Washington, D.C.

12/ Section 203.14 of the Regulations of the Assistant Secretary for Labor-Management Relations provides:

"A Complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

DEPARTMENT OF THE NAVY,
SAN DIEGO MARINE CORPS EXCHANGE 10-2,
SAN DIEGO, CALIFORNIA
A/SLMR No. 409

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local Union 3318 (AFGE), seeking to include in its existing exclusively recognized unit at the San Diego Marine Corps Exchange 10-2, San Diego, California, incumbents in the following job classifications; Section Supervisor, S-4; Assistant Section Supervisor, S-1 and Office Supervisor, H-10 in the Main Store; Stock Control Supervisor, S-2, Shipping Supervisor, S-1 and Assistant Stock Control Supervisor, H-10, in the Warehouse; Service Supervisor, H-15, in the Service Station; Utility Supervisor, S-1; Assistant Utility Supervisor, H-11; Maintenance Chief, H-15 and Senior Utility Man, H-8, in the Maintenance Property Department; Accounting Supervisor, S-3, in the Accounting Department; Senior Buyer, S-5, in the Purchasing Department; Supervisor, S-1, and Assistant Supervisor, H-1 in the Pantry; Supervisor in the Cash Office, H-10; and Supervisor, S-3 and Assistant Supervisor, S-1, in the Enlisted Services Club/Food Service. Contrary to the view of the AFGE, the Activity contended that the disputed classifications should be excluded as supervisory.

The Assistant Secretary found that, with exception of the Service Supervisor and the Office "Supervisor," employees in the disputed categories who were classified as Supervisors or Assistant Supervisors were, in fact, supervisors within the meaning of Executive Order 11491 and should not be included in the unit. In this respect, he noted that employees in these classifications possessed, among other things, responsible authority to direct other employees and schedule and assign work and leave. Further, they effectively recommend hiring, adjust or effectively recommend the adjustment of grievances, and exercise independent judgement in performing these job functions. The Assistant Secretary found also that the Maintenance Chief (Maintenance/Property), H-15 and the Senior Buyer (Purchasing), S-5, were supervisors and should be excluded from the unit.

With respect to the job categories, Office "Supervisor" (Main Store), H-10, and Senior Utility Man (Maintenance/Property), H-8, the Assistant Secretary found that the record reflected they were not supervisors within the meaning of the Order and, therefore, should be included in the unit.

Accordingly, the Assistant Secretary ordered that the unit be clarified consistent with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
SAN DIEGO MARINE CORP EXCHANGE 10-2,
SAN DIEGO, CALIFORNIA

Activity 1/

and

Case No. 72-4134

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO,
LOCAL UNION 3318,
SAN DIEGO, CALIFORNIA

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer John J. Shea. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Petitioner and the Activity, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, AFL-CIO, Local Union 3318, hereinafter called AFGE, filed a petition for clarification of unit in the subject case seeking clarification of an exclusively recognized bargaining unit. Specifically, the AFGE seeks to clarify the status of the following employee job classifications, whose incumbents the AFGE asserts are not supervisory employees and, therefore, should be included in the unit: Section Supervisor, S-4; Assistant Section Supervisor, S-1 and Office Supervisor, H-10, in the Main Store; Stock Control Supervisor, S-2; Shipping Supervisor, S-1 and Assistant Stock Control Supervisor, H-10, in the Warehouse; Service Supervisor, H-15, in the service station; Utility Supervisor, S-1; Assistant Utility Supervisor, H-11; Maintenance Chief, H-15 and Senior Utility Man, H-8, in the Maintenance Property Department; Accounting Supervisor, S-3, in the Accounting Department; Senior Buyer, S-5, in the Purchasing Department;

1/ The name of the Activity appears as amended at the hearing.

Supervisor, S-1 and Assistant Supervisor, H-7 in the Pantry; Supervisor in the Cash office, H-10; and Supervisor, S-3 and Assistant Supervisor, S-1, in the Enlisted Services Club/Food Service. 2/

The record reflects that on June 24, 1965, Local 1085, American Federation of Government Employees, AFL-CIO, was granted exclusive recognition as the exclusive bargaining representative in a unit of all eligible employees at the San Diego Marine Corps Exchange, San Diego, California. On August 2, 1972, the Activity and AFGE, Local 3318, the successor to AFGE, Local 1085, entered into a negotiated agreement covering employees in the exclusively recognized unit.

The Activity is a non-appropriated fund activity located in San Diego, California, and consists of a number of sales activities rendering a variety of services. It employs over 500 employees working as a team to accomplish its mission which is to provide all active and retired military personnel and their dependents with articles and services, at reasonable prices, necessary for their health, comfort, and convenience. At the time of the hearing in this matter, there were approximately 415 civilian employees at the Activity who were in the exclusively recognized unit.

DISPUTED JOB CLASSIFICATIONS

Section Supervisors (Main Store), S-4; Stock Control Supervisor (Warehouse), S-2; Shipping Supervisor (Warehouse), S-1; Service Supervisor (Service Station), H-15; ~~3/~~ Utility Supervisor (Maintenance/Property), S-1; Accounting Supervisor (Accounting), S-3; Supervisor (Pantry), S-1, Supervisor (Cash office), H-10; Supervisor (Enlisted Service Club/Food Services), S-3.

The evidence established that the incumbents in the above described job classifications report to their respective activity managers. The incumbents are responsible for approximately 4 to 80 people in their sections, all of whom are junior in grade. They have the authority to

2/ At the hearing, the parties, by stipulation, amended the subject petition to delete two additional job classifications, Activity Manager and Assistant Activity Manager. Under these circumstances, I shall treat the parties' stipulation as a request to withdraw the subject petition insofar as it applies to such employee job classifications, and I find it unnecessary to make an eligibility determination with respect to such job classifications. Cf. Illinois Army National Guard, 1st Battalion, 202nd Air Defense Artillery, Arlington Heights, Illinois, A/SLMR No. 370 and New Jersey Department of Defense, A/SLMR No. 121.

3/ As no job description or other evidence was introduced at the hearing in respect to the employee in the classification Service Supervisor (Service Station), H-15, I make no finding as to whether the employee in this classification should be excluded from the unit.

settle minor grievances and to make recommendations for the disposition of major grievances, which recommendations the record shows normally are followed. Further, they have the authority to authorize annual and sick leave and to recommend the scheduling of annual leave, with a majority of their recommendations in this regard being followed. The record reveals also that employees in these classifications have interviewed job applicants, who have been hired upon their recommendations, and that they have the authority to recommend promotions, meritorious wage increases, and letters of commendation. The incumbents in these classifications also assign employees to jobs within their sections and transfer employees between various jobs and locations within their sections, which occurs regularly.

As the record reflects that employees in these classifications possess responsible authority to direct other employees, schedule and assign work and leave, effectively recommend hiring, and adjust or effectively recommend the adjustment of grievances, and as they are required to exercise independent judgement in performing these functions, I find that employees in the above classifications [with the exception of the Service Supervisor (Service Station), H-15] are supervisors within the meaning of the Order and, therefore, should be excluded from the unit.

Assistant Section Supervisors (Main Store), S-1; Assistant Stock Control Supervisor (Warehouse), H-10; Assistant Utility Supervisor (Maintenance/Property), H-11; Assistant Supervisor (Pantry), H-7; Assistant Supervisor (Enlisted Service Club/Food Services), S-1.

The incumbents in these classifications report to their respective section supervisors. They are responsible for from approximately 5 to 60 employees, all of whom are junior in grade. They interview applicants for employment, make a selection, and forward a recommendation that the individual of their choice be hired, which recommendation generally is followed. Although limited by the parties' negotiated agreement to effecting verbal reprimands and warnings, Assistant Supervisors have the authority to discipline employees verbally and virtually all have, in fact, done so. These incumbents also have the authority to recommend more severe discipline such as written reprimands or warnings, suspension and discharge and have, in fact, done so with such recommendations being followed. Further, the record reveals that Assistant Supervisors have the authority to recommend, and have made recommendations for, promotions, rewards in the form of meritorious wage increases, and letters of commendation and that such recommendations have been followed. The incumbents in these positions also may assign and transfer Exchange employees to their various duties within their respective sections. The Assistant Supervisors further have the authority to resolve employee grievances, as well as the authority to grant or deny leave to employees under their supervision. Moreover, virtually all of the incumbents fill in for their own immediate supervisors on a regular daily, or weekly basis, and due to the hours of the Exchange operations, most of these incumbents are the individuals solely in charge of their sections or departments for substantial periods of time averaging 8 to 20 hours per week. During such periods, they exercise all the authority of their supervisors.

In view of the fact that employees in these Assistant Supervisor classifications possess responsible authority to direct other employees, have the authority to make effective recommendations as to hiring, and are authorized to adjust grievances; and as they exercise independent judgement in the performance of these functions, I find that the incumbents are supervisors within the meaning of the Order and, therefore, employees in these classifications should be excluded from the unit.

OFFICE "SUPERVISOR" (Main Store), H-10

The position of Office "Supervisor" is located in the main store in the Manager's office, and an employee in this classification reports to the Manager. The incumbent is responsible for two employees in this section and is responsible primarily for the orderly administration of the store office, including disseminating instructions and information to and from department supervisors as directed.

The incumbent's job description indicates that she is required to take dictation, maintain necessary office files, compile data, make reports as required, and operate a typewriter, adding and copying machines, and other conventional office equipment. The incumbent's job description also indicates that she spends most of her time operating such equipment as well as performing routine clerical work. The job description further reflects that the Office "Supervisor" generally works alongside the other employees of the store office who are engaged in routine work which they are able to perform without any guidance or direction from the incumbent. The Activity alleges that the incumbent assigns work in her section, independently directs its completion, supervises the inspection of the work, renders opinions on the performance of other employees, establishes work priorities, has the authority to discipline employees verbally or in writing, and may recommend written reprimands, promotions, meritorious wage increases, and letters of commendation. The record does not indicate that the performance reviews are seen or initialled by the evaluated employee or that such personnel recommendations as are performed are other than routine or require the exercise of independent judgement. The record reveals also that the incumbent does not attend any supervisory meetings.

Under the circumstances, I find that the Office "Supervisor" does not possess the indicia of supervisory authority as set forth in Section 2(c) of the Order. Thus, the employee in this classification spends the majority of her time working with other store office employees and the record reveals that her relationship with other employees in the office is in the nature of a more experienced employee guiding and training less experienced employees. Moreover, the evidence does not establish that such direction as the incumbent provides other employees, or such recommendations as are made with respect to these employees, are other than routine in nature, or are not within established guidelines, or require the exercise of independent judgement. Accordingly, I find that the employee in this classification should be included within the unit.

MAINTENANCE CHIEF (Maintenance/Property), H-15

The position of Maintenance Chief is located in the Maintenance/Property Department of the Activity, and the employee in this classification reports to the Exchange Officer. Having responsibility for the maintenance of all of the Exchange properties throughout the base, the incumbent has thirteen employees in his section, all of whom are junior in grade. The record reveals that the incumbent interviews applicants for employment, makes a selection, and forwards a recommendation that is generally followed. Although limited to verbal reprimands and warnings, the Maintenance Chief has the authority to, and has, in fact, recommended more severe discipline, such as written reprimands or warnings, suspension and discharge, which recommendations have been followed. The incumbent also may recommend promotions and awards, such as meritorious wage increases and letters of commendation, and on occasions when he has made such recommendations, they have been accepted. He also may assign and transfer employees under his direction to various duties throughout the Exchange and may handle and resolve employee grievances. Further, he evaluates the performance of maintenance employees on a standard evaluation form which requires written comments by the incumbent and a written acknowledgment by the employee and he has the authority to grant or deny leave.

Based on the foregoing, I conclude that the Maintenance Chief possesses independent and responsible authority to direct other employees, schedule and assign work and leave, and effectively recommend hiring and the adjustment of grievances. Accordingly, I find that the Maintenance Chief is a supervisor within the meaning of the Order and, therefore, this classification should be excluded from the unit.

SENIOR UTILITY MAN (Maintenance/Property), H-8

The position of Senior Utility Man is located in the Maintenance/Property Department of the Exchange, and employees in this classification report to the Utility Supervisor. The incumbents work with a crew of approximately six utility men, engaged in janitorial and ground maintenance duties within the Exchange, all of whom are junior in grade. Essentially the incumbents are responsible for seeing that the directions of the Utility Supervisor are carried out.

Although the Activity contends that the incumbents in the above classification are supervisors, it acknowledges that such employees oversee rather than supervise the work of the utility men in their sections. Notwithstanding the assertions of the Activity that the incumbents assign employees to their various duties, are able to issue verbal reprimands and warnings, and make recommendations to their supervisors with respect to the performance of men under their direction, the record reflects such duties are routine in nature, are within established guidelines, and do not require the exercise of independent judgement. Further, the job description for this position indicates that most of the duties involve physical activity on the part of the incumbents, such as moving and placing into position material, equipment and furniture, either manually, or with simple material handling equipment and tools. The record also reveals that the incumbents are required to perform normal janitorial duties such as

sweeping, mopping, buffing, etc., and that they additionally perform light gardening and maintenance duties. The incumbents do not interview for hiring, effectively recommend promotions or in-grade raises, adjust grievances, conduct training, or exercise independent judgement in the running of their section. While they may fill in for their supervisors, this occurs only on an intermittent and sporadic basis. Because their job functions are essentially routine in nature employees who work with the Senior Utility Man are able to perform their duties without any guidance or direction from the incumbents.

Based on the foregoing, I conclude that employees in this classification do not have supervisory responsibilities in that they work with, and alongside, their crews most of the time, such direction as is provided other employees is routine and does not require the exercise of independent judgement, and they substitute for their superiors only on an intermittent and sporadic basis. Accordingly, I find that employees in this classification are not supervisors within the meaning of the Order and, therefore, this classification should be included in the unit.

SENIOR BUYER (Purchasing), S-5

The Senior Buyer, who is responsible directly to the Activity Manager, has approximately 4 buyers and 1 procurement clerk under his direction. The position is located in the Purchasing Department of the Exchange. The incumbent is responsible for assisting in the administration of all Exchange policies and procedures of the merchandise program and he assumes the duties of the Activity Manager in the latter's absence. His duties also encompass the training and supervising of purchasing activity personnel on all retail merchandise matters.

The record indicates that the incumbent interviews applicants for employment, makes a selection and forwards a recommendation which is usually followed. It further indicates that verbal reprimands and warnings are issued by the incumbent and that he has the authority and has, in fact, recommended more severe discipline such as a written reprimand, suspension and discharge. The Senior Buyer also has the authority and has, in fact, recommended promotions and rewards in the form of meritorious wage increases and letters of commendation, which recommendations have been followed. Further, he has the authority to assign and transfer employees to their various duties within the purchasing activity. The incumbent evaluates the performance of employees in the purchasing activity by way of a standard evaluation form which must be discussed with the employee and signed by him. Further, he handles and resolves employee grievances within the Activity, and has the authority to grant and deny leave. Moreover, the Senior Buyer regularly fills in for his Activity Manager and is in sole charge of the Activity on the average of one day per week.

In view of the fact that an employee in this classification possesses authority to direct other employees, has the power to make effective recommendations as to hiring, and is authorized to adjust grievances,

and in the exercise of this authority he utilizes independent judgement, I find that the incumbent is a supervisor within the meaning of the Order and, therefore, this classification should be excluded from the unit.

July 9, 1974

ORDER

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the AFGE on June 24, 1965, at the Marine Corps Exchange 10-2, Marine Corps Recruit Depot, San Diego, California, be, and hereby is, clarified by including in said unit the positions of Office Supervisor (Main Store), H-10; and Senior Utility Man (Maintenance Property), H-8, and by excluding from said unit the positions of Section Supervisor (Main Store), S-4; Assistant Section Supervisor (Main Store), S-1; Stock Control Supervisor (Warehouse), S-2; Shipping Supervisor (Warehouse), S-1; Assistant Stock Control Supervisor (Warehouse), H-10; Supervisor, Utility (Maintenance/Property), S-1; Maintenance Chief (Maintenance/Property), H-15; Assistant Supervisor, Utility (Maintenance/Property), H-11; Accounting Supervisor (Accounting), S-3; Senior Buyer (Purchasing), S-5; Supervisor (Pantry), S-1; Assistant Supervisor (Pantry), H-7; Supervisor (Cash Office), H-10; Supervisor (Enlisted Service Club/Food Services), S-3; Assistant Supervisor (Enlisted Service Club/Food Services), S-1.

DEPARTMENT OF THE AIR FORCE,
VANDENBERG AIR FORCE BASE,
CALIFORNIA
A/SLMR No. 410

This unfair labor practice proceeding involved a complaint filed by the National Federation of Federal Employees, Local 1001 (Complainant) alleging that the Department of the Air Force, Vandenberg Air Force Base, California, (Respondent) violated Section 19(a)(1) and (6) of the Order by certain conduct of its Employee Relations Specialist in the Civilian Personnel Office. Essentially, the complaint alleges that the Respondent limited, at a grievance adjustment meeting, the participation of the Complainant and refused to consult, confer or negotiate with the Complainant.

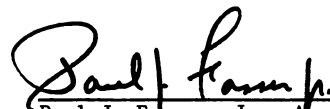
The grievance involved the Respondent's assignment of the employee involved to work which, due to his health, he could not perform. At the grievance meeting, held on April 24, 1972, the Complainant requested certain medical records of the Respondent concerning a physical examination undergone by the employee. This request was refused on the ground that the information could be released only to the employee's private physician in accordance with certain regulations. At this meeting the Complainant requested also information in writing demonstrating the efforts made by the Respondent to obtain a job which the employee's health would allow him to perform. This request was refused by the Respondent, although the Respondent's representative informed the Complainant of the Placement Division's action on behalf of the employee.

The Administrative Law Judge concluded that the Complainant was given adequate notice of the grievance meeting of April 24, and that although the Respondent inadvertently failed to provide the Complainant with its usual written notification, the record did not establish any prejudice resulting to the Complainant or the grievant because of the lack of written notice. The Administrative Law Judge concluded also that the Complainant "failed to show by convincing evidence" that the Respondent's representative interfered with the Complainant's representation of the grievant, or refused to accord the Complainant full rights of participation.

With regard to the allegation concerning the Respondent's failure to produce medical records requested by the Complainant, the Administrative Law Judge reasoned that the Respondent's refusal to release such records was in accordance with regulations covering disclosure of medical information, and concluded that the Respondent's "Section 19(a)(6) obligations in the context of the grievance adjustment meeting were not evaded."

Finally, with regard to the Complainant's request for information in writing regarding the efforts of the Respondent to find an alternative job for the employee, the Administrative Law Judge found that the Complainant

Dated, Washington, D.C.
July 9, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

failed to demonstrate under what applicable regulations or provisions of the Order the Respondent was obligated to so conform with the Complainant's demands. He further noted that the employee's grievance had not been prejudiced, nor had the Complainant's rights been disparaged by the Respondent's actions.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, noting his credibility findings and the absence of any exceptions to the Report and Recommendations. Accordingly, in agreement with the recommendation of the Administrative Law Judge, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 410

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
VANDENBERG AIR FORCE BASE,
CALIFORNIA

Respondent

and

Case No. 72-3878

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1001

Complainant

DECISION AND ORDER

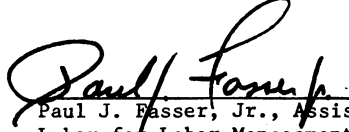
On May 28, 1974, Administrative Law Judge Francis E. Dowd issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, 1/ conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-3878 be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 9, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.



Francisco Region. The proceeding was initiated by the filing of a Complaint by Local 1001 of the National Federation of Federal Employees (hereafter referred to as the Union or Complainant) against the Department of the Air Force, Vandenberg Air Force Base, California (hereafter referred to as the Activity or Respondent) on October 24, 1972.

An Amended Complaint filed on August 30, 1973 asserts that at a grievance adjustment meeting held "on or about April 25, 1972," the Activity representative there present restricted the participation of the Union representative and refused to consult, confer, or negotiate. This, the Union complained, violated Section 19(a), subsections (1) and (6) of the Executive Order.

A hearing on the Amended Complaint was held at Santa Maria, California on October 31 and November 1, 1973. Both parties were present and represented by counsel and were afforded full opportunity to call and examine witnesses and to adduce relevant evidence. The post-hearing brief submitted by the Respondent has been duly considered.

On the basis of the entire record in this case, and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations.

Findings of Fact

1. Complainant herein is the certified exclusive representative for all non-supervisory, non-temporary, non-professional civilian employees at Vandenberg Air Force Base, California. Ms. Marie C. Brogan, who plays a central role in the happenings which led to the instant proceeding, was, at the time of the occurrence, president of Local 1001.

2. On April 14, 1972, 1/ Buddy L. Brannon, a wage board employee assigned as a plumber in the Civil Engineering Squadron, filed a grievance with the Civilian Personnel Office (CPO) at the Activity. The grievance complained of Brannon's assignment to work duties which he, upon the advise of his personal physician, considered potentially injurious to a chronic asthmatic condition from which he suffered. The grievance also complained of the length of time which had past, without action, since he had requested the aid of the CPO in filing an application for disability retirement. The grievance designated Ms. Brogan as Brannon's representative under the procedures available for grievance adjustment.

3. Mrs. Joyce Ann Cummings, an Employee Relations Specialist in the CPO, received Brannon's grievance on April 18. On the 19th of April Cummings telephoned Brannon's supervisor,

1/ Unless otherwise indicated all dates hereinafter mentioned are in 1972.

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In the Matter of :
 :
DEPARTMENT OF THE AIR FORCE :
VANDENBERG AIR FORCE BASE, :
CALIFORNIA, :
Respondent :
 :
and : Case No. 72-3878
 :
NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL 1001, :
Complainant :
 :
..... :

Frank Sprague, Esq., 4392 ASG,
Judge Advocate Office
Vandenberg AFB, California 93437
and
Charles L. Wiest, Jr.
Captain, USAF
Headquarters 15th Air Force
Judge Advocate Office
March AFB, California 92508
For the Respondent

Homer Hoisington
Regional Business Agent
National Federation of Federal
Employees
Post Office Box 870
Rialto, California 92376
For the Complainant

Before: FRANCIS E. DOWD
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding under Executive Order 11491, as amended (hereafter referred to as the Order) arises pursuant to a Notice of Hearing on Complaint and Order Rescheduling Hearing issued by the Regional Administrator of the U. S. Department of Labor, Labor-Management Services Administration, San

Carl W. Loveall, regarding a meeting with Brannon to discuss his grievance. She proposed an April 24 meeting date and instructed Loveall to inquire of Brannon whether this was acceptable. Later that same day Cummings again called Loveall to remind him to be sure to inform Brannon of his right to have a representative present. Loveall spoke with Brannon on the 19th of April and received his approval of the April 24 meeting date. Either late in the work day of the 19th or early in the morning of the 20th Loveall informed Brannon of his right to have the representative of his choice present with him at the scheduled meeting.

4. Although it is the practice of the Activity to send to a grievant's designated representative written confirmation of a meeting called to discuss a grievance, in the instant case such notice inadvertently was not sent to Brogan who testified that she was first informed of the meeting on the day before it was to be held, when Mr. Brannon came to her office to request her aid and ask her to accompany him. Brogan was obviously mistaken in this recollection as the day preceding the Monday meeting of April 24 was not a work day and therefore Brannon could not have approached Brogan as she recalled. Rather, Brogan must have been informed of the meeting sometime after Brannon agreed to the suggested date but before the close of business on Friday, April 21. 2/

5. On April 24, Cummings, Brannon and Loveall were present at the CPO at 9:00 a.m., the appointed time at which the meeting was to begin. Brogan arrived at the office 15 or 20 minutes later. Brogan testified that from her joining the meeting until its termination she was rudely treated by Cummings, repeatedly excluded from participating in the discussion of Brannon's interests. On the other hand Cummings' testimony, corroborated by Loveall, was to the effect that Brogan was treated in a courteous, business-like manner and accorded every proper opportunity to present her views, counsel the grievant and represent his interests. It was Cummings' testimony, however, again supported by Loveall, that Brogan repeatedly disrupted the proceedings, jumping up and shouting her denunciations of Cummings' conduct of the meeting. 3/

It is impossible to reconcile the differing reports of the April 24 meeting related by the participants. This being

2/ In any event Ms. Brogan testified that she was thoroughly familiar with Mr. Brannon's disability claim and cannot be seen to have been prejudiced in her representation of Mr. Brannon at the April 24 meeting because of inadequate time to prepare.

3/ Regretfully Brannon was unavailable to give testimony at the hearing because of a compelling personal matter needing his attention. No inference whatever is drawn from his failure to appear.

the case my role as fact-finder requires me, on the basis of the reasonableness of the testimony, its inherent believability and my assessment of the credibility of the witnesses, to credit one version over the other. I am persuaded, by the weight of the evidence adduced and my observation of the witnesses and their demeanor, that Cummings' recounting of the events of the meeting, corroborated by Loveall's testimony is the more credible. I am unable to credit the testimony of Brogan. When testifying to particular events, Brogan was very vague and her recollections were fuzzy and confusing. With very little prodding by Respondent's counsel, she quickly became agitated and demonstrated that she possessed a temper not easily controllable. She was extremely argumentative throughout her testimony and struck me as being a very difficult person to have to deal with in precisely the kind of situation which is the subject of this proceeding. As noted in Respondent's excellent brief, Brogan often refused to answer questions without insisting upon first prefacing her answers with irrelevant, lengthy editorial comments. In contrast, witness Cummings displayed an even, businesslike approach and retained her composure during cross-examination.

I therefore find that Brogan was allowed to participate in the meeting as Brannon's representative and that no impediment to her effective representation was offered by Cummings.

6. In addition to its general complaint regarding Cummings' conduct of the April 24 meeting, the Union contends that Brannon and Brogan, as his representative, were wrongfully denied access to the records of the medical examination Brannon had undergone at the Vandenberg AFB Hospital upon instructions from the CPO. 4/

As diagnosed by his personal physician, Brannon suffered from asthmatic bronchitis and a chronic anxiety reaction which,

4/ As Mrs. Cummings explained the procedures involved in the processing of an application for disability retirement, an employee is initially requested to secure from his own physician an evaluation of the employee's medical condition and an explanation of how it relates to his work. This report is then sent to the base hospital for a Federal Medical Opinion. If the private physician's report is sufficient for the base doctors to render their evaluation no further examination is required. If, as is most often the case, the base doctors find that they require additional information, the employee is required to report to the base hospital for further examination. After Brannon's private physician's report was found to be inadequate, Brannon was requested to undergo an additional examination at the base hospital on March 30. It is the report of this examination which Brannon and his representative requested and which was denied to them.

in his doctor's opinion, limited his performance of assigned job duties. 5/ The Activity's doctors arrived at a similar diagnosis but felt that only minimal restrictions in Brannon's capacity to perform job duties were indicated. 6/

Brogan testified that portions of the base hospital evaluation were read to her by a hospital official prior to the grievance meeting, she was not then given a copy of the report, even though she presented a release signed by Brannon. She again requested a copy of the report at the April 24 meeting but was told by Cummings that binding regulations prohibited its disclosure. 7/ Brogan maintained at the meeting that the regulations were inapplicable.

The Complainant renewed this argument at the hearing and in addition contended that its misapplication worked a violation of the Section 19(a)(6) duty to consult, confer, or negotiate.

Colonel Andrew Nielsen, a physician stationed at the Vandenberg AFB Hospital, testified for the Respondent as to the regular practice of the Hospital in releasing medical records. Colonel Nielsen further testified that although he had no direct knowledge of Brannon's medical condition, accepting as factual the hospital report of the March 30 examination, his reading of the applicable regulations would forbid disclosure of the report to anyone other than Brannon's personal physician. 8/

7. Finally, Complainant contends that a request made by Brogan to Cummings at the April 24 meeting was wrongly refused in violation of the Order. Specifically Brogan requested that Cummings reduce to writing efforts that had been made by the Placement Office to find alternate, acceptable employment for Brannon. 9/ Cummings related that attempts had been made to

5/ Respondent's Exhibit No. 2.

6/ Respondent's Exhibit No. 3.

7/ Federal Personnel Manual Chapter 294, Subchapter 4-1 and Chapter 339, Subchapter 1-4, and Air Force Regulation 40-716; Respondent's Exhibit Nos. 1 and 4 respectively.

8/ The physician who conducted the March 30 examination was unavailable for the purpose of giving testimony at the hearing.

9/ Under procedures in effect at the Activity an employee may qualify for disability retirement from one position and still qualify for placement in another position. When an employee has applied for disability retirement the Activity is under the obligation to actively search for an alternative position for him. If one is found, the employee then has the option of accepting either the offered position or disability retirement with its benefits, if it has been approved.

find alternate positions but that none had been found. 10/ She refused to reduce to writing those efforts which had been made in this regard, however, because she knew of no regulation which so required her and, as she repeated in her testimony, she considered her word as her bond.

Discussion and Conclusions of Law

1. The Union contends that the Activity's actions in the meeting of April 24 and the events surrounding that meeting constitute a violation of Section 19 subsections (a)(1) and (6) of the Executive Order. 11/ After careful review of the entire record in this case and the arguments of counsel I am not persuaded that the Activity's conduct was improper.

2. It was admitted by the Respondent that its usual practice was to send written confirmation of a scheduled grievance adjustment meeting to the representative designated by the grievant. It was admitted further that with regard to the April 24 meeting scheduled to discuss Brannon's grievance no such notification was furnished Brogan. Complainant has not indicated however, nor have I by independent inquiry discovered, any provision of the Order or any applicable regulation which mandates written notice to a designated employee representative. It is uncontradicted that adequate notice of the date arranged for a meeting on his grievance was provided to Brannon and that he was fully informed of his right under the Order to have present with him a representative of his choice. Likewise, I have found that Brogan was in fact informed of the meeting sufficiently in advance to allow for her preparation, and that no prejudice resulted to her or to Mr. Brannon because of the lack of written notice. This contention of the Complainant is therefore without merit.

3. Having found as I have above with regard to the differing versions of the April 24 meeting, I further conclude Complainant has failed to show by convincing evidence that Cummings, acting for the Activity, interfered with Brogan's representation of Brannon, refused to accord her full rights of participation or any other way violated the provisions of the Order.

10/ The Activity was at the time involved in a reduction-in-force (RIF) operation. Those employees who would lose their positions because of the RIF would have priority in job placement over employees in Brannon's position.

11/ Section 19(a) Agency management shall not:

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order.

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

4. Complainant's contentions regarding the failure of the Activity to release medical records obtained from Brannon's March 30 examination at the base hospital are likewise without merit and must be dismissed. The regulations, previously cited, concerning the disclosure of medical information which governed the conduct of Cummings and base hospital personnel provide, in essence, that medical information concerning an employee's mental or other condition which a prudent physician would hesitate to disclose to the employee will be released only to a licensed physician designated in writing by the employee or his designated representative.

Colonel Nielson's opinion, as a prudent physician, regarding the impropriety of releasing the report of the March 30 examination to Mrs. Brogan was uncontradicted. 12/ Complainant has failed to show by competent evidence how Colonel Nielson's appraisal of Mr. Brannon's condition was erroneous or how his opinion regarding release of the medical report was improper. Accepting Colonel Nielson's testimony, it can be seen that Cummings' refusal to release the same information was likewise directed by the regulations and that the Activity's Section 19(a)(6) obligations in the context of the grievance adjustment meeting were not evaded.


5. I turn now to Complainant's contentions regarding Cummings' refusal to provide a written account of the efforts which had been made to find Brannon an alternative job position at the Activity. Complainant does not dispute Cummings' testimony that she was fully prepared to provide this information orally to Brogan if she would have allowed it. The gravamen of the charge is Cummings' refusal to accede to Brogan's demand for a written transcription. Aside from its simple assertion of wrongdoing on the part of the Activity in this regard, Complainant fails to demonstrate under what applicable regulations or provisions of the Order the Activity was obligated to so conform to Brogan's demands. Nor have I been informed how Brannon's position on his grievance has been prejudiced, or the Union's rights disparaged by Cummings' actions. Accordingly, I conclude that Complainant's grievance in this regard can find no redress under the provisions of the Executive Order.

Recommendation

Upon the basis of the foregoing findings and conclusions it is recommended that the Assistant Secretary dismiss in its entirety the Complaint filed herein by Local 1001 of the

12/ Colonel Nielson stated that he wouldn't release the information because of the statement therein concerning a "psycho-physiologic respiratory illness."

National Federation of Federal Employees against the Department of the Air Force, Vandenberg Air Force Base, California.


 FRANCIS E. DOWD
 Administrative Law Judge

Dated: May 28, 1974
 Washington, D. C.

July 10, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE, SOCIAL SECURITY ADMINISTRATION,
KANSAS CITY PAYMENT CENTER,
BUREAU OF RETIREMENT AND SURVIVORS INSURANCE
A/SLMR No. 411

This case involved an unfair labor practice complaint filed by Social Security Local 1336, American Federation of Government Employees, AFL-CIO (Complainant), against the Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance (Respondent) alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491 by failing and refusing to provide certain reports and factual documentary material which reflected the production record of employees Myrtle McBride and Betty Thomas requested by the Complainant as necessary to the processing of potential grievances.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) by failing and refusing to provide the Complainant with reports filed by employee McBride pursuant to its request in the processing of a potential grievance on behalf of McBride. The Administrative Law Judge reached a different conclusion with regard to the Complainant's request for such reports filed by employee Betty Thomas based upon evidence that Thomas had retained copies of her own reports and that these reports already were available to the Complainant. In addition, the Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) by destroying the machine utilization reports relative to employee McBride subsequent to the request for such reports by the Complainant. In reaching these conclusions, the Administrative Law Judge found that in January 1973, employee Thomas was given a progress interview by her immediate supervisor wherein specific reference was made to certain machine utilization reports as to Thomas' production and diligence. Employee Thomas disagreed with the findings of her immediate supervisor during this progress interview and had recourse to the Complainant, her bargaining representative, for assistance in rebutting the adverse portions of the progress interview. Similarly, in February 1973, employee McBride was given a progress interview by her immediate supervisor wherein reference was made to certain reports as to her production and diligence. McBride also disagreed and went to the Complainant for assistance in rebutting the adverse portions of that interview. Pursuant to its role as representative of both Thomas and McBride, the Complainant served a written request for copies of the machine utilization reports relied upon by the supervisors of both Thomas and McBride during the progress interviews, for purposes of evaluating the possibility of further action by the Complainant on behalf of the two employees. The Complainant was assured by the supervisory personnel of the Respondent that, pursuant

to the policy of the Respondent, the machine utilization reports periodically were destroyed and that the reports requested by the Complainant were no longer available. Thereafter, in March 1973, the Complainant located the reports in question and verified their existence to a responsible official of the Respondent. Nevertheless, subsequently such reports were destroyed by the Respondent.

The Administrative Law Judge, relying on the Assistant Secretary's decision in Department of Defense, State of New Jersey, A/SLMR No. 323, found that the reports in question constituted relevant and necessary information in connection with determining whether or not to initiate grievances, and that the refusal of the Respondent to make available such relevant and necessary information constituted a violation of Section 19(a)(1) and (6). Further, the Administrative Law Judge found that the Respondent's conduct herein was not based on any statute or government regulation prohibiting the disclosure of such information. Accordingly, the Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) of the Order by its conduct in failing and refusing to make available the information requested and also by destroying the reports requested.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE, SOCIAL SECURITY ADMINISTRATION,
KANSAS CITY PAYMENT CENTER,
BUREAU OF RETIREMENT AND SURVIVORS INSURANCE

Respondent

and

Case No. 60-3455(CA)

SOCIAL SECURITY LOCAL 1336, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO

Complainant

DECISION AND ORDER

On April 4, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Report and Recommendations. Further, the Complainant was granted leave to file an answering brief to the Respondent's exceptions and the Respondent was granted leave to file a response to the Complainant's answering brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. 1/ The rulings are hereby affirmed. Upon consideration of the

1/ Contrary to the assertions contained in the Respondent's exceptions, I find that the record in this proceeding contains no evidence or support for a finding that the Administrative Law Judge exhibited bias or prejudice. Accordingly, I reject these assertions made by the Respondent. Moreover, as to certain inadvertent errors made by the Administrative Law Judge in technical terminology and dates, these were not considered to affect the ultimate disposition of the instant case.

Administrative Law Judge's Report and Recommendations and the entire record in this case, including the exceptions and supporting brief filed by the Respondent, the answering brief to the Respondent's exceptions filed by the Complainant, and the response to the answering brief filed by the Respondent, I hereby adopt the findings, 2/ conclusions, and recommendations of the Administrative Law Judge. 3/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, shall:

1. Cease and desist from:

(a) Refusing to provide, upon request by Social Security Local 1336, American Federation of Government Employees, AFL-CIO, any factual data or documentary materials utilized to evaluate or appraise employee Myrtle McBride, or any other bargaining unit employee represented by Social Security Local 1336, American Federation of Government Employees, AFL-CIO, which are necessary for such labor organization to discharge its obligations as the exclusive bargaining representative of all of the employees within the unit.

(b) Destroying any factual data or documentary materials utilized by supervisors in evaluating or appraising bargaining unit employees which have been requested by Social Security Local 1336, American Federation of Government Employees, AFL-CIO, pursuant to the discharge of its responsibilities as the exclusive bargaining representative, without prior consultation thereon.

(c) Interfering with, restraining, or coercing employee Myrtle McBride, or any other bargaining unit employee, by refusing to provide Social Security Local 1336, American Federation of Government Employees, AFL-CIO, machine utilization reports or any other factual data or documentary materials which reflect the production of employee Myrtle McBride, or any other bargaining unit employee.

2/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

3/ As set forth below, under the circumstances of this case, I have found it necessary to modify the Administrative Law Judge's recommended order and Notice to Employees.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

(a) Upon request, make available to Social Security Local 1336, American Federation of Government Employees, AFL-CIO, factual data and documentary materials utilized in preparing reports of interviews, performance evaluations or appraisals of employee Myrtle McBride, or any other bargaining unit employee, where such materials or data are necessary for the discharge of the obligation of Social Security Local 1336, American Federation of Government Employees, AFL-CIO, to represent all employees in the bargaining unit.

(b) Post at its Kansas City, Missouri facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of Management, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director of Management shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 10, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to supply, upon request by Social Security Local 1336, American Federation of Government Employees, AFL-CIO, any factual data or documentary materials which were utilized in preparing reports of interviews, performance evaluations or appraisals and which reflect the production of employee Myrtle McBride or any other bargaining unit employee.

WE WILL NOT destroy any factual data or documentary materials utilized by supervisors in evaluating or appraising bargaining unit employees which are requested by Social Security Local 1336, American Federation of Government Employees, AFL-CIO, and which are necessary for the Social Security Local 1336, American Federation of Government Employees, AFL-CIO, to discharge its obligations to employees in the bargaining unit, without prior consultation thereon.

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 Executive Order.

WE WILL, upon request, make available to Social Security Local 1336, American Federation of Government Employees, AFL-CIO, factual data and documentary materials utilized in preparing report of interviews, performance evaluations or appraisals of employee Myrtle McBride, or any other bargaining unit employee, which are necessary for Social Security Local 1336, American Federation of Government Employees, AFL-CIO, to discharge its obligation to represent all employees in the bargaining unit.

(Agency or Activity)

Dated _____ By: _____
(Signature) (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



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 In the Matter of :
 :
 DEPARTMENT OF HEALTH, EDUCATION, AND :
 WELFARE, SOCIAL SECURITY ADMINISTRATION, :
 KANSAS CITY PAYMENT CENTER, BUREAU OF :
 RETIREMENT AND SURVIVORS INSURANCE :
 :
 Respondent : CASE NO. 60-3455 (CA)
 :
 and :
 :
 SOCIAL SECURITY LOCAL 1336, AMERICAN :
 FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO :
 :
 Complainant :

Mr. Francis A. Dippel
Bureau of Retirement and
Survivors Insurance
Room 516 Altmeyer Building
6501 Security Boulevard
Baltimore, Maryland 21235

For the Respondent

James Rosa, Esquire
National AFGE Headquarters
1325 Massachusetts Avenue, N. W.
Washington, D. C.

For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to an amended complaint first filed on August 10, 1973, under Executive Order 11491, as amended, by Social Security Local 1336, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or AFGE), against the Social Security Administration, Kansas City Payment Center, (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Regional Director for the Kansas City, Missouri, Region on November 30, 1973.

The complaint alleges, in substance, that the Respondent refused the Union's request for, and later destroyed, certain data relied upon by supervisory personnel in giving adverse evaluations to two employees, all, in violation of Sections 19(a) (1) and (6) of the Executive Order.

A hearing was held in the captioned matter on February 12, 1974, in Kansas City, Missouri. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.^{1/}

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following conclusions and recommendations:

Findings of Fact

Respondent operates a computer facility in Kansas City, Missouri, known as Mid-America Program Center, wherein, among other things, it is involved in the transcription of certain data or "hard copy" into computer language for further processing through Respondent's computers. Prior to November 1971, the transcription of "hard copy" into the computers was accomplished by means of a key punch system whereby the information was punched out on cards which were later manually processed prior to feeding the information thereon into the computers. In November 1971, Respondent switched its operation to a more sophisticated system known as Keyplex. The Keyplex system did away with the old punch card and substituted therefor a disc pack which ultimately conveyed the information recorded thereon to magnetic tape.

The Keyplex machines were not owned by Respondent, but rather leased from the Honeywell Company. According to the terms of the lease each piece of Keyplex equipment had to be operational ninety-five percent of the time for a period of thirty consecu-

^{1/} Both parties filed post-hearing briefs which have been duly considered.

tive days from date of installation or the Respondent was not obligated to continue the lease. Additionally, following the initial first thirty days of the lease, Respondent was allowed a reduction in its rental or lease agreement if the down time on the machine exceeded a certain percentage of a 480-minute day. In view of the foregoing considerations and also for purpose of determining the effectiveness of the Keyplex equipment as compared to the obsolete key punch equipment, Respondent devised and instituted a machine utilization report (hereinafter referred to as machine utilization reports or time sheets) which each Keyplex operator was required to fill out at the end of each work day.

The machine utilization report contained numerous columns which indicated, among other things, down time, idle time, re-key time and also the amount of work processed by each employee on each machine per day. The completed reports were submitted daily by the employees to their respective supervisors for verification. ^{2/} According to the Respondent's policy as espoused by numerous bulletins and other circulated memoranda emanating from Respondent's main headquarters in Baltimore, Maryland, the aforementioned reports, as well as other machine reports, were not to be used for any purposes other than evaluating equipment.

Pursuant to Agency regulations and/or procedure, on or about January 18, 1973, Keyplex operator Betty Thomas was given her semi-annual progress interview by her immediate supervisor, Laverne Hughes. During the course of the interview Hughes informed Thomas that Thomas' production was substandard, whereupon Thomas, who had carbon copies of her own daily machine reports, asked Hughes to produce copies of the machine utilization reports submitted by her fellow Keyplex operators so that she might compare production. Hughes responded that she did not have such reports. A written report of the interview was issued sometime in March 1973. Upon receipt of the written report of the interview which amounted to an adverse appraisal, Thomas with the help of the Union, which was the recognized representative of the Keyplex operators, filed a rebuttal.

^{2/} Inasmuch as each machine utilization report was based upon a 480-minute day, each minute therein had to be accounted for. Due to this required verification by the respective supervisors and since each step of a batch of work or particular job had to be fully completed before another Keyplex operator could "key in" on the job for further processing, any errors, intentional or otherwise, as far as listed production on the machine utilization reports, would come to the supervisor's immediate attention the next morning during review of the reports prior to making further assignments with respect to the work being fed into the Keyplex system. Accordingly, due to the composition of the machine utilization reports, the supervisors could determine and observe the daily production accomplishments of the employees under their respective supervision.

Similarly, on February 6, 1973, Keyplex operator Myrtle McBride was given her semi-annual progress interview by her immediate supervisor, Blanche Shaw. During the course of the interview, Shaw advised McBride that McBride's production was sub-standard. When McBride questioned Shaw's conclusion with respect to McBride's production, Shaw cited as a partial basis therefor the machine utilization reports made out by McBride on a daily basis. McBride then asked Shaw for the machine utilization reports and Shaw replied that she did not have them. Subsequently, on March 7, 1973, Shaw, in accordance with Agency practice, composed a written report of the oral interview wherein she again made reference to the machine utilization reports submitted by McBride as a basis for her conclusion that McBride's production was below standard. Shaw's written report further noted that "on one or more occasions I have observed that work recorded on your time sheets and control sheets did not agree when listed out on the console..."

Following receipt of the aforementioned written report, McBride, with the assistance of the Union, filed a rebuttal attacking the adverse appraisal contained therein.

Shortly after Thomas received her initial interview on or about January 18, 1973, she contacted the Union and requested its aid in attacking and/or rebutting supervisor Hughes' conclusion with respect to her production output. A similar request was made of the Union by McBride in early February 1973. Thereafter, pursuant to the aforementioned requests of Thomas and McBride, shop steward Sylvia Tehrani approached supervisor Shaw and asked her if she would consider amending or changing the conclusion stated in her interview with McBride. Upon receiving a negative reply, Tehrani asked Shaw for copies of McBride's time sheets (machine tabulation reports) that had been turned in during the present rating period. Shaw, who expressed doubt that she had the authority to make the time sheets available, suggested to Tehrani that she put her request in writing. Tehrani followed Shaw's suggestion and on or about February 12, 1973, directed written requests to supervisors Hughes and Shaw wherein she asked for the respective time sheets of McBride and Thomas for the appraisal period then under consideration. Both supervisors separately responded by telephone on the afternoon of February 12, 1973, and informed Tehrani that they did not have the power to grant her request and suggested that she contact their superior, Section Chief Ed Macholan. Upon contacting Macholan, per the suggestion of supervisors Hughes and Shaw, Tehrani was informed that he could not give her the requested time sheets because they were destroyed monthly and that in any event she should take the whole matter up with his immediate supervisor, Branch Chief James Hall.

Subsequently, a meeting was held on February 14, 1973, with Hall and his assistant, and various representatives of the Union, including Tehrani and Union President Dwight Johnson. During the meeting Tehrani explained her problem concerning one item of the appraisals, i.e., production, and informed Hall that if the Union could see the time sheets submitted on a daily basis by McBride and Thomas for the appraisal period then under consideration they could resolve the problem. Hall informed Tehrani that he could not grant her request because the Respondent did not have the time records since they were destroyed periodically. According to Hall, it was his understanding that the time records were supposed to be destroyed after final verification and compilation, which took about a month.

On March 8, 1973, Tehrani was passing through the P.R.P. Branch tabulating room during her lunch break and stopped to talk to a few employees working therein. She was informed that the time sheets she had been looking for, and had requested of Respondent, were stacked in the rear of the room. She went immediately to the rear of the room and discovered several stacks of the machine utilization reports which were chronologically filed for the period June 1972 through February 1973. Thereupon, she left the tabulating room and sought out two Union officers, Reed and Burkendine, informed them of her discovery and had them accompany her back to the tabulating room for purpose of verification. Following verification of Tehrani's discovery, the three individuals decided to go back to the Union's office and report the existence of the requested documents and seek advice. On the way out of the tabulating room Tehrani pick up several copies of the machine utilization reports from one of the stacks. These reports bore various dates in November 1972.

Following a discussion among the union representatives with respect to the discovery, Arthur Johnson, president of the Union, telephoned Rick Barker, Director of Management, explained the problem and circumstances surrounding the Union's request for the machine tabulation reports and asked him to conduct an investigation of the matter. Johnson further informed Barker that the reason he was contacting Barker rather than Hall was the Union's fear that Hall would destroy the documents. Barker promised Johnson that he would look into the matter and get back to him at a later date.

Thereafter, on an unspecified date between March 8 and March 30, 1973, the machine tabulation reports were destroyed by the Respondent's representatives. On March 30, 1973, during a meeting between representatives of both the Respondent and the Union, which was called for purposes of discussing the problem of

the machine tabulation reports, the Union representatives were informed for the first time that the reports had been destroyed. At this meeting the Union representatives were shown a copy of a memorandum dated March 9, 1973, from Branch Chief Hall to Chief, Payment Records Processing Branch which reads as follows:

It was brought to my attention that individual machine utilization reports dating back to June 1972 were found in the Tabulating Unit. These Reports should have been disposed of when the composite report was finalized and submitted to our central office.

It came as a complete surprise to me that such reports were retained. Just recently I assured union representatives that these reports were disposed of once our monthly machine utilization report has been submitted. It was embarrassing to branch management when something like this happens.

In the future, when the monthly report has been assembled and approved the individual sheets will be disposed of immediately.

Subsequent to the aforementioned events, Respondent, per a union suggestion, revised the format of the machine utilization reports so that no production figures were recorded thereon.

DISCUSSION AND CONCLUSIONS

Section 10(e) of the Executive Order provides as follows:

When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

In interpreting the aforesaid provision of the Order, the Assistant Secretary has concluded that such provision confers a responsibility upon a labor organization for representing the interests of all employees in the unit. The Assistant Secretary has further concluded that "clearly, it [a labor organization] cannot meet this responsibility if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances." Accordingly, the refusal of an Agency to make available such relevant and necessary information, barring any statute or government regulation prohibiting the disclosure of same, constitutes a violation of Sections 19(a)(1) and (6) of the Executive Order. 3/

In the instant case, Respondent refused to make available to the Union the machine utilization reports which were relied upon in part by supervisors Huges and Shaw in making their respective appraisals of employees Thomas and McBride. Inasmuch as the reports, particularly in the case of McBride, were the only tangible evidence from which the Union could verify or attack the supervisors' conclusions with respect to the employees' production and determine whether or not to go through the formality of processing grievances, I find that the Union was entitled to the requested information, i.e., machine utilization reports. 4/

Respondent does not contend that the information contained in the machine utilization reports is not relevant to an analysis of the employees' performance in the area of production. Rather, Respondent defends its actions on the grounds that the reports are privileged communications and that in any event, the reliance thereon by the supervisors for purposes of making appraisals was contrary to the policy of the Agency. In support of its contention that the documents are privileged the Respondent relies on Section 4(b)(5) of the Public Information Section of the Administrative Procedure Act, 5 U.S.C. 552 and the exclusionary language contained in Section 11(b) of Executive Order 11491.

Inasmuch as the requested information, which was a product of the employees involved, neither bears on the mission of the Agency, etc., nor constitutes inter-agency or intra-agency memoranda or letters underlying any policy determinations, I find the Respondent's contention that the information is privi-

3/ Department of Defense, State of New Jersey A/SLMR No. 323

4/ With respect to the machine tabulation reports submitted on a daily basis by Thomas, who admittedly had copies of same, I find, for reasons set forth infra, that the Respondent was under no obligation to make them available to the Union.

leged to be without merit. Moreover, assuming that certain parts of the information contained in the machine utilization reports are privileged, in view of the make-up of the reports, Respondent could have easily deleted the objectionable material therefrom and submitted to the Union the requested information bearing solely on the affected employees' production. While a Union is entitled to all information necessary for intelligent representation and an agency is obligated to supply same, the information need not be in the exact form requested. 5/ In this latter regard, I note that the Respondent at no time prior to the destruction of the newly discovered reports raised the issue of "privilege", but instead took it upon itself to destroy the documents without any prior consultation with the Union. Such action had the effect of depriving the Union of the only documentary evidence available for analyzing the merits of the appraisals as they pertained to the employees' production.

As to the Respondent's second contention, i.e., that the supervisors acted contrary to Agency policy, sufficeth to say, that a principal is responsible for the acts of its agents. Additionally, reliance on specific information by a respondent is not a condition precedent to the obligation to supply information, solely in its possession, necessary for intelligent representation or bargaining.

In view of the foregoing considerations, I conclude that Respondent, by its actions in refusing the Union's request for, and later destroying, the machine utilization reports prepared by employee McBride, refused to consult, confer and negotiate with a labor organization in violation of Section 19(a)(6) of the Executive Order. I further conclude that by this same conduct, Respondent violated Section 19(a)(1) of the Executive Order in that such conduct inherently interferes with, restrains and coerces unit employees in their right to have their exclusive representative act for and represent their interests in matters concerning grievances, personnel policies and practices as assured by Section 10(e) of the Order.

Lastly, it is concluded that Respondent's action in refusing the Union's request for, and subsequently destroying, the machine utilization reports of employee Thomas was not violative of Sections 19(a)(1) and (6) of the Executive Order. To justify

5/ Although the decisions of the National Labor Relations Board in the private sector are not controlling, it is noted that the Board has reached similar conclusions. Cf. The Cincinnati Steel Casting Company, 86 NLRB 592; Lasko Metal Productions Inc., 148 NLRB 976; and United Aircraft Corp., 192 NLRB No. 62.

a 19 (a)(1) and (6) violation in the area of "information" it must be shown that the information requested is necessary for intelligent bargaining, is not readily available from some other source, and that without which the Union will be impeded in carrying out the responsibilities imposed upon it by the Order. Such is not the case with respect to Thomas, who, admittedly, had copies of the reports and could have easily made them available to the Union. In these circumstances, I find no obligation imposed upon the Respondent to duplicate information readily available to the Union.

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (6) of Executive Order 11491, as amended, by virtue of its actions in refusing to supply and/or destroying the machine utilization reports of employee McBride, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Executive Order. 6/ I also recommend that the Sections 19(a)(1) and (6) allegations predicated on Respondent's refusal to supply the machine utilization reports of employee Thomas be dismissed.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance shall:

1. Cease and desist from:

(a) Refusing to supply to Social Security Local 1336, American Federation of Government Employees, AFL-CIO, the machine utilization reports or any other future reports which reflect the production of employee Myrtle McBride.

(b) Destroying any documentary materials requested by Local 1336, American Federation of Government Employees, AFL-CIO, without prior consultation thereon.

(c) Interfering with, restraining or coercing its employees by refusing to supply to Social Security Local 1336, American Federation of Government Employees, AFL-CIO, the machine utilization reports or any other future reports which reflect the production of employee Myrtle McBride.

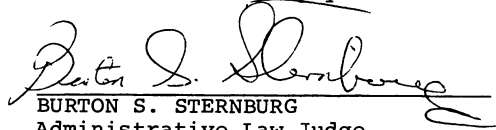
6/ Inasmuch as the machine utilization reports have been destroyed, an affirmative order with respect thereto, would be futile. I will therefore make the recommended Order and Notice broader than usual.

(d) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Post at its Kansas City, Missouri facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of Management; and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director of Management shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from date of this Order as to what steps have been taken to comply therewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: April 4, 1974
Washington, D. C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to supply to Social Security Local 1336, American Federation of Government Employees, AFL-CIO, the machine utilization reports or any other future reports which reflect the production of employee Myrtle McBride or any other employee.

WE WILL NOT in the future destroy any materials requested by Social Security Local 1336, American Federation of Government Employees, AFL-CIO, without prior consultation thereon.

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 Executive Order.

WE WILL upon request, make available to Social Security Local 1336, American Federation of Government Employees, AFL-CIO, any and all documentary materials reflecting on, or underlying adverse employee appraisals.

(Agency or Activity)

By: _____
(Signature)

Dated _____

July 11, 1974

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 its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2511 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,
ABERDEEN PROVING GROUND
A/SLMR No. 412

This proceeding arose upon the filing of an unfair labor practice complaint by International Association of Machinists and Aerospace Workers, Local Lodge 2424 (Complainant). The complaint, as amended, alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to seek review by the Federal Labor Relations Council or to comply with a binding arbitration award issued pursuant to the terms of the parties' negotiated agreement. The case was transferred to the Assistant Secretary pursuant to Section 206.5(b) of the Assistant Secretary's Regulations after the parties had submitted a stipulation of facts and exhibits to the Assistant Regional Director for Labor-Management Services.

The Respondent contended that it lacked the authority to carry out the Arbitrator's proposed remedy. It further asserted that the Arbitrator in making his award went beyond interpreting or applying the terms of the parties' negotiated agreement and, further, that the unfair labor practice complaint lacked sufficient specificity.

The Assistant Secretary rejected the Respondent's contention that the complaint lacked specificity. The Assistant Secretary concluded that the Respondent's refusal to comply with an award issued by an arbitrator under conditions agreed to by the parties, in his judgment, would constitute a unilateral action with respect to negotiated terms and conditions of employment, would thwart the arbitration process, would be inconsistent with the purposes and policies of the Order, and would be violative of Section 19(a)(1) and (6) of the Order. However, he noted the Respondent's defense, *i.e.* - that it is unable to make payment of the amount involved because no appropriation exists for payment and a special authorization from the Comptroller General is needed in order to implement the award - raised the following major policy issues: (1) whether the Assistant Secretary has jurisdiction to enforce under Section 19 of the Order a binding arbitration award in which no exceptions were filed with the Federal Labor Relations Council; and (2) if the Assistant Secretary has jurisdiction to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitrator's award until it receives authorization from the Comptroller General to make payment dispositive of the matter? Under these circumstances, the Assistant Secretary referred these issues to the Federal Labor Relations Council for decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
ABERDEEN PROVING GROUND

Respondent

and

Case No. 22-5129(CA)

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LOCAL LODGE 2424

Complainant

ORDER REFERRING MAJOR POLICY ISSUES TO THE
FEDERAL LABOR RELATIONS COUNCIL

This matter is before the Assistant Secretary pursuant to Assistant Regional Director for Labor-Management Services Kenneth L. Evans' Order Transferring Case to the Assistant Secretary pursuant to Section 206.5(b) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The initial complaint in the subject case alleged that the Respondent violated Section 19(a)(1), (2), (3), (5), and (6) of the Order 1/ by refusing to seek review by the Federal Labor Relations Council or to comply with a binding arbitration award issued pursuant to the terms of the parties' negotiated agreement.

The Complainant contends that a refusal to comply with a binding arbitration award without filing exceptions under Section 13(b) of the Order 2/ with the Federal Labor Relations Council constitutes an unfair

1/ On February 19, 1974, the Complainant's request to withdraw its 19(a)(2), (3), and (5) allegations was approved by the Assistant Regional Director.

2/ Section 13(b) provides: "A negotiated procedure may provide for the arbitration of grievances over the interpretation or application of the agreement, but not over any other matters. Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council."

labor practice. On the other hand, the Respondent argues that it lacks the authority to carry out the Arbitrator's proposed remedy. It asserts also that the Arbitrator in making his award went beyond interpreting or applying the terms of the parties' negotiated agreement and, further, that the unfair labor practice complaint in this matter herein lacks sufficient specificity.

The undisputed facts, as stipulated by the parties, are as follows:

On August 9, 1972, the parties entered into a negotiated agreement which provided, in part, for the deduction of dues and the transmittal to the Complainant of an amount equal to the deductions each pay period not later than three workdays after each pay day.

On October 18, 1971, Robert L. Wright, an employee who had filed a voluntary dues withholding authorization, was promoted from a unit job to a job outside the unit. Contrary to the terms of the parties' negotiated agreement, the Respondent's payroll office failed to terminate the dues withholding authorization and erroneously continued to deduct and remit such dues to the Complainant until the last pay period of November 1972, over a year after Wright was promoted out of the unit. Upon ascertaining its mistake, the Respondent ceased deducting dues from Wright's pay and, in December 1972, reimbursed Wright in the amount of \$80.33, which equaled the amount of dues erroneously deducted from his pay since October 18, 1971. In order to correct its error, the Respondent transmitted to the Complainant the dues deductions for November 1972, less the \$80.33 it had previously paid the Complainant in error. Based upon the Respondent's action, the Complainant filed a grievance under the negotiated grievance procedure requesting the payment of the withheld \$80.33. The grievance proceeded to arbitration. 3/ Thereafter, on August 3, 1973, the Arbitrator issued his decision finding that the Respondent had violated the negotiated agreement by withholding from a payment of deducted union dues an amount previously paid to the Complainant by mistake. Limiting his finding to the fact that "the particular method used in the instant case violated the provisions of the Collective Bargaining Agreement," the Arbitrator ordered that the Respondent reimburse the Complainant in the amount of \$80.33 which had been improperly withheld.

Notwithstanding the arbitration award, the Respondent has not paid the \$80.33 to the Complainant nor filed a petition for review with the Federal Labor Relations Council. Instead, the Respondent claimed that it did not know from which account to charge the \$80.33 and, on August 17, 1973, sought an advance decision from the Comptroller General of the United States as to the appropriate fund citation, if any, from which

3/ The issue in the arbitration proceeding as framed by the Arbitrator was: "Has the Employer violated the provisions of the Collective Bargaining Agreement by reducing a current payment for deducted Union dues by an amount mistakenly deducted from wages of an ineligible employee and paid to the Union previously?"

to make payment to the Complainant. The Comptroller General has accepted the Respondent's request for an opinion. The Respondent indicates that it has prepared a voucher for payment and is awaiting that decision.

All of the facts and positions set forth above are derived from the parties' stipulation and accompanying exhibits.

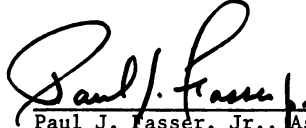
In my view, a party's refusal to comply with a binding arbitration award would be violative of Section 19(a)(1) and (6) of the Order in circumstances where such party has not availed itself of the right to file exceptions to the award under the Rules and Regulations of the Federal Labor Relations Council. Thus, such a refusal to comply with an award issued by an arbitrator under conditions agreed to by the parties, in my judgement, would constitute a unilateral action with respect to negotiated terms and conditions of employment, would thwart the arbitration process, and would be inconsistent with the purposes and policies of the Order. In this regard, it was noted that the Study Committee's Report and Recommendations (August 1969) states, in pertinent part, that: "We feel that arbitrators' decisions should be accepted by the parties. ...exceptions should be taken expeditiously by notifying the other party ...of the full nature of the objections to the decision. If the agency and the organization cannot resolve the matter within a reasonable period of time, either party should have the right to appeal to the Council in accordance with its rules." While, as noted above, the Order provides specifically that parties may file exceptions to arbitration awards with the Federal Labor Relations Council under regulations prescribed by the Council, the Order and the Rules and Regulations of the Federal Labor Relations Council are silent with respect to the procedure to follow in order to obtain enforcement of arbitration awards. In the instant case it was noted that the Complainant, whose position was essentially adopted by the Arbitrator, had no reason to file exceptions within the time limits prescribed by the Rules and Regulations of the Federal Labor Relations Council.

The Respondent raises, by way of defense, that it is unable to make payment of the amount involved because no appropriation exists for payment and a special authorization from the Comptroller General of the United States is needed in order to implement the award. In this connection, the Respondent asserts that it is willing to carry out the Arbitrator's award, but that until an authorization by the Comptroller General is obtained in accordance with its request it is unable to do so. In my opinion, the Respondent's defense in this matter raises major policy issues - (1) whether the Assistant Secretary has jurisdiction to enforce under Section 19 of the Order a binding arbitration award in which no exceptions were filed with the Federal Labor Relations Council, and (2) if the Assistant Secretary has jurisdiction to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitration award until it receives authorization from the Comptroller General to make payment dispositive of the matter? Under these circumstances, and pursuant to Section 2411.4 of the Rules and Regulations of the Federal Labor Relations

-3-

Council and Section 203.25(d) of the Assistant Secretary's Regulations, the above issues are hereby referred to the Federal Labor Relations Council for decision. 4/

Dated, Washington, D.C.
July 11, 1974


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations

4/ I reject the Respondent's contention that the instant complaint lacks specificity. The complaint herein clearly states that an arbitration award was issued under an agreement containing a binding arbitration provision, that review of the arbitration award was not sought with the Federal Labor Relations Council by the Respondent, and that the Respondent has refused to comply with the award.

-4-

July 11, 1974

A/SLMR No. 413

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND REMAND
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. GEOLOGICAL SURVEY,
DEPARTMENT OF THE INTERIOR,
ROLLA, MISSOURI
A/SLMR No. 413

U.S. GEOLOGICAL SURVEY,
DEPARTMENT OF THE INTERIOR,
ROLLA, MISSOURI

Activity

and

Case No. 62-3832(DR)

IRVIN J. HAWKINS

Petitioner

and

LOCAL 934, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES 1/

DECISION AND REMAND

The Petitioner, Irvin J. Hawkins, sought the decertification of the Intervenor, Local 934, National Federation of Federal Employees, the current exclusive representative of certain employees of the Activity. The Intervenor moved to dismiss the petition, contending: (1) that there was an agreement bar to an election, and (2) that at all times material to drawing up, circulating and arranging the petition, the Petitioner was a supervisor. Relying on the Area Administrator's pre-hearing investigation which concluded that the Petitioner was not a supervisor within the meaning of the Order, the Hearing Officer, over an objection by the Intervenor, refused to consider any evidence in this regard.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Clarence E. Teeters. Except as modified herein, the Hearing Officer's rulings made at the hearing are hereby affirmed.

With respect to the alleged agreement bar, the Assistant Secretary rejected the Intervenor's contention that November 10, 1972, the date on which the draft basic agreement was signed at the local level by the Intervenor and the Activity, was controlling for the purpose of determining the open period for filing an election petition. (This contention was made notwithstanding the fact that the November 10, 1972, date did not appear on the draft basic agreement). Thus, consistent with the rationale contained in Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45, and a reading of Section 202.3(c)(1) of the Regulations, the Assistant Secretary considered the controlling date in computing the "open" period for the filing of the petition in question to be the terminal date of the one-year negotiated agreement involved herein and concluded that the petition was timely filed during the 60-90 day open period of the agreement.

Upon the entire record in this case, including the briefs filed by the Activity and the Intervenor, the Assistant Secretary finds:

With respect to the alleged supervisory status of the Petitioner and the Hearing Officer's ruling pertaining thereto, in the Assistant Secretary's view the Hearing Officer erred in not permitting the introduction of evidence pertaining to the alleged supervisory status of the Petitioner. In this regard, he noted prior decisions where petitions filed by a management official and a guard for a non-guard unit were dismissed. Accordingly, the Assistant Secretary remanded the case for the purpose of reopening the hearing to obtain evidence on the Petitioner's supervisory status at the time he filed the decertification petition in this matter.

The Petitioner, Irvin J. Hawkins, seeks the decertification of Local 934, National Federation of Federal Employees, herein called the Intervenor, which currently represents exclusively a unit of all General Schedule and Wage Board employees, including those in printing and lithographic positions, employed by the U.S. Geological Survey, Department of the Interior, Rolla, Missouri.

Prior to the hearing in this matter, the Intervenor moved to dismiss the subject petition contending that there exists an agreement bar to an

1/ The name of the Intervenor appears as amended at the hearing.

election, and that, at all times material "to drawing up, circulating and arranging the petition," the Petitioner was a supervisor "in violation of Section 1(a) and (b), and Section 19(a)(1) and (2) of the Order." The Intervenor's motion was referred to the Hearing Officer in this case. At the hearing, the Hearing Officer ruled that all allegations raised by the Intervenor in its motion, with the exception of the allegation concerning the agreement bar, had been determined to be without merit and, therefore, the scope of the hearing would be restricted to developing evidence relating only to the agreement bar issue. The Intervenor excepted to the Hearing Officer's ruling limiting the scope of the hearing.

With regard to the agreement bar issue, the Intervenor noted that the effective date of the parties' negotiated agreement was January 10, 1973. However, it asserted that November 10, 1972, the date on which the draft basic agreement was signed at the local level, is controlling for agreement bar purposes. Under these circumstances, in the Intervenor's view, the agreement bar period of the one-year agreement terminated on November 9, 1973, and, therefore, the instant decertification petition filed on October 24, 1973, was untimely in that it was not filed during the prescribed open period. ^{2/} On the other hand, the Activity and the Petitioner contend that no agreement bar to an election exists in this matter. In this regard, they contend that as the negotiated agreement became effective on January 10, 1973, the petition herein was timely filed in relation to the actual termination date of such agreement. Further, the Petitioner contends that the negotiated agreement was the only source available for determining the period in which a challenge to the majority status of the Intervenor could be filed and that the only date contained on such agreement was its effective date, i.e., January 10, 1973.

The record reveals that the Intervenor and the Activity negotiated and signed a draft basic agreement which was forwarded to the Personnel Officer, U.S. Geological Survey, Department of the Interior for approval by the Department's Director of Personnel. The signed draft basic agreement was undated; however, a November 14, 1972, memorandum of transmittal to the Personnel Officer indicated that it had been signed on November 10, 1972. Under the terms of that agreement, it was to become effective on the date of approval by the Director of Personnel and to remain in effect for one year from that date. The basic agreement was approved and signed by the Director of Personnel on January 10, 1973, and also was signed on that date by the Personnel Officer of the Department of the Interior and by the President of the National Federation of Federal Employees.

^{2/} See Section 202.3(c)(1) of the Assistant Secretary's Regulations which provides: "When an agreement covering a claimed unit has been signed by the activity and the incumbent exclusive representative, a petition for exclusive representation or other election petition will be considered timely when filed...ⁿot more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed."

It has been held previously that in order for an agreement to constitute a bar to the processing of a petition, it should contain a clearly enunciated fixed term or duration from which employees and labor organizations can ascertain, without the necessity of relying on other factors, the appropriate time for the filing of representation petitions. ^{3/} It has been noted also, in this regard, that to permit agreements of unclear duration to constitute bars to elections would, in effect, be granting protection to parties who have entered into ambiguous commitments and could result in the abridgement of the rights of employees under the Executive Order. As indicated above, under the terms of the undated draft basic agreement, the Intervenor and the Activity agreed that the effective date and duration of their negotiated agreement would be determined by the date of approval by the Director of Personnel. The evidence establishes that the negotiated agreement was approved by the Director of Personnel on January 10, 1973, and that it states clearly that it shall be effective on that date and remain in effect for one year from that date.

Section 202.3(c)(1) of the Assistant Secretary's Regulations, quoted above at footnote 2, clearly indicates that the controlling date in computing the "open" period for the filing of a petition for an election is the terminal date of an agreement such as the one in this case, which has a term of three years or less. Finding the terminal date of the negotiated agreement in this case to be January 9, 1974, I conclude, therefore, that the October 24, 1973, decertification petition herein was timely filed during the 60-90 day open period of that agreement. Accordingly, in the circumstances of this case, I find that the negotiated agreement between the Intervenor and the Activity does not bar an election among the employees covered by the instant decertification petition.

As indicated above, the Intervenor further alleged that at all times material "to drawing up, circulating and arranging the petition," the Petitioner was a supervisor. Relying on the Area Administrator's pre-hearing investigation which concluded that the Petitioner was not a supervisor within the meaning of the Order, or worked in such a capacity while engaged in activity leading to his filing of the instant petition, as noted above, the Hearing Officer, over an objection by the Intervenor, refused to consider any evidence in this regard. The Hearing Officer made such a ruling notwithstanding the fact that the Intervenor maintained that it still was in disagreement as to the supervisory status of the Petitioner.

In my view, the Hearing Officer erred in not permitting the introduction of evidence pertaining to the alleged supervisory status of the Petitioner. Thus, in prior decisions it has been found that petitions filed by a management official and a guard for a non-guard unit warranted

^{3/} See Treasury Department, United States Mint, Philadelphia, Pennsylvania, A/SLMR No. 45.

July 12, 1974

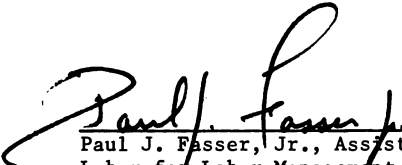
dismissal. ^{4/} Accordingly, in view of the Intervenor's exceptions to the Hearing Officer's refusal to accept evidence pertaining to the supervisory status of the Petitioner and the lack of sufficient evidence necessary to decide this question, I shall remand the subject case to the appropriate Assistant Regional Director for the purpose of reopening the hearing to obtain evidence on the Petitioner's supervisory status at the time he filed the instant decertification petition.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Assistant Regional Director.

Dated, Washington, D.C.
July 11, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
DETROIT AREA OFFICE,
DETROIT, MICHIGAN
A/SLMR No. 414

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO (Complainant) against the Department of Housing and Urban Development, Detroit Area Office, Detroit, Michigan (Respondent). The complaint alleged that the Respondent violated Section 19(a)(1), (2), (4) and (6) of the Executive Order by refusing to grant an employee a promotion and increasing her daily workload because of her union affiliation and action in filing an agency discrimination complaint, and subsequently failing to confer in good faith with respect to a pending agency discrimination complaint.

During the course of the hearing, the Respondent moved for dismissal of the complaint on the grounds that: (1) the charge and/or complaint were not timely filed; and (2) the Complainant had failed to establish a prima facie case.

The Administrative Law Judge found that the evidence adduced by the Complainant in support of its allegations dealt solely with events occurring during the period August 1971 through January 1972, more than six and nine months, respectively, prior to the filing of the pre-complaint charge and the complaint in this matter. Accordingly, he concluded that the Respondent's motion to dismiss based on untimeliness had merit and should be granted.

Although the Administrative Law Judge found the instant complaint to be untimely, nevertheless, he considered the merits of the case. In this regard, he found that there was no evidence submitted in support of the Section 19(a)(4) and (6) allegations of the complaint. With respect to the 19(a)(6) allegation, he noted that the Complainant was not the majority representative of the Respondent's employees and, as a result, no obligation was imposed by Section 19(a)(6) of the Order upon the Respondent to consult and confer. The Administrative Law Judge further found that there was no evidence that the employee involved was denied a promotion and was possibly subjected to more serious working conditions because of her union activities. Accordingly, the Administrative Law Judge concluded that the Complainant had not sustained the burden of proof prescribed by Section 203.14 of the Assistant Secretary's Regulations and he recommended that the complaint be dismissed in its entirety for lack of evidence.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed.

^{4/} See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135, and the Federal Labor Relations Council's decision pertaining thereto in FLRC No. 72A-19, where the Council stated: "...a petition is defective and should be dismissed if it was filed by a person determined to be a member of agency management..." See also Veterans Administration Hospital, Brockton, Massachusetts, A/SLMR No. 21.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
DETROIT AREA OFFICE,
DETROIT, MICHIGAN

Respondent

and

Case No: 52-4804

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On April 16, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 52-4804 be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 12, 1974

Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

. :
In the Matter of :
 :
DEPARTMENT OF HOUSING AND URBAN :
DEVELOPMENT, DETROIT AREA OFFICE, :
DETROIT, MICHIGAN :
 :
Respondent : Case No. 52-4804
 :
and :
 :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO :
Complainant :
. :

Raymond W. Kemp, Esquire
Department of Housing and Urban Development
Detroit Area Office
1223 First National Building
Detroit, Michigan 48226

For the Respondent

Mr. Joseph H. James
National Representative
American Federation of Government Employee, AFL-CIO
8335 Ohio Avenue
Detroit, Michigan 48204

For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint filed on January 15, 1973, under Executive Order 11491, as amended, by the American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or AFGE), against the Department of Housing and Urban Development, Detroit Area Office, Detroit, Michigan, (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Acting Assistant Regional Director for the Chicago, Illinois, Region on July 5, 1973. 1/

The complaint alleges, in substance, that the Respondent refused to grant an employee a promotion and increased her daily work load because of her union affiliation and action in filing an Agency discrimination complaint, and subsequently failed to confer in good faith with respect to the pending Agency discrimination complaint, all in violation of §§19(a)(1), (2), (4) and (6) of the Executive Order.

A hearing was held in the captioned matter on March 12, 1974, in Detroit, Michigan. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. 2/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following conclusions and recommendations:

Findings of Fact

Sharon Hails was hired by the Respondent as a GS-4 and assigned to a position in the Housing Management Division of the Respondent sometime in 1971. Subsequently, several months later on June 13th, 1971, after being previously interviewed and selected by Thomas Higginbothan, Director of Equal Opportunity, she was promoted to a GS-6 secretarial position in Higginbothan's office.

In July or August 1971, Hails joined AFGE which was then conducting an organizational campaign among the employees in the

1/ The hearing originally scheduled for October 2, 1973, was postponed and subsequently rescheduled for March 12, 1974, by Order dated January 15, 1974.

2/ During the course of the hearing Respondent moved for dismissal of the complaint on the grounds (1) that the charges and/or complaint were not timely filed; and (2) that the Complainant had failed to establish a prima-facie case. Both motions were taken under advisement by the undersigned.

Respondent's Detroit, Michigan office. Hails served as AFGE's Assistant Secretary and along with four or five other employees solicited membership in AFGE. Concurrently, the National Federation of Federal Employees (hereinafter referred to as NFFE) was also attempting to organize the employees in the Respondent's Detroit office. Subsequently, pursuant to a run-off election in December 1971, NFFE was certified as the majority representative of the employees in Respondent's Detroit, Michigan, office.

In August of 1971, Hails applied for promotion to the position of Program Aid which carried a GS-7 rating. Upon being denied promotion to the position of Program Aid, Hails, on or about September 16, 1971, filed a discrimination complaint against Director Higginbothan. Thereafter, in an attempt to settle the discrimination complaint the parties met with E.E.O. Counselor Featherstone in October 1971 and discussed a conciliation agreement. Subsequently, a conciliation agreement dated October 15, 1971, was drafted by Featherstone and presented to Higginbothan for signature. Higginbothan refused to sign the conciliation agreement because certain of the provisions contained therein were not in the form agreed upon and other provisions required prior approval of his superiors. Thereafter, James, National Representative for the 7th District, AFGE, unsuccessfully attempted on several occasions throughout the period November-December 8, 1971, to contact various officials of the Respondent to discuss the matter of Hails' discrimination complaint.

Hails, who was the sole witness for the Complainant, further testified that following the filing of her discrimination complaint she was overburdened with work and found it difficult, particularly in January 1972, to secure permission from Higginbothan to take annual leave. While Hails ascribes both of the foregoing actions, i.e., overburdening with work and difficulty in securing permission for annual leave, to her participation in AFGE activities, she acknowledged that she had no evidence to support her conclusions in this respect or to indicate union animus on behalf of Respondent.

With respect to the Respondent's actions in refusing to promote Hails to the position of Program Aid, Higginbothan, who was, and remains a dues paying member of AFGE, and who was responsible for selecting the person to fill the position of Program Aid, credibly testified that he did not consider Hails for the position since she was not on the Merit Staffing Panel's "Well Qualified, Best Qualified List" from which he was required to make his selection.

Higginbothan acknowledged that Hails might have been overburdened with respect to her secretarial duties, but pointed out that such overburdening was due solely to the fact that his professional staff had multiplied without a proportionate increase

in secretarial personnel. Thus, Mrs. Hails found herself doing the secretarial work for seven rather than four professionals. The situation improved somewhat in January 1972, when Higginbothan, after several requests was allowed to hire another secretary for his office. Higginbothan further testified that he had always advocated the formation of a union and in fact had incorporated a recommendation to this effect in a memorandum submitted to his superior, the Area Director. The memorandum was identified and received in the record as Respondent's Exhibit No. 2.

DISCUSSION AND CONCLUSIONS

As noted supra Respondent's motions, made at the hearing, for dismissal of the instant complaint on the grounds of untimeliness and failure to establish a prima facie case were taken under advisement by the undersigned. Upon further consideration, I find, for reasons stated below, merit in both motions and will accordingly recommend dismissal of the complaint.

§203.2(a)(2) and 203.2(b)(3) of the Regulations, provide that charges and complaints must be filed within six and nine months, respectively, of the occurrence of the alleged unfair labor practices. Inasmuch as the evidence adduced by Complainant in support of its allegations deals solely with events occurring during the period August 1971 through January 1972, more than six or nine months, respectively, prior to the filing of the charges on October 11, 1972, and the complaint on January 15, 1973, further proceedings thereon are barred by the Regulations.


Additionally, even if the charges and complaint were deemed timely filed, I further find that the Complainant has not sustained the burden of proof imposed by §203.14 of the Regulations. In this regard I note that no evidence whatsoever was submitted in support of the §19(a)(4) and (6) allegations of the complaint. As to the latter allegation, I further note that the AFGE, the Complainant herein, is not the majority representative of the Respondent's employees, and that in the absence of same, no obligation is imposed by §19(a)(6) of the Order upon Respondent to consult and confer.

Finally, with regard to the remaining 19(a)(1) and (2) allegations of the complaint, Complainant has only shown that employee Hails was denied a promotion and possibly been subjected to more onerous working conditions. Other than Hails' self serving statements, no connection, direct or otherwise, has been made to the alleged discrimination and her union activities, a necessary

ingredient to an unfair labor practice finding under the Order. ^{3/} Needless to say, conjecture or opinion is not evidence.

Recommendation

Upon the basis of the foregoing findings and conclusions, I hereby recommend to the Assistant Secretary that the Complaint herein against Respondent be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

Dated: April 16, 1974
Washington, D. C.

^{3/} In any event, no evidence whatsoever was offered to counter the credible testimony of Higginbothan with regard to the reasons and circumstances underlying Hails' denial of a promotion and/or her alleged unsatisfactory working conditions.

July 12, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD,
BREMERTON, WASHINGTON
A/SLMR No. 415

This case involved an unfair labor practice complaint filed by the Bremerton Metal Trades Council, Metal Trades Department, AFL-CIO (Complainant) against the Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington (Respondent). The complaint alleged that the Respondent violated Section 19(a)(1), (2) and (6) of the Executive Order by: (a) bargaining in bad faith because it knew at the time of the parties' negotiations that it intended to change the practice regarding the issuance of photo passes to Council members who were not officers of the Council, and (b) conduct which interfered with and restrained employees in the exercise of their rights assured under the Order, and which also discouraged membership in the Complainant.

The Respondent moved to dismiss the complaint contending that the principle issue in the case involved a disagreement as to the interpretation of the terms of the parties' negotiated agreement and that because there was a grievance procedure contained in the agreement the Assistant Secretary should not consider the problem in the context of an unfair labor practice but, rather, should leave the parties to their remedies under their agreement.

The Administrative Law Judge denied the motion, finding that the sections of the negotiated agreement involved were clear and unambiguous and that the Assistant Secretary had jurisdiction to decide the issues involved on their merits. As to the merits, he concluded that the evidence did not support a finding of a violation of 19(a)(6) of the Order, noting that the fact that the Respondent did not change its practice of freely issuing photo passes to the Complainant's representatives until after the effective date of the current agreement, did not, without more, support a finding of bad faith bargaining during negotiations. He found also that there was no evidence to indicate that the change was motivated by animus toward the Complainant, nor that the Respondent was seeking to deny the Complainant's representatives access to the Shipyard. Under these circumstances, he found that the Complainant had not met the burden of establishing, by a preponderance of the evidence, that the Respondent violated 19(a)(6) of the Order by engaging in bad faith bargaining and recommended dismissal of that portion of the complaint.

The Administrative Law Judge also found no merit in the Complainant's contention that the Respondent violated Section 19(a)(1) and (2) of the Order by refusing to grant the type of passes previously issued to its representatives thereby making their entry into the Shipyard on the Complainant's

business more difficult and, in some instances, causing postponement and rescheduling of matters affecting grievance and arbitration procedures with the resulting effect of discouraging membership in the Complainant. The Administrative Law Judge concluded that at no time did the Respondent deny the Complainant's representatives access to the Shipyard to conduct union business and found that while there was a breakdown in the new system of issuing passes which caused the Complainant's representatives considerable delay and inconvenience, the failure of these procedures was not the result of the Respondent's animus toward the Complainant or its representatives. Therefore, he found, in the absence of any evidence of anti-union motivation, that the Complainant had failed to establish that the Respondent violated Section 19(a)(1) or (2) of the Order and he recommended dismissal of those portions of the complaint.

Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, and noting that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD,
BREMERTON, WASHINGTON

Respondent

and

Case No. 71-2520

BREMERTON METAL TRADES COUNCIL,
METAL TRADES DEPARTMENT, AFL-CIO

Complainant

DECISION AND ORDER

On March 29, 1974, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-2520 be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 12, 1974


Paul J. Esser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



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In the Matter of

DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD,
BREMERTON, WASHINGTON,
Respondent

and

BREMERTON METAL TRADES COUNCIL,
METAL TRADES DEPARTMENT, AFL-CIO,
Complainant
.....

Case No. 71-2520

Edwin J. Carrig, Grand Lodge Representative
Bellvue, Washington
For the Complainant

Richard C. Wells and James C. Causey, Esqs.
San Francisco, California
For the Respondent

Before: GORDON J. MYATT
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint and two amended complaints filed January 22, February 27, and March 5, 1973, respectively, under Executive Order 11491, as amended, by Bremerton Metal Trades Council, Metal Trades Department, AFL-CIO (hereinafter called the Council) against Department of the Navy, Puget Sound Naval Shipyard (hereinafter called the Respondent), a Notice of Hearing was issued by the Regional Administrator for the San Francisco Region on May 30, 1973. The complaint alleged among other things that the Respondent engaged in violations of Sections 19(a)(1), (2) and (6) of the Executive Order.

A hearing was held in this matter on July 31, 1973 in Seattle, Washington. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved. Briefs were filed by the parties and have been duly considered.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing I make the following findings, conclusions and recommendations:

Findings of Fact

The Council is the exclusive representative of employees at the Respondent's facility, excluding professional employees, pattern makers, technical employees, planners, estimators, and progress employees. The Council is composed of affiliated local unions of national or international organizations whose members are employed in the Respondent's shipyard. Over the years the Council has negotiated and serviced collective bargaining agreements with the Respondent on behalf of its constituent locals. The latest agreement in effect at the time of this hearing was approved by the Office of Civilian Manpower Management of the Department of the Navy on June 23, 1972.

The current collective bargaining agreement contains provisions relating to shipyard passes to be issued to Council representatives and officers to enable them to enter the facility on Council business. 1/ The language of these provisions has been incorporated in all prior agreements without alteration since 1969.

1/ Article VII, Section 12 provides:

Upon written request of the Council, the employer agrees that officers of the Council that are not active employees of the Shipyard will be issued a Shipyard pass if they meet the necessary security requirements. Upon written request of the Council, national officers of the Metal Trades or international unions and other representatives of the Council who are not active employees of the Shipyard may be issued a temporary Shipyard pass for the purpose of meeting with officials of the Council or the employer on matters of mutual concern during working hours for specifically approved purposes and specific durations of time if they meet the necessary security requirements.

Section 13 of that same Article provides:

Council representatives who are not active employees of the Shipyard may upon written request of the Council be issued a temporary Shipyard pass, which will be valid for entry into the Shipyard to discuss Council matters with Shipyard employees during non-working hours. Abuse of these pass privileges will result in its immediate suspension. Such visits shall be governed by the security regulations, and the employer reserves the right to require that such visitors be escorted by a representative of the employer during his stay in the Shipyard.

Following the negotiations of the 1969 agreement, the Respondent followed the practice of granting, upon request of the Council, passes to certain designated representatives of the Council. The passes were described as "temporary passes" and were usually for a specific time period; generally for one year. 2/ The record shows that in 1969 the Respondent renewed the shipyard pass of Larry Finneman who had been reelected vice-president of the Council. 3/ Finneman's pass was for the tenure of his position as vice-president of the Council. Similarly, on August 25, 1969, a pass was issued for the balance of the calendar year to Charles Temple, Grand Lodge Representative of the International Association of Machinists and Aero-space Workers Union. Temple was the chief negotiator for the Council during the then pending contract negotiations. On September 30, 1970 the Council requested and received a pass for Temple for a period of one year as chief coordinator of its membership drive in the shipyard. During the year 1970, Finneman, who was neither an officer of the Council nor an employee of the shipyard, received a pass for a year to conduct business at the shipyard on behalf of the Council. Again in 1971, Finneman was reelected vice-president of the Council and received a pass for a period of a year. Temple, who was the initial chief negotiator for the Council, received a pass for a year on October 5, 1971. 4/

In addition to Finneman and Temple, other union representatives received passes for specific periods of time when they were engaged in business at the shipyard on behalf of the Council. For example, in 1970, the Council conducted educational programs for the metal trades shop stewards at the shipyard and a pass for a period of one year was issued to the AFL-CIO representative in charge of the program. The program was repeated in 1971, and a similar type pass for the same period of time was issued to another AFL-CIO representative for this purpose.

2/ Each pass carried the photograph of the person to whom it was issued and was retained by that individual until the expiration date. Issuance of the pass also included an automobile sticker which allowed the union representative to park in the shipyard.

3/ Finneman was a former shipyard employee who resigned his position to become the Business Representative of Machinists Lodge 282. He was also the delegate from the Lodge to the Council.

4/ Finneman completed the negotiations commenced by Temple for the 1972 collective bargaining agreement.

The record shows that in addition to union representatives, passes were issued to various classes of individuals who conducted business in the shipyard. For example, numerous vendors supplying services to the shipyard were issued yearly passes. These passes contained the photograph of the particular vendor and in some instances, additional passes were issued to individuals who substituted for the particular vendor. Taxi cab companies servicing the shipyard were issued passes for their drivers, and bus companies were also issued passes for this purpose. In addition, contractors and various other non-employees working at the facility were issued passes to the shipyard. In the case of the labor representatives, the passes were authorized by the Industrial Relations Office, but the persons in the vendor or contractor category were authorized by the Security Office of the shipyard.

The controversy in this case centers around a request of the Council to renew Finneman's pass which expired at the end of June 1972, and Temple's pass which expired in October of the same year. A formal request for renewal of Finneman's pass was sent to the Industrial Relations Office on July 11, 1972 by the president of the Council. The request was denied in writing on August 7, 1972 by A. L. McFall, head of the Employee Management Relations Division of the Industrial Relations Office. McFall took the position that Finneman was neither an officer of the Council nor an employee of the shipyard. Thus, under the terms of Article VII, §12 of the agreement he was only entitled to a temporary pass for specified purposes and specific durations of time. 5/ McFall agreed, however, to provide the Security Office with the information necessary to allow Finneman to have access to the shipyard to conduct Council business.

This arrangement was not satisfactory to the Council and a meeting between Council representatives and the Shipyard commander and officials of the Industrial Relations Office was held on August 11. At this meeting the Shipyard commander

5/ There is some apparent confusion in the record regarding the classification of passes. The internal memos of the Respondent which were introduced into evidence indicate that the passes previously issued to the union representatives were considered "temporary passes", even though they contained the photograph of the individual and were for periods of a year or less. However, the testimony would seem to indicate that these were "permanent passes" in the sense that they were retained by the person to whom they were issued until the expiration date. Temporary passes, on the other hand, were apparently passes which were issued at the time of entry and contained no photograph and were returned at the time that the recipient left the shipyard.

indicated that security at the facility had been lax and he was extremely concerned about the number of passes which had been circulating through the community. He instructed the officials of the Industrial Relations Office to work out an arrangement whereby security requirements would be met and the union officials would have access to the shipyard. The management officials considered several possibilities. They rejected the idea of a single pass containing the photograph of the union representative which would be picked up at the gate and returned when that person left the base. 6/ Management also rejected the idea of having the union representatives come through the Employment Office each time they sought to enter the shipyard as there was no parking available in that area. It was finally decided that a pass without a name affixed to it and without a photograph attached would be left at the gate for the union officials. In order to make this plan operate, it was necessary for management to list the names of the union officials in a log book to be retained at the sentry stations. It was also imperative to make certain that instructions were given to the sentries so the union representatives could enter without being delayed by following the "visitors procedures."

While the plan devised by the Respondent's officials was theoretically sound, its implementation broke down on several occasions. In preparation for an arbitration hearing to be held on November 9, 1972, Temple sought to enter the shipyard to confer with Council officials. There was no pass available for him and the sentry had to call the Industrial Relations Office. Arrangements were finally made for Temple to gain entry. When Temple appeared on the day of the arbitration proceeding, he was told by the sentry that all passes had been cancelled. He was referred to the Security Office in the shipyard. There he was told that he could only gain access through the Industrial Relations Office. Temple managed to contact the Industrial Relations Office and they saw to it that he was admitted to the shipyard. On another occasion, Temple attempted to enter the shipyard to confer with Council representatives and employees regarding a grievance. He was informed by the Marine sentry on duty that no passes were available. The delay interfered with other union commitments Temple had elsewhere, and he had to cancel the meeting.

Both Temple and Finneman testified that they experienced numerous delays at the gates because the Marine sentries knew nothing of the arrangements made on their behalf by the Industrial Relations Office. They also testified that they frequently had to point out the log book to the sentries, and

6/ This idea was apparently rejected for security reasons.

on several occasions their names were not in it. On other occasions, the sentries would not require them to produce identification, but would simply allow them to pass through the gate. On March 3, 1973 Temple attempted to enter the shipyard on Council business. He was told by the sentry on duty that there were no more passes available. He left without gaining entry in order to keep other commitments. Again, on April 9, Temple sought to enter the shipyard to transact union business and the Marine sentry on duty refused to allow him to enter and directed him to the escort gate. Because of the delay involved, Temple was forced to cancel the meeting scheduled that day at the shipyard. 7/

The civilian head of the Security Office of the shipyard testified that the practice of issuing permanent passes to vendors and other suppliers of services was in the process of being modified. Permanent passes to taxi cab operators and vendors were being recalled as they expired, and persons seeking entry to the facility are being required to enter under the "host" procedure. 8/

Concluding Findings

The initial matter to be considered here is the Respondent's Motion to Dismiss. 9/ The motion is grounded on the Assistant Secretary's ruling contained in the Report No. 49 10/ and the theory set forth in the Collyer case 11/ by the National Labor Relations Board. While the arguments advanced by the Respondent are well-reasoned and plausible, I am of the opinion that the motion must be denied. In Report No. 49 the Assistant Secretary stated that "Where a complaint alleges as an unfair labor practice, a disagreement over the interpretation of an existing collective bargaining agreement

7/ The contingent of Marines stationed at the Shipyard was constantly changing because of returnees from the Vietnam conflict. Therefore instructions regarding the Council representatives were frequently not transmitted.

8/ This procedure requires the shipyard host to know the vendor is coming to the facility, and the vendor is required to fill out a number of slips at the gate in order to gain entry. The new procedure did not apply to employees of contractors who worked at the shipyard on a permanent basis.

9/ The motion was filed prior to the hearing and renewed during the course of the hearing. Ruling on the motion was reserved until issuance of the decision herein.

10/ Report on Ruling of the Assistant Secretary, Report No. 49.

11/ Collyer Insulated Wire, 192 NLRB No. 150.

which provides a procedure for resolving the disagreement, [he] will not consider the problem in context of an unfair labor practice but will leave the parties to their remedies under their...agreement." I understand this ruling to indicate that where it is clear that interpretation of the agreement is the issue and a grievance or arbitration procedure is contained in the agreement, the parties must pursue their contractual remedies. Cf. NASA, Kennedy Space Center, Florida, A/SLMR No. 223. But the Assistant Secretary has also taken the position that this does not require him to withdraw jurisdiction in all instances where contract interpretation is involved. For example, in the NASA case, supra, the Assistant Secretary stated that withdrawal of jurisdiction was not intended in situations "where at issue was the question whether a party to an agreement has given up rights granted under the Order." Similarly, in a more recent case the Assistant Secretary apparently asserted jurisdiction although the Administrative Law Judge found that it involved a matter of contract interpretation. 12/ There the complaint alleged that the respondent agency violated the Order by unilaterally changing the conditions of employment of nursing employees granted under the terms of the current bargaining agreement. The Administrative Law Judge held that the issue involved contract interpretation and application. Accordingly he found that the parties must resolve their dispute by invoking the grievance procedures contained in the collective bargaining agreement. He recommended dismissal of the complaint. The Assistant Secretary agreed with the recommendation and dismissed the complaint, but in so doing addressed himself to the merits of the case. The Assistant Secretary held that the complainant waived its right to insist upon an unqualified privilege to clean up before completing a shift, in spite of past practice, by the terms of the contested provision contained in the collective bargaining agreement. Thus, by implication, the Assistant Secretary did not consider himself deprived of jurisdiction, even though the matter involved a term of the collective bargaining agreement.

In the instant case, I find that Article VII, Sections 12 and 13 are clear and unambiguous. There is no doubt as to what the language states nor is there any dispute as to its meaning. The Respondent agreed to issue a Shipyard pass upon written request to officers of the Council who were not employees of the Shipyard, provided they met the security requirements. It is also agreed that, upon written request, national officers of the Metal Trades or international unions and other representatives of the Council who were not shipyard employees may be issued temporary shipyard passes for purpose of meeting with officials of the Council or the employer on matters of mutual concern during working hours. Section 13

12/ Veterans Administration Center, Bath, New York, A/SLMR No. 335.

of Article VII clearly spells out when Council representatives who are not employees of the shipyard may be issued temporary passes to discuss Council matters with the shipyard employees during non-working hours. There is nothing in the language of these provisions of Article VII that requires contract interpretation. Accordingly, I find that Respondent's Motion to Dismiss must be denied and I find that the Assistant Secretary has jurisdiction to decide the issues on their merits.

Turning to the merits of the case, the Complainant has alleged that the Respondent bargained in bad faith because it knew at the time of negotiations it intended to change the practice regarding the issuance of photo passes to Council representatives who were not officers of the Council. There is no evidence here to support this allegation. The language of Article VII, Sections 12 and 13 is identical to the language contained in prior agreements. The fact that the Respondent did not change its practice of freely issuing photo passes to Council representatives when requested until after the effective date of the current contract does not, without more, support a finding of bad faith bargaining during negotiations. Moreover, the change was based upon the Respondent's understanding of the requirements of Article VII, Section 12 of the agreement. There is no evidence in this record to indicate that the change was motivated by animus toward the Council or its representatives. Nor is there any evidence that the Respondent was seeking to deny Council representatives access to the shipyard. In these circumstances, it cannot be said that the Complainant has met the burden of establishing by a preponderance of the evidence that the Respondent violated Section 19(a)(6) of the Order by engaging in bad faith bargaining. Accordingly, I shall recommend dismissal of this portion of the complaint.

The allegations that the Respondent interfered with and restrained its employees in the exercise of rights assured by the Executive Order and thereby discouraged membership in the Council must also be dismissed in my judgment. There is no doubt that the Respondent had the authority and the right to tighten its security procedures and, indeed, to alter the pass arrangements of all persons seeking entry into the shipyard. 13/ The Complainant contends, however, that the Respondent violated Section 19(a)(1) of the Executive Order by refusing to grant the type of passes previously issued to

13/ There is some evidence in the record that the Council representatives considered themselves to be categorized as "security risks." Nothing in the record supports this view. The mere fact that the Respondent was tightening its security procedures in no way carried with it the implication that the Council representatives themselves were to be considered security risks.

the Grand Lodge Representative and the business representative thereby making their entry into the Shipyard on Council business more difficult; and in some instances, causing postponement and rescheduling of matters affecting grievance and arbitration procedures. It is urged that the difficulties encountered by the Council representatives over the pass procedures interfered with and restrained employees in the exercise of the right to assist the Council in representing them as assured by Section 1(a) of the Order. This is alleged to constitute a violation of Section 19(a)(1) with the resultant effect of discouraging membership in the Council in violation of Section 19(a)(2).

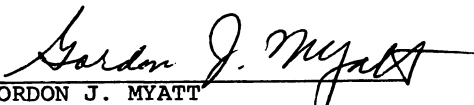
In my judgment, the sweep of these allegations is not supported by the evidence developed in this record. At no time did the Respondent deny the Council representatives access into the shipyard to conduct Council business. It is quite apparent that the procedures finally adopted by the Respondent regarding the type of passes issued to the Council representatives caused them considerable delay and inconvenience, which certainly cannot be said to be conducive to the creation of a harmonious relationship. But the failure of these procedures was not the result of animus toward the Council or its representatives. Rather it was the direct result of breakdown in communication between the Industrial Relations Office and the contingent of Marines guarding the shipyard. This unfortunate situation was further compounded by the fact that the Marine personnel on duty at the shipyard were constantly changing. There can be no doubt that the difficulties encountered by the Council representatives in gaining entry into the shipyard would not have occurred if the less stringent practice of the previous shipyard commander, in issuing photo passes upon request, had been continued. The change in the pass procedures, however, was not in contravention to the collective bargaining agreement, but rather was in compliance with its terms. Indeed, as pointed out by the Respondent in its brief, it was seeking to establish a "viable system of temporary badges" which would enable the Council representatives to enter the shipyard on Council business in conformity with the terms of the collective bargaining agreement. Therefore, in the absence of any evidence of anti-union motivation, the Complainant has not established that the Respondent violated Section 19(a)(1) or (2) of the Executive Order. 14/

14/ This conclusion is further buttressed by the fact that other classes of individuals who previously enjoyed photo pass privileges were currently having their pass procedures modified in keeping with the orders of the shipyard commander.

Accordingly, I shall recommend dismissal of this portion of the complaint.

Recommendation

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the Complaint herein be dismissed in its entirety.


GORDON J. MYATT
Administrative Law Judge

DATED: March 29, 1974
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGION 7, FORT WORTH, TEXAS
A/SLMR No. 416

This proceeding arose upon the filing of separate unfair labor practice complaints by two employees (Complainants) of the Respondent Activity alleging that the latter, through the issuance of insubordination citations to the Complainants for their failure to attend a grievance meeting, violated Section 19(a)(1) of the Order in that such action had been motivated by discriminatory considerations and/or had had the effect of discouraging membership in the Union.

The Administrative Law Judge found that the Complainants had not offered any evidence to support the contention that their immediate supervisor had been motivated by anti-union considerations in issuing the insubordination citations, which were subsequently cancelled and destroyed on the basis of extenuating circumstances surrounding the instructions to attend the grievance meeting. In this connection, he credited the immediate supervisor's denial that any union considerations entered into his actions in this matter. As the grievance procedure involved was an agency grievance procedure rather than a negotiated grievance procedure, the Administrative Law Judge held, in accordance with the decision in Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, affirmed, in pertinent part, FLRC No. 74A-3, that in the absence of probative evidence indicating that the insubordination citations given to the Complainants were discriminatorily motivated or constituted disparate treatment based upon union considerations, there was insufficient basis for finding a violation of Section 19(a)(1). Accordingly, he recommended that the complaints be dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the matter, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation that the complaints be dismissed.

UNITED STATES DEPARTMENT OF LABOR



BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 7, FORT WORTH, TEXAS

Respondent

and

Case Nos. 63-4757(CA) and
63-4758(CA)

DAN N. KING
MILES C. FREEMAN

Complainants

DECISION AND ORDER

On May 17, 1974, Administrative Law Judge Burton S. Sternberg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject cases, and noting particularly that no exceptions were filed, I hereby adopt the findings, l/ conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 63-4757(CA) and 63-4758(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
July 16, 1974

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

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In the Matter of :
: GENERAL SERVICES ADMINISTRATION, :
: REGION 7, FORT WORTH, TEXAS :
: Respondent : Case Nos. 63-4757(CA) and
: : 63-4758(CA)
: and :
: DAN N. KING :
: MILES C. FREEMAN :
: Complainants :
.....

James D. Llewellyn, Esq.
Larry L. Hathaway, Esq.
General Services Administration
819 Taylor Street
Forth Worth, Texas 76102

For the Respondent

Mr. Dan N. King
116 Highland Terrace South
Forth Worth, Texas

Mr Miles C. Freeman
P. O. Box 25
Burleson, Texas

For the Complainants

Before: BURTON S. STERNBURG
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to separate complaints filed on November 8, 1973, under Executive Order 11491, as amended by Dan N. King and Miles C. Freeman, individually, against General Services

Administration, Region 7, Fort Worth, Texas (hereinafter called the Respondent or GSA), a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the Kansas City, Missouri, Region on March 11, 1974. 1/

The complaints allege, in substance, that Respondent by virtue of its action in issuing insubordination citations to King and Freeman for failure to attend a meeting on a grievance violated Section 19(a)(1) of the Executive Order since such action was discriminatorily motivated and/or had the effect of demonstrating the futility of union membership.

A hearing was held in the captioned matter on April 25, 1974, in Fort Worth, Texas. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations:

FINDINGS OF FACT

On May 4, 1973, following an election, the International Federation of Federal Police was certified as the exclusive representative of "all guards and federal protective officers employed by, an assigned to GSA Region 7". As of April 25, 1974, the date of the hearing herein, no collective bargaining agreement had been executed. Accordingly, only the GSA established grievance procedure was available for the processing of grievances.

On August 31, 1973, Miles Freeman, a member of the guard force, filed a grievance, under the GSA Grievance Procedure directed to Jay Bolton, Regional Administrator for GSA, wherein he alleged that a particular individual had been detailed by Building Manager Chapman to a higher grade position without the requisite posting of such position as required under the GSA Promotion Plan. Although Dan King also signed the grievance as president, local 29, I.F.F.P., 2/ the record discloses

1/ The cases were consolidated for hearing by Order dated March 11, 1974.

2/ Although not completely clear from the record, it appears that King and Freeman had attempted to establish Local 29, IFFP. However, their efforts in this direction were unsuccessful.

that Respondent recognized his status on the grievance as only that of Freeman's personal representative. In this latter regard, Stephenson, Respondent's Labor Management Relations Officer, credibly testified that GSA had never been officially notified of either the existence of Local 29 or the appointment of King to any official position in either the International Union or Local 29 prior to the events concerned herein. Neither Freeman nor King, who alleged that he was a duly authorized representative of the International, offered any probative evidence to the contrary.

Upon receiving the above described grievance, Stephenson set a meeting thereon for 2 p.m., on September 6, 1973, and notified various lower echelon representatives to pass the word to Freeman and King. Thereafter, Building Manager Chapman advised Captain Hitts, who in turn advised Sergeant Washington, who in turn advised the complainants King and Freeman at approximately 8:20 p.m., on September 5, 1973, of the scheduled meeting the next afternoon. The next morning, September 6, 1973, at about 7:50 a.m., Freeman and King requested a fellow guard, Wheeler, to inform Sergeant Kessler that neither of them would attend the scheduled meeting and that they requested the answer to their pending grievance in writing.

Despite receiving the message from Freeman and King that they would not attend the scheduled meeting, Chapman and Stephenson met at the appointed place at the appointed time. Thereafter, by "Record of Infraction" dated September 7, 1973, Chapman charged both Freeman and King with "insubordination under Penalty Guide I, Paragraph 7: Deliberate refusal to comply with authorized instruction issued by a supervisor." Subsequently, after Freeman and King submitted their respective answers to the charges, Stewart, Regional Commissioner, Public Buildings, reviewed the matter, found extenuating circumstances surrounding the instructions concerning the meeting" and cancelled and destroyed the proposed "Record of Infraction."

Although King and Freeman contended at the hearing that Chapman's action in issuing the insubordination citation was motivated by anti-union considerations, neither could offer any evidence in support of such contention. Chapman, on the other hand, credibly denied that any union considerations entered into his actions. Freeman and King further testified that to their knowledge this was the first occasion that any guard had failed to heed a management request to attend a meeting.

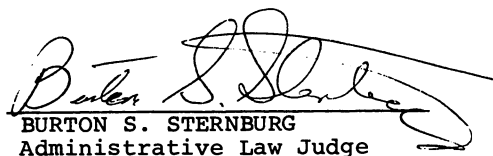
CONCLUSIONS

In Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, affirmed in pertinent part by the Federal Labor Relations Council FLRC No. 74A-3, the Assistant Secretary for Labor-Management Relations concluded that "different considerations apply" to a unilaterally established agency grievance procedure than to a bilaterally negotiated grievance procedure. The former does not result from any rights accorded individual employees or a labor organization under the Executive Order, while the latter owes its existence directly to the Executive Order. In accordance with such distinction, the Assistant Secretary further concluded that agency actions under a negotiated grievance procedure which might conceivably denigrate a union's status and consequently interfere with the rights of employees in violation of Section 19(a)(1) of the Order, do not, in the absence of evidence of discriminatory motivation or disparity of treatment based on union membership considerations, constitute similar violations when occurring under a unilaterally established agency grievance procedure.

Inasmuch as the foregoing rationale and conclusions with respect to the utilization of a unilaterally established agency grievance procedure appear to be equally applicable to the facts presented herein and in the absence of any probative evidence indicating that the insubordination citations given to King and Freeman were discriminatorily motivated or constituted disparate treatment based on union considerations, I find insufficient basis for a 19(a)(1) finding.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.


 BURTON S. STERNBURG
 Administrative Law Judge

Dated: May 17, 1974
 Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
 OMAHA DISTRICT OFFICE
 A/SLMR No. 417

This case involves a complaint filed by the National Treasury Employees Union (NTEU) and Chapter No. 003 (Complainant) against the Internal Revenue Service, Omaha District Office (Respondent), alleging violations of Section 19(a)(1) and (6) of the Order. The case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director. The complaint alleged that the Respondent's failure to recognize a retired employee as the Chief Representative of Chapter No. 003 was violative of the Order.

The Respondent contended that: (1) the parties intended, as demonstrated by the terms of the negotiated agreement, that the Chief Representative would be an employee of the Internal Revenue Service; (2) that as the dispute involved the interpretation and application of a negotiated agreement, the Assistant Secretary lacks jurisdiction; and (3) that, even if the dispute involved Executive Order rights, such rights were waived by virtue of the parties' negotiated agreement.

The Assistant Secretary concluded that in accordance with prior holdings no withdrawal of jurisdiction was intended in situations such as this where at issue is the question whether a party to an agreement has given up rights granted under the Order. With respect to the question whether the Complainant had clearly and unmistakably waived its right under the parties' negotiated agreement to designate a retired employee as its Chief Representative, the Assistant Secretary found that while arguably the contractual language involved could be interpreted in the above manner other interpretations were possible, as evidenced by the terms of a subsequent Memorandum of Understanding signed by the parties which stated only that Complainant would "encourage the appointment of bargaining unit employees as representatives," and did not clearly and unmistakably indicate that any non-bargaining unit representative had to be on-duty Internal Revenue Service employees. Nor was a letter of the Complainant's Counsel considered dispositive of the matter. While the letter stated that it was "intended that the Chief Representative would be a unit employee," it further indicated that the appointment of a retiree as Chief Representative was not prohibited by the parties' negotiated agreement. Under these circumstances, the Assistant Secretary found that the Complainant had not clearly and unmistakably waived its right to choose a retired employee as a Chief Representative. He concluded, therefore,

that an attempt by the Respondent to dictate the selection of the Complainant's Chief Representative, in effect, constituted an attempt to interfere improperly in the internal affairs of the Complainant, and also constituted an improper refusal to meet and confer with an appropriate representative of the exclusive representative of its employees. Accordingly, the Assistant Secretary found that Respondent's conduct herein violated Section 19(a)(1) and (6) of the Order.

A/SLMR No. 417

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
OMAHA DISTRICT OFFICE

Respondent

and

Case No. 60-3444(CA)

NATIONAL TREASURY EMPLOYEES UNION
(NTEU) and CHAPTER No. 003

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Assistant Regional Director for Labor-Management Services Cullen P. Keough's Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations. 1/

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The subject complaint, as amended, alleges that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to recognize a retired employee as the Chief Representative of Chapter No. 003. In this regard, the Complainant contends that it has the right to appoint whomever it chooses as its Chief Representative and that the Respondent has an obligation to recognize that choice. The Respondent, on the other hand, contends: (1) that the parties intended, as demonstrated by the terms of their negotiated agreement, that the Chief Representative would be an employee of the Internal Revenue Service; (2) that as the dispute involved herein arises over the interpretation and application of the parties' negotiated agreement, the Assistant Secretary lacks ju-

1/ On March 12, 1974, the Assistant Regional Director amended the above Order to include transfer of: (1) the Respondent's Motion to Dismiss Complaint Against Agency; (2) the Respondent's Motion for Summary Judgement; and (3) the Complainant's response to the above Motions.

jurisdiction to consider the matter; 2/ and (3) that, even if the dispute involved Executive Order rights, such rights were waived by virtue of the parties' negotiated agreement.

FACTS

On or about April 5, 1972, the parties entered into a negotiated agreement containing, among other things, a provision regarding union representation. According to the agreement, the Complainant could designate a certain number of representatives depending on the size of the Internal Revenue Service District involved. Also, Article 6, Section 2.B. of the negotiated agreement states that:

In general, the representatives will be employed in the organizational segment each represents. The Union will supply the Employer with the names of the representatives which will be posted on appropriate bulletin boards. It will be the duty of the Union to notify the Employer of any changes in the roster.

Further, Article 6, Sections 3 and 4 of the agreement establish the administrative time and leave policy for Union representatives, including the representative in each district designated by the Union as Chief Representative.

On July 28, 1972, the parties signed a Memorandum of Understanding, the purpose of which was "to clarify the Union's entitlement to representatives who will be eligible to use official time for union activity...." Although under the Memorandum of Understanding the Respondent was "not obligated to recognize Union representatives who are not bargaining unit employees for purposes of the time allotments provided for under Article 6," it agreed "to administratively grant to representatives who are outside the bargaining unit and who are employed in the same District as the grievant the time provided for under Article 6, Section 3C(1) and (2)" of the negotiated agreement. The Complainant, in turn, agreed "to encourage the appointment of bargaining unit employees as representatives."

2/ In this connection, the Respondent contends that under such circumstances the parties to a negotiated agreement should be left to pursue their contractual rather than unfair labor practice remedies. However, as found previously, no withdrawal of jurisdiction by the Assistant Secretary was intended in situations such as this where at issue is the question whether a party to an agreement has given up rights granted under the Order. See NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223. See also Veterans Administration Center, Bath, New York, A/SLMR No. 335. Accordingly, I reject the Respondent's contention that the complaint herein should be dismissed for lack of jurisdiction.

- 2 -

Thereafter, on January 31, 1973, pursuant to Article 6, Section 2.B. of the negotiated agreement, the Complainant notified the Respondent that Fred B. Lorenz, a retired employee, had been designated as Chief Representative of NTEU Chapter No. 003. By letter dated February 6, 1973, the Respondent, noting the retired status of Lorenz, refused to recognize the latter as Chief Representative because he was not an employee of the Internal Revenue Service. The Respondent based its rejection on the negotiated agreement between the parties, stating that it revealed "no provision for non-IRS employees to serve as Union Representatives...." In a letter dated February 15, 1973, the Complainant's Counsel wrote Chapter President Morton and stated, in part, that, "When negotiating the Agreement [the parties] intended that the Chief Representative would be a unit employee.... However, the Agreement does not prohibit the appointment of a retiree as Chief Representative." The letter also indicated the Complainant's belief that it had the right to appoint whomever it chose as its representative and that the Respondent could not interfere with that choice.

All of the facts and positions set forth are derived from the parties' stipulation and accompanying exhibits.

CONCLUSION

In my view, absent a clear and unmistakable waiver, a labor organization holding exclusive recognition has the right to select its own representatives when dealing with agency management. 3/ The question presented herein is whether, under the circumstances of this case, the Complainant clearly and unmistakably waived this right. 4/ The Respondent contends that pursuant to the language contained in Article 6, Section 2.B. of the parties' negotiated agreement, the Complainant limited its right in the choice of a representative to currently employed individuals. While the language in question arguably could be interpreted in this manner, other interpretations are possible as evidenced by the terms of the parties' subsequent Memorandum of Understanding of July 28, 1972. Thus, as noted above, the Memorandum of Understanding provided only that Complainant would "encourage the appointment of bargaining unit employees as representatives." However, it did not clearly and unmistakably indicate that any non-bargaining unit representatives were required to be on-duty Internal Revenue Service employees. Nor do I view the February 15, 1973, letter of the Complainant's Counsel to be dispositive of this matter. While, as noted above, the letter states that it was "intended that the Chief Representative would be a unit employee," it further indicates that

3/ Cf. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242.

4/ See NASA, Kennedy Space Center, Kennedy Space Center, Florida, cited above.

- 3 -

appointment of a retiree as Chief Representative was not prohibited by the parties' negotiated agreement.

Under all of these circumstances, I find that the Complainant did not clearly and unmistakably waive its right to choose a retired employee as a Chief Representative. And, as noted above, absent such a waiver, the Complainant had the right to select such an individual as its own representative. In this context, I view the attempt by the Respondent to dictate the selection of the Complainant's Chief Representative as, in effect, an attempt to interfere improperly in the internal affairs of the Complainant, which, in turn, resulted in an interference with employee rights assured under Section 1(a) of the Order, ^{5/} and as an improper refusal to meet and confer with appropriate representatives of the Complainant, which is the exclusive bargaining representative of the Respondent's employees. Accordingly, I find that the Respondent's conduct herein was violative of Section 19(a)(1) and (6) of the Executive Order. ^{6/}

REMEDY

Having found that the Respondent engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the purposes and policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Omaha District Office, shall:

1. Cease and desist from:

(a) Refusing to recognize the Chief Representative designated by the National Treasury Employees Union (NTEU), Chapter No. 003, the exclusive representative of its employees.

(b) Interfering with, restraining, or coercing employees by refusing to recognize the Chief Representative designated by the National Treasury Employees Union (NTEU), Chapter No. 003, the exclusive representative of its employees.

^{5/} Cf. Department of the Navy, Office of the Secretary, Washington, D.C., A/SLMR No. 393.

^{6/} In view of this disposition, the Respondent's Motions to Dismiss Complaint Against Agency and for Summary Judgement are hereby denied.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

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

(a) Upon request, recognize the Chief Representative designated by the National Treasury Employees Union (NTEU), Chapter No. 003 for its Omaha District Office.

(b) Post at its facility at the Internal Revenue Service, Omaha District Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 31, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to recognize the Chief Representative designated by the National Treasury Employees Union (NTEU), Chapter No. 003 for our Omaha District Office.

WE WILL NOT interfere with, restrain, or coerce our employees by refusing to recognize the Chief Representative designated by National Treasury Employees Union (NTEU), Chapter No. 003, the exclusive representative of the employees in the Omaha District Office.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, recognize the Chief Representative designated by the National Treasury Employees Union (NTEU), Chapter No. 003 for its Omaha District Office.

(Agency or Activity)

Dated _____ By _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL RAILROAD ADMINISTRATION
A/SLMR No. 418

This unfair labor practice proceeding involved a complaint filed by American Federation of Government Employees, AFL-CIO, Local 2814 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by implementing the reorganization of the Office of Safety of the Respondent without good faith consultation on the impact of the reorganization with the Complainant.

With regard to the Respondent's contention that it was not obligated to meet and confer on matters concerning its mission, budget, and organization, but that, in any event, it had fully informed the Complainant in a timely manner of the reorganization of the Office of Safety as it became known to it, the Assistant Secretary found that under Sections 11(b) and 12(b) of the Order, the Respondent was under no obligation to meet and confer with the Complainant with regard to its decision to reorganize the Office of Safety. However, the Assistant Secretary found that with respect to the Respondent's memorandum to "All Employees," dated November 6, 1972, which the Complainant did not receive until Friday, November 10, 1972, at 3:30 P.M., and in which the Respondent announced the reorganization of the Office of Safety and listed the temporary personnel assignments effective as of Monday, November 13, 1972, the Respondent had failed to meet and confer with the Complainant as to the procedures management intended to observe in effectuating its decision to reassign employees and as to the impact of such decision. In this regard, he noted prior decisions in which it was found that an exclusive representative should be afforded the opportunity to meet and confer, to the extent consonant with law and regulations, as to such intended procedures, and as to the impact of the reassignment decision on those employees adversely affected. He concluded that the Respondent had not complied with its obligations under the Order by not affording the Complainant reasonable notification and ample opportunity to meet and confer on the matters involved prior to taking action. Accordingly, he found that the Respondent's conduct constituted a violation of Section 19(a)(6) of the Order.

Further, the Assistant Secretary found that the Respondent's improper failure to meet and confer with the Complainant had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order. Accordingly, he concluded that the Respondent's improper conduct herein also violated Section 19(a)(1) of the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL RAILROAD ADMINISTRATION

Respondent

and

Case No. 22-3933(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2814

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Acting Assistant Regional Director for Labor-Management Services Eugene M. Levine's Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts and issues, accompanying exhibits and briefs, the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19(a) (1) and (6) of the Executive Order by implementing, on November 13, 1972, the reorganization of the Respondent's Office of Safety without good faith consultation with the Complainant on the impact of such reorganization. It is alleged further that this conduct interfered with, restrained, or coerced the employees of the Respondent in the exercise of their rights assured by the Order.

The Respondent takes the position that it had no obligation to consult with the Complainant on the reorganization of the Office of Safety, nor did it have an obligation to negotiate with the Complainant on the impact of the reorganization upon bargaining unit employees. Further, it contends that, in any event, it met its obligation to consult in good faith.

Background and Facts

The Federal Railroad Administration is an operating administration of the Department of Transportation (DOT) with headquarters in Washington, D.C.

On April 28, 1971, the American Federation of Government Employees, AFL-CIO, (AFGE) was certified as the exclusive representative of a nationwide unit of all of the Respondent's employees, excluding professionals and employees of the Alaska Railroad. AFGE Local 2814 was chartered to represent this unit of employees. Thereafter, on September 3, 1971, the Respondent and the Complainant negotiated a two-year agreement which covered the above unit and which contained an automatic renewal clause. 1/

As a result of the passage of the Rail Safety Act in 1970, a reorganization of the Office of Safety was necessitated. In 1971, the headquarters of the Respondent began consideration of various internal recommendations regarding such reorganization. Although the Complainant was not informed officially of these recommendations, some of the documents pertaining thereto were shown to certain officers of the Complainant, which then requested that the reorganization not be effectuated until a study was made to determine how the Office of Safety should be reorganized. In light of this request, a study was undertaken in December 1971 and was completed on May 2, 1972. This study became known as the "Park's Study."

During the period between January 20 and July 19, 1972, the Complainant, by letter, at regular meetings of the Labor-Management Committee, or by telephone, sought: (a) to meet with management to discuss matters of mutual interest prior to the completion of the Park's Study, (b) to obtain a copy of the Study, or (c) to be informed as to the status of the Study and its results. On occasion during this period, the Respondent advised the Complainant, in effect, that the Study was under advisement and that the Complainant would be kept informed of any course of action that the Respondent might propose to take as a result of the Study which would affect unit employees. At no time was the Complainant provided a copy of the Park's Study. Also, at various times throughout this period, the Respondent assured the Complainant that none of the employees would be demoted or discharged due to the reorganization of the Office of Safety.

The record indicates that at the July 19, 1972, regular meeting of the Labor-Management Committee, the Respondent's Associate Administrator for Safety met with the Committee as the Respondent's designee to discuss the proposed Office of Safety reorganization plan. On August 10, 1972, the Complainant wrote the Respondent and advised that there were four matters which were unresolved between the Respondent and the Complainant, one of which was "the delay to [sic] consulting on the Office of Safety reorganization in a

1/ Article IV of the agreement provides for the establishment of a Labor-Management Committee. The Article states, in pertinent part, "...This Committee will meet periodically, normally not less than once every two months, to consult with regard to personnel policies and practices and matters affecting working conditions of the employees in the unit. This Committee will consist of four Union and four Employer representatives..."

The record reveals that regular meetings of the Committee were held on March 8, May 8, July 19, October 3 (postponed from September), and December 12, 1972, and on February 15 and May 1, 1973.

timely manner." Subsequently, on August 12, 1972, the Complainant notified the Respondent that if the four matters set forth in its letter of August 10 were not resolved at the next regular Labor-Management Committee meeting scheduled for the week of September 18, 1972, an unfair labor practice charge would be filed against the Respondent. Thereafter, on August 17, 1972, a special meeting was called by the Respondent which was attended by the Complainant's Executive Committee and several representatives of the Respondent, including its Administrator. The Executive Committee was briefed as to the proposed reorganization plan. At that time, the Complainant inquired if the organization depicted during the briefing was definite, and it was informed that the proposed structure represented the Respondent's "best thinking at the time." However, the Respondent advised that the plan was flexible in order to allow for any necessary changes in the event problems arose, but assured the Complainant that the latter would be notified before any such changes were made.

Although the record reveals that the Complainant's Executive Committee was not satisfied with the information received and felt that the information presented was insufficient to comment upon intelligently, it did not express these views to the Administrator or seek further elaboration. Upon leaving the meeting, the Complainant's Washington Office Vice-President stated that in his opinion "consultation" as defined for the Executive Committee by the AFGE National Office had not taken place.

In a letter dated August 21, 1972, to the Respondent, the Complainant again requested consultation on the reorganization of the Office of Safety as the reorganization progressed. On August 22, 1972, the Respondent forwarded to the Complainant's Executive Committee six copies of the reorganization plan, presented at the meeting of August 17, together with a copy of a letter prepared for distribution to each employee of the Office of Safety to acquaint them as to the latest information regarding the reorganization. The letter advised the employees that the Complainant's officers had been similarly informed on August 17, 1972. 2/

On August 22, 1972, the Respondent notified the Complainant that the four matters considered by the Complainant to be unresolved would be entertained, among other matters, as agenda items during the regular Labor-Management Committee meeting scheduled for the week of September 18, 1972,

2/ The letter stated in part: "The plan is proposed and subject to possible revisions still, but in essence it represents our best thinking to date towards implementing the Secretary's recent study of our field and headquarters organization. We are presently working to flesh out this plan in more detail and expect to have more information for you in the near future...."

which meeting subsequently was postponed until October 3, 1972. 3/ At this meeting, the Complainant received no further information concerning the reorganization than it had received in August, nor did it specifically request any further information. In this regard, the record reveals that the Executive Committee viewed the information supplied as having "very little value and really told them nothing that they could comment on." At a subsequent Federal Railroad Administration Regional Conference held on October 19, 1972, which the Complainant attended, no further information was furnished on the Office of Safety headquarters reorganization.

Thereafter, on November 6, 1972, a memorandum was issued by the Respondent to all employees of the Office of Safety. This memorandum had organizational charts attached thereto and stated, in pertinent part:

"Personnel changes are being made to successfully implement the expanded safety program. The attached staffing plan lists temporary personnel assignments effective November 13, 1972, pending development and classification of all new or revised position descriptions. Final decisions on personnel assignments will not be made until all positions have been classified. Classifications should be completed within the next two months and all personnel actions resulting from the reorganization will be completed by February 13, 1973."

This November 6, 1972, memorandum was received by the Complainant at 3:30 P.M. on Friday, November 10, 1972; the personnel assignments became effective on the following Monday, November 13, 1972.

On November 20, 1972, an unfair labor practice charge was served on the Respondent alleging violations of Section 19(a)(1) and (6) of the Order on the basis that the Respondent, on November 13, 1972, had implemented the reorganization without good faith consultation with the Complainant. A letter of November 29, 1972, from the Complainant to the Respondent, set forth background information concerning the Respondent's alleged failure to consult and indicated the Complainant's position thereon. 4/ The Respondent's

3/ On October 1, 1972, a meeting was held between the Respondent and representatives of private railroad unions. A copy of a DOT notice regarding the reorganization of the Office of Safety with a functional statement on such reorganization was submitted to the unions. Although a copy of this document was not sent to the Complainant until November 14, 1972, the Complainant acquired a copy following the October 1, 1972, meeting from one of the railroad union representatives and, therefore, had knowledge of its contents before the October 3, 1972, meeting.

4/ The letter stated in part: "...At every labor-management consultation we have offered our assistance and helpful suggestions to the material shown

(Continued)

final decision on the charge was transmitted to the Complainant in a letter of January 23, 1973.

By letter dated January 3, 1973, the Complainant's Vice-President and Washington Grievance Chairman complained to the Respondent concerning the latter's procedural violations of Federal personnel regulations in the implementation of the reorganization of the Office of Safety. The Complainant asked that corrective action be taken and that it be advised as to how the violations were resolved. Subsequently, at the regular meeting of the Labor-Management Committee on February 15, 1973, the Complainant was briefed on the status of the reorganization by the Respondent's Personnel Division Chief. The minutes of the meeting report that:

"...The Union indicated they were advised not to discuss the reorganization because of its possible impact on a pending arbitration case. The briefing was held after FRA stated that the Union could accept information and ask questions without indicating their position on any item discussed by FRA.

FRA indicated that some positions will have higher grades and plans are that no individuals will be RIF'd or demoted as a consequence of this reorganization..."

On March 19, 1973, the subject complaint was filed.

All of the facts and positions set forth above are derived from the parties' stipulation and accompanying exhibits.

Allegations and Findings

The Respondent contends that it acted in accordance with its belief that under Section 11(b) of the Order it was not obligated to meet and confer on the matters herein involved which concern its mission, its budget, and its organization. Moreover, the Respondent maintains that it fully informed the Complainant, in a timely manner, of the reorganization of the Office of Safety as the specific changes became known to it, with "ample opportunity

4/ us without objecting to anything. Yet at the same time your subordinates are making decisions and implementing changes in working conditions about which the union has not been consulted and which may vitally affect employees... The union does not deny your right to reorganize the office under your jurisdiction, but we do deny your right to implement these reorganizations without consultation with the union. At our first consultation you gave the union your assurance that we would be consulted before any part of the reorganization of the Office of Safety was implemented, but this has not been the case..."

5/ for the Complainant to bring forth comments on the impact the reorganization might have on the working conditions of the employees in the bargaining unit." On the other hand, the Complainant asserts that the Respondent disregarded its obligations under the Order to deal in good faith and failed to enter into negotiations over the impact of the reorganization in accordance with the parties' negotiated agreement. 5/

Under the circumstances of this case, I find that under Sections 11(b) and 12(b) of the Order the Respondent was under no obligation to meet and confer with the Complainant with regard to its decision to reorganize the Office of Safety 6/. However, the Respondent's memorandum to "All Employees" dated November 6, 1972, announcing the reorganization of the Office of Safety 7/ to which were attached organizational charts and a staffing plan listing temporary personnel assignments which were to become effective on Monday, November 13, 1972, raises questions regarding the Respondent's obligation to meet and confer in good faith on the procedures to be observed in taking the action involved and on the impact of its reorganization decision on employees adversely affected by such decision. Thus, it has been found in prior decisions that despite the fact that there is no obligation to meet and confer on a particular management decision, an exclusive representative should be afforded the opportunity to meet and confer, to the

5/ Article II of the agreement, entitled "Mutual Rights and Obligations of the Parties," Section D, Subsections 4 and 6 states:

Subsection 4. The Employer agrees to discuss beforehand with the Union changes in regulations and practices as they affect employees in the bargaining unit. To the extent that there is disagreement and that such changes are negotiable, the FRA agrees to negotiate the changes with the Union at the next regular bargaining session thereafter.

Subsection 6. The Employer agrees, through established channels for Union-Management relationships, to notify the Union as far in advance as possible of impending actions which will affect the jobs or working conditions of employees covered by the Agreement. The Employer and the Union will advise their officials, supervisors and representatives of their obligation to demonstrate an affirmative willingness to consult, while maintaining necessary neutrality on questions of Union membership.

6/ Cf. United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289 and Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329. Cf. also Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31, and Naval Public Center, Norfolk, Virginia, FLRC No. 71A-56.

7/ As noted above, the Complainant did not receive this information until Friday, November 10, 1972, at 3:00 P.M.

extent consonant with law and regulations, as to the procedures management intends to observe in effectuating its decision, and as to the impact of such decision on those employees adversely affected. 8/ In the case herein, I find that the evidence establishes that the Respondent's conduct was inconsistent with these obligations. Moreover, Article II, Section D, Subsections 4 and 6, of the parties' negotiated agreement, set forth above at footnote 5, provides that before any changes in regulations and practices as they affect employees in the bargaining unit are made, the Respondent will discuss these changes with the Complainant; and, further, that it will notify the Complainant as far in advance as possible of impending actions which would affect the jobs or working conditions of employees covered by the agreement.

In my view, the Respondent's obligation to meet and confer set forth above was not met by affording the Complainant notification of personnel reassignments which was received on the Friday afternoon prior to the effective date of such reassignments on the following Monday. Thus, the right to engage in a dialogue with respect to matters for which there is an obligation to meet and confer becomes meaningful only when agency management has afforded the exclusive representative reasonable notification and an ample opportunity to explore fully the matters involved prior to taking action. 9/ As noted by the Administrative Law Judge in Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, cited above, whose Report and Recommendations was adopted by the Assistant Secretary, "If the Union cannot have a voice in the process of assigning employees in any respect whatsoever, its capacity to act as a bargaining representative is rendered futile and meaningless."

Under all of these circumstances, and in the absence of any evidence of an overriding exigency which would have required immediate action, I find that the Respondent's failure to meet and confer with the Complainant regarding the procedures to be followed in the reassignment of employees pursuant to the reorganization, as well as the impact of the reassignment on the employees adversely affected, constituted a violation of Section 19(a)(6) of the Order.

Further, I find that the Respondent's failure to meet and confer with the Complainant in this regard necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order. Accordingly, I conclude that the Respondent's conduct herein also violated Section 19(a)(1) of the Order.

8/ See the cases cited above at footnote 6. See also U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SLMR No. 341.

9/ Cf. National Labor Relations Board, A/SLMR No. 246.

REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Sections 19(a)(1) and 19(a)(6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the purposes and policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Railroad Administration shall:

1. Cease and desist from:

Instituting a reassignment of employees represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 2814, or any other exclusive representative, without notifying the American Federation of Government Employees, AFL-CIO, Local 2814, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

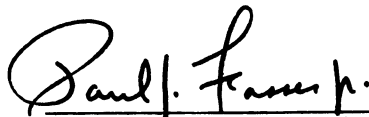
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 2814, or any other exclusive representative, of any intended reassignment of employees and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

(b) Post at its facility at the Federal Railroad Administration copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Administrator and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 31, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith by instituting a reassignment of employees exclusively represented by American Federation of Government Employees, AFL-CIO, Local 2814, or any other exclusive representative, without notifying American Federation of Government Employees, AFL-CIO, Local 2814, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL notify American Federation of Government Employees, AFL-CIO, Local 2814, or any other exclusive representative, of any intended reassignment of employees and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment, and on the impact the reassignment will have on the employees adversely affected by such action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Executive Order.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

August 1, 1974

A/SLMR No. 419

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION, AND
WELFARE, SOCIAL SECURITY ADMINISTRATION,
GREAT LAKES PROGRAM CENTER
A/SLMR No. 419

DEPARTMENT OF HEALTH, EDUCATION, AND
WELFARE, SOCIAL SECURITY ADMINISTRATION,
GREAT LAKES PROGRAM CENTER

Respondent

and

Case No. 50-9119

LOCAL 1395, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

This unfair labor practice proceeding involved a complaint filed by Local 1395, American Federation of Government Employees, AFL-CIO (AFGE) alleging that the Department of Health, Education, and Welfare, Social Security Administration, Great Lakes Program Center (Respondent) violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by denying Emma Coleman union representation during her September 5, 1972, "Performance Interview."

While the Administrative Law Judge found that Coleman had, in fact, been denied union representation during the subject "Performance Interview," he determined that the interview involved was not a formal discussion within the meaning of Section 10(e) of the Order. As Coleman was not entitled to have union representation at such discussion, the Administrative Law Judge held, in accordance with the decision in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, that the denial of Coleman's request to have a union representative present during her "Performance Interview" was not a violation of Section 19(a)(1) or (6) of the Order. Accordingly, he recommended that the complaint be dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the matter, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation that the complaint be dismissed in its entirety.

DECISION AND ORDER

On May 29, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No timely exceptions were filed to the Administrative Law Judge's Report and Recommendation. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, 2/ conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-9119 be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 1, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

- 1/ The Complainant filed untimely exceptions which were not considered.
2/ While the record reflects that the employee in question had three grievances pending at the time that her "Performance Interview" was conducted, the evidence establishes that the subject interview did not include consideration or discussion of such pending grievances. Cf. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, FLRC No. 74A-11.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



..... :
In the Matter of :
: :
DEPARTMENT OF HEALTH, EDUCATION, and :
WELFARE, SOCIAL SECURITY ADMINISTRATION, :
GREAT LAKES PROGRAM CENTER :
Respondent :
: Case No. 50-9119
and :
: :
LOCAL 1395, AMERICAN FEDERATION of :
GOVERNMENT EMPLOYEES :
Complainant :
..... :

Jack S. Walker
Vice President, AFGE Local 1395
165 N. Canal Street
Chicago, Illinois 60606
For the Complainant

Francis X. Dippel
Labor-Management Relations Officer
Bureau of Retirement and Survivors
Insurance
Social Security Administration
Baltimore, Maryland 21235
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended.
It was initiated by a complaint dated October 12, 1972 and
filed October 19, 1972. The complaint alleges a violation

of Sections 19(a)(1), (2), (4), and (6) of the Executive
Order. The violation was alleged to consist of denying
to Emma Coleman, a Search and Control Assistant employed
by Respondent (at the time known as the Chicago Payment
Center), the right to have a union representative present
at a "Performance Interview" although the employee re-
quested it.

The Area Administrator investigated the complaint and
reported to the Assistant Regional Director. The Respondent
filed with the Assistant Regional Director a Motion to Dis-
miss, and extensive proceedings ensued. On September 13,
1973, the Acting Assistant Regional Director dismissed the
allegation of a violation of Section 19(a)(4) and stated he
would send the remaining issues to hearing because the posi-
tions of the parties concerning them raised material factual
issues. No review was sought from the dismissal of a viola-
tion of Section 19(a)(4) of the Executive Order. At the
hearing the allegation of a violation of Section 19(a)(2)
was expressly abandoned.

On December 4, 1973, the Assistant Regional Director
issued a Notice of Hearing to be held on February 20, 1974
in Chicago, Illinois. Hearings were held February 20 and
21, 1974 in Chicago. Pursuant to extensions of time granted
therefor, timely briefs were filed April 3 and 4, 1974.

Contentions of the Parties

The Complainant contends that a "Performance Interview"
is a formal discussion between a supervisor and a supervisee
covered by the last sentence of Section 10(e) of the Execu-
tive Order at which a recognized union has a right to be
represented and that consequently the employee has the right
to have a union representative present. The Respondent con-
tends that a "Performance Interview" is not a discussion
envisaged by the last sentence of Section 10(e).

Findings of Facts

The Social Security Administration is a component of the Department of Health, Education, and Welfare. The S.S.A. has a number of bureaus, including the Bureau of Retirement and Survivors Insurance. The Bureau in turn has six Program Centers, one of which is the Great Lakes Program Center which at the time of the alleged unfair labor practice was known as the Chicago Payment Center. Emma Coleman is, and at all relevant times was, a clerk in the Great Lakes Program Center.

The American Federation of Government Employees has had exclusive national recognition with the Social Security Administration since 1969. Its recognition covers all non-supervisory employees. Its representation of employees of the Bureau of Retirement and Survivors Insurance is through its National Council of Social Security Payment Center Locals. The Council consists of six Locals, one for each of the Program Centers. The Local for the Great Lakes Program Center is Local 1395. It has authority to act for the Council with respect to the Great Lakes Program Center.

On September 5, 1972 Ms. Coleman had a "Performance Interview" with her immediate supervisor, whose name then was Marion Fitzpatrick and who at the time of the hearing was Marion Fitzpatrick DeShazor. The Interview was at Ms. DeShazor's desk. Ms. Coleman asked that a representative of her union be present and Ms. DeShazor denied that request. After the Interview Ms. DeShazor wrote a memorandum to Ms. Coleman summarizing the interview. Since the nature and significance of a Performance Interview is the critical issue in this case, it is described in some detail.

Supervisors in the Social Security Administration are supposed to have Performance Interviews with employees they directly supervise. The purpose is for the supervisor to acquaint the supervisee with how the supervisor believes the supervisee is performing her job, -- which parts of her work are being performed well, ways of improving those aspects that were not satisfactory, work habits, absences,

relations with fellow employees, and other work-related aspects of performance of the job. There was no rigid periodicity for the Interviews. In general, it was expected that a Performance Interview would be held at least once in each rating period between the time of the ratings. Employees who were in Grade GS-6 or lower were rated every six months and those in higher grades once a year. Supervisors had discretion in how often to have a Performance Interview; they were had more often with employees who were problems. The twenty to thirty employees supervised by Ms. DeShazor were all in Grade GS-6 or lower, and she had a Performance Interview with each of them every three months or so.

After a Performance Interview, the supervisor wrote a summary of what was said. The supervisor gave a copy to the supervisee and filed a copy in the supervisor's "SF 7-B Extension File", described below. The supervisee had a right to file a response to the summary, to question either its accuracy as a summary of what was said or the correctness of what the supervisor had said at the Performance Interview. Such right was seldom exercised. After each Performance Interview Ms. DeShazor told each employee of such right. The supervisor's summary of the Performance Interview could be the subject of a grievance. At the time of the Performance Interview here involved, Ms. Coleman had three grievances pending, one of which was a statement made by Ms. DeShazor at the previous Performance Interview as reflected in its summary.

An SF 7-B Extension File is an informal file that a supervisor may keep with respect to an employee he supervises. Some supervisors who supervise only very few employees do not have such files; a supervisor who supervises as many employees as Ms. DeShazor supervises keeps such files. Ms. DeShazor kept an SF 7-B Extension File for every employee she supervised.

Material in the SF 7-B Extension File is of a temporary nature and is discarded from time to time. It includes the supervisor's summary of a Performance Interview, 1/ notes of

1/ The summary of a Performance Interview is not filed in the employee's Official Personnel File.

a personal observation of a supervisee, notations of special recognition, or any other note the supervisor cares to make. The material in the Extension File may be used by the supervisor for assistance in preparing performance appraisals, support for recommending an award or discipline, support of management's position when a grievance is filed, and other purposes. Material in the Extension File is discarded periodically without any record being made that it had been in the Extension File. Normally, the Extension File is purged of its material after about six months or a year, but material pertinent to a pending matter such as a grievance may be kept until the matter is disposed of.

The employee who is the subject of an SF 7-B Extension File receives a copy of everything that goes into it or at least has access to everything in the file. But the primary and dominant purpose of the file is for the use of the employee's immediate supervisor to assist him in his supervisory work such as making performance appraisals of supervisees if he has too many to rely solely on his own memory.

The matter of discipline, proposed or contemplated, is never the subject of a Performance Interview. Any such matter is always the subject of a separate discussion at which the employee has a right to have a union representative present if it is a serious matter.

Discussion and Conclusions

Three decisions of the Assistant Secretary are directly pertinent to the basic issue in this case, i.e., whether the denial to Ms. Coleman of her request that a representative of her union be present at her Performance Interview on September 5, 1972 was a violation of Section 19(a)(1) or (6) or both. U.S. Army Headquarters, U.S. Army Training Center, Ft. Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242; U.S. Department of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR

No. 278; Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336. It is the distinctions between those cases that determine the appropriate disposition of this case. Other decisions are only peripherally relevant.

All three of those cases, and this case, turn on the meaning and application of the last sentence of Section 10(e) of the Executive Order, which reads:

"The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

In the Fort Jackson case, an employee of the Activity who was on extended sick leave received a letter from the Activity's Manager. The letter directed the employee to furnish a doctor's certificate by September 9 setting forth the employee's physical condition and the date on which the employee was expected to return to work, and stated that failure to comply with such direction might be the basis for "disciplinary or adverse action". The employee was disturbed by the letter. She returned to work on September 8 with a doctor's certificate attesting to her illness.

On September 23 the President of the employee's exclusively recognized local union called the employee's Manager and tried to arrange a meeting to be attended by himself, the Manager, and the employee. The Manager refused the request. The Manager called a meeting the same day at which several management people were present one of whom was to take notes to make a record of the meeting. The employee and another employee she considered her shop steward were called to the meeting. The meeting was called to explain the letter to the employee and to answer her questions. At the commencement of the meeting the employee requested that her local President be present and was told he would not be there. The employee refused to discuss the matter without her local President present.

It was held that the meeting was a "formal discussion" within the meaning of Section 10(e) of the Order and that it involved "personnel policies and practices". The "formal" nature of the meeting was found from the number of management representatives present, the fact that one of them was to make a record of the meeting, and the fact that an employee considered to be a steward was present. That it concerned personnel policies and practices was concluded from the fact that the subject of requiring a doctor's certificate in some types of sick leave had ramifications for all unit employees. It was held further that the union had a right therefore to be present by a representative of its own choosing and that holding the meeting without the local's President after denying his request for a meeting was a refusal to consult, confer, or negotiate in violation of Section 19(a) (6) of the Order.

In the Fort Wainwright case (No. 278), a meeting was held by the Activity with an employee to discuss the implementation of the decision of a Civil Service Commission Hearing Examiner in an Equal Employment Opportunity proceeding brought by the employee. Four management representatives were present, but the employee was told to come to the meeting alone and was not told the purpose of the meeting. When the employee was told at the meeting the purpose of the meeting, he requested the presence of his union representative. The request was denied. A management representative then discussed the Hearing Examiner's decision and instructed two of the other management representatives present to implement the decision. The employee remained silent. At the conclusion of the meeting he was asked if he had any questions about implementing the decision. He again requested the presence of his union representative, and again it was denied. The manner of implementing the decision was found to have a general impact on the employees in the unit beyond the rectification of the employee's charge of racial discrimination.

It was held that this meeting of high level management representatives with the employee to discuss the implementation of the decision was a formal discussion of a grievance and a matter affecting working conditions of employees in the unit. Accordingly, not giving the exclusive representative an opportunity to be present was a violation of

Section 19(a) (6) of the Order. It was held also that Section 10(e), in giving the union the right to an opportunity to be present at such a discussion, conferred a concomitant right on the employees in the unit that the representative be given the opportunity to represent them, and denying such right was a violation of Section 19(a) (1).

The most recent decision in point is the Texas Air National Guard case (No. 336). In the pertinent part of that case, the Activity had twice denied union representation to an employee at a "counselling" session. ^{2/} The first was a discussion between the employee and his second tier supervisor concerning changes in the employee's job. (The employee's conduct at this session later became the subject of a grievance). The employee expressed a desire to have a union representative present at this counselling session, but such representation was denied to him. The second "counselling" session was a meeting between the employee and his third tier supervisor concerning the employee arriving at work in civilian clothes contrary to an existing order that military clothes be worn. This time also the employee stated he wanted union representation, but his supervisor stated that union representation was not permitted at "counselling sessions". As a result of that "counselling" session the employee was given a letter of "Adverse Personnel Action". This resulted in the filing of a grievance.

The Assistant Secretary held that neither of these discussions was a formal discussion within the meaning of the last sentence of Section 10(e) and that therefore the denial of union representation at them was not a denial of a union right conferred by that provision on the union nor a denial of the concomitant right of the employees that the union be given an opportunity to be present and that therefore the denial of union representation was not a violation of either Section 19(a) (1) or Section 19(a) (6) of the Executive

^{2/} Such a session was a meeting between an employee and his supervisor at which a wide range of subjects could be discussed, including proposed disciplinary action.

Order. This conclusion was reached on the basis that (1) the sessions were not related to the processing of a grievance, (2) the matters discussed did not involve general working conditions, 3/ (3) each of the discussions related only to an individual employee's alleged shortcomings, and (4) they had no wider ramifications than an individual employee at a particular time with respect to incidents related to the individual employee.

A reconciliation of the holdings in these three cases leads to some general observations and some specific conclusions.

Of course the label attached to a discussion as a "formal discussion", an "informal discussion", a "counseling session", or any other label, is not dispositive of its inclusion within or exclusion from the requirement of the last sentence of Section 10(e). Rather it is the nature and significance of the discussion that is determinative. With this in mind, let us look at what were considered the significant facts in those three cases to determine whether in this case there was a "formal discussion" that is governed by the Fort Jackson and Fort Wainwright decisions or whether it is governed by the Texas Air National Guard decision.

Two significant differences are observed between the meetings involved in the Fort Jackson case and the Fort Wainwright case and the meetings involved in the Texas Air National Guard Case.

In both the Fort Jackson and Fort Wainwright cases, management was represented by several people. In the Texas Air National Guard case, and in the instant case, the discussion was between only the employee and his supervisor, a "one-on-one" discussion. In the first two cases the

3/ The requirement of the wearing of the uniform by members of a National Guard has frequently been the subject of formal discussions in other cases and is a general working condition, but apparently in this case the requirement was not the subject of the discussion but only the employee's violation of the requirement.

subjects discussed had potential ramifications and significance beyond the individual employee, -- the requirement of a doctor's certificate when sick leave was taken in the Fort Jackson case, and the manner of implementation of a decision in a discrimination case in the Fort Wainwright case. In the Texas Air National Guard case, each of the two "counseling" sessions concerned only the individual employee. Even though the second of the two sessions resulted in a letter of "Adverse Personnel Action", it was held that Section 10(e) was inapplicable because only the employee was or could be affected. In the present case also only the individual employee was or could be affected, and, further, no adverse action could result from the Performance Interview. The Interview had no wider ramifications than an individual employee at a particular time.

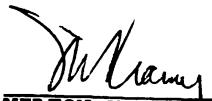
It is apparent that the instant case is much more like the Texas Air National Guard case than like the earlier cases. Indeed, the non-applicability of the last sentence of Section 10(e) to this case would appear to follow a fortiori from the decision in that case. In that case one of the discussions involved changes that had been made in the employee's job-content, and the other discussion resulted in the imposition of discipline. Neither of such circumstances is present here.

I conclude that the Performance Interview involved here was not a formal discussion concerning a matter affecting general working conditions within the meaning of Section 10(e) of the Executive Order, that Ms. Coleman was not entitled to have a union representative present at that discussion, and that the denial of her request that a union representative be present was not a violation of either Section 19(a)(1) or Section 19(a)(6) of the Executive Order.

RECOMMENDATION

I recommend that the complaint be dismissed.

DATED: May 29, 1974
Washington, D.C.


MILTON KRAMER
Administrative Law Judge

August 1, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987
A/SLMR No. 420

This case involved an unfair labor practice complaint filed by Jerry L. Norris (Complainant) alleging violation of Sections 19(b)(1) and (3) of the Order. The complaint alleged that the Respondent labor organization, American Federation of Government Employees, Local 987, violated the Order when on February 15, 1973, agents of the Respondent confronted the Complainant on two occasions and requested the Complainant to cease passing out dues revocation forms. The complaint alleges further that one of the Respondent's agents threatened to "blackball" the Complainant if he attempted to rejoin the Union and that his work performance was impeded by this confrontation.

The Complainant, Norris, was a sheet metal mechanic who, at the time in question, also served as an alternate to the supervisor of his sub-unit. On February 14, 1973, Norris executed a form which served to revoke his voluntary dues checkoff and, on the same date, during duty hours, passed out copies of the form to employees in his unit. However, there was no evidence Norris had formally resigned from the Union at the time of the incidents in question. The next day, three of the Respondent's stewards approached Norris and requested that he stop passing out copies of the revocation form, and one of the stewards told Norris he would "blackball" Norris if Norris should later seek to rejoin the Union. At a second meeting the same day, the stewards and a representative of the Respondent again sought to have Norris discontinue passing out the dues revocation forms.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that Norris was not a supervisor within the meaning of Section 2 (c) of the Order, and that the Respondent did not violate Section 19(b)(3) of the Order because there was insufficient evidence to establish that the actions of Respondent's agents were for the purpose of hindering or impeding Norris' work performance.

The Assistant Secretary found also that the Respondent's overall conduct in attempting to stop Norris from passing out the dues revocation forms did not violate Section 19(b)(1) of the Order. In this regard, he noted that a labor organization is entitled to protect itself from the acts of its members which threaten its continued existence, and that Norris' action constituted such an act. The Assistant Secretary further noted that the Respondent's right to protect itself from such acts was unrelated to a specific time frame and, therefore, contrary to the conclusion of the Administrative Law Judge, the Assistant Secretary held it was immaterial whether or not Norris distributed the dues revocation form during worktime and whether his actions contravened Section 20 of the Order. In addition, the Assistant Secretary found, contrary to the Administrative

Law Judge, that in the circumstances of the case, the statement by one of the stewards that he would "blackball" Norris if he sought to rejoin the Union was not violative of the Order.

Having found that the Respondent did not violate Section 19(b)(1) and (3) of the Order, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 987

Respondent

and

Case No. 40-4790(CO)

JERRY L. NORRIS

Complainant

DECISION AND ORDER

On April 8, 1974, Administrative Law Judge Francis E. Dowd issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had violated Section 19(b)(1) of Executive Order 11491, as amended, and recommending, among other things, that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. The Administrative Law Judge found other conduct by the Respondent not to be violative of the Order. Thereafter, the Respondent filed exceptions and supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge, only to the extent consistent herewith. 2/

The complaint in the instant case alleged that the Respondent violated Section 19(b)(1) and (3) of the Order when on February 15, 1973, agents of the Respondent confronted the Complainant on two occasions

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

2/ On page 11 of his Report and Recommendations, the Administrative Law Judge inadvertently referred to "Agency management" rather than to "a labor organization," in setting forth the provisions of Section 19(b)(1) of the Order. This inadvertence is hereby corrected.

and requested the latter to cease passing out dues revocation forms. It is alleged further that a representative of the Respondent threatened to "blackball" the Complainant if he attempted to rejoin the Union and that his work performance was impeded by this confrontation.

The essential facts of the case, which are not in dispute, are set forth in detail in the Administrative Law Judge's Report and Recommendations, and I shall repeat them only to the extent necessary.

The Complainant, Jerry Norris, a sheet metal mechanic of the U.S. Air Force Warner Robins Materiel Area at Robins Air Force Base, Georgia, at the time in question also served as an alternate to the supervisor of his sub-unit. The Respondent is the exclusive representative for five bargaining units at the Warner Robins Materiel Area. On February 14, 1973, Norris executed a form which served to revoke his voluntary dues checkoff 3/ and, on the same date, during duty hours, passed out copies of the form to employees in his unit. The following day, three of the Respondent's stewards - Lassiter, Shephard and Haney, - approached Norris, and Lassiter requested that he stop passing out copies of the revocation form claiming that such activity violated Executive Order 11491. Norris stated that he disagreed and, in the discussion which followed, Lassiter told Norris he would "blackball" Norris if he later attempted to rejoin the Union. At a subsequent meeting with Norris, the stewards and Bobby Harnage (an employee of the Respondent) again importuned him to discontinue passing out the dues revocation forms.

The Administrative Law Judge found, and I agree, that under the circumstances of this case Norris was not a supervisor within the meaning of Section 2(c) of the Order. He found further that Norris' distribution of the dues revocation forms was conduct protected by Section 1(a) of the Order, but that such conduct lost its protected status because it occurred during duty hours, which, in the Administrative Law Judge's view, constituted a violation of Section 20 of the Order. Under these circumstances, he concluded that, with the exception of Lassiter's statement that he would "blackball" Norris if he later attempted to rejoin the Union, the Respondent's conduct was not violative of Section 19(b)(1) of the Order. Moreover, the Administrative Law Judge found, and I agree, that the Respondent did not violate Section 19(b)(3) of the Order because there was insufficient evidence to establish that the actions of the Respondent's agents were for the purpose of hindering or impeding Norris' work performance.

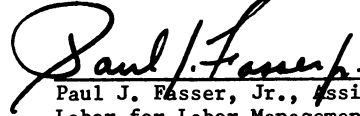
I concur in the Administrative Law Judge's conclusion that the Respondent's overall conduct in attempting to stop Norris' distribution of dues revocation forms did not constitute a violation of Section 19(b)(1) of the Order. However, contrary to the Administrative Law Judge, I find also that Lassiter's "blackball" statement was not, in the particular circumstances of this case, violative of Section 19(b)(1), and that the provisions of Section 20 of the Order are not relevant in reaching the disposition herein.

3/ There was no evidence Norris had formally resigned from the Union at the time of the incidents in question.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-4790(CO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 1, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

In my view, a labor organization is entitled to protect itself from those acts of its members 4/ which threaten its continued existence.5/ In this regard, the distribution of dues revocation notices constitutes such an act and was of legitimate concern to the Respondent. Thus, the Respondent's effort to have Norris discontinue his action of distributing dues revocation cards was in furtherance of its proper interests and was consistent with its rights under the Order. 6/ Moreover, I find, contrary to the Administrative Law Judge, that Lassiter's isolated statement concerning his intent to "blackball" Norris in the future if he attempted to rejoin the Union was not improper under the circumstances of this case. In this connection, it was noted that the statement was made during the height of a heated confrontation between Norris and the Respondent's agents, was made in only one instance by one of the three agents of the Respondent present, entailed no job related threat or threat of bodily injury and, in effect, was a statement by one individual member concerning his intentions if Norris in the future sought to reenter the Union. 7/

Accordingly, as I find that the Respondent's conduct herein did not violate Section 19(b)(1) and (3) of the Order, I shall order that the instant complaint be dismissed in its entirety.

- 4/ Even if Norris was no longer a member of the Union, as he claims, the request for him to discontinue his actions did not, in my opinion, violate Section 19(b)(1) or (3) of the Order in the absence of evidence of any threats related to his job or threats of bodily injury.
- 5/ In my view, a labor organization may, pursuant to Section 19(c) of the Order, subject its members to discipline, including, in appropriate cases, expulsion, to protect its continued existence, if such discipline is meted out in accordance with procedures under the labor organization's constitution or by-laws which conform to the requirements of the Order. Cf., Local 1858, American Federation of Government Employees (Redstone Arsenal, Alabama), A/SLMR No. 275, and American Federation of Government Employees, Local 1650, Beeville, Texas (Naval Air Station, Chase Field, Beeville, Texas, et al., A/SLMR No. 294.
- 6/ As the protecting of the Respondent's legitimate interest, noted above, is unrelated to a specific time frame, it is immaterial whether or not Norris distributed the dues revocation forms during worktime and whether his conduct contravened the provisions of Section 20 of the Order. Accordingly, I find it unnecessary to pass upon the Administrative Law Judge's findings with respect to the obligations of Agency management and labor organizations under Section 20.
- 7/ Whether the Respondent could, in fact, prevent Norris from rejoining the Union in the future would, of course, depend on whether such exclusion was consistent with the requirements of Section 19(c) of the Order. See, in this regard, the Assistant Secretary's decisions cited above at footnote 5.

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 WASHINGTON, D.C. 20210



.....
 In the Matter of :
 :
 AMERICAN FEDERATION OF :
 GOVERNMENT EMPLOYEES, LOCAL 987 :
 Respondent :
 and : CASE NO. 40-4790 (CA)
 :
 JERRY L. NORRIS :
 Complainant :

Bobby L. Harnage
 Special Assistant
 American Federation of
 Government Employees, Local 987
 P.O. Box 1079
 Warner Robins, Georgia 31093
 For the Respondent

Lewis M. Scaggs
 P.O. Box 205
 Warner Robins, Georgia 31093
 For the Complainant

Before: FRANCIS E. DOWD
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

This case concerns an unfair labor practice allegedly committed by Respondent, American Federation of Government Employees, Local 987 (the Union) against Complainant, Jerry L. Norris. By Complaint filed April 16, 1973, 1/ Mr. Norris

1/ Unless otherwise indicated all dates herein refer to the year 1973.

charges that the Union violated sections 19(b)(1) and (3) of Executive Order 11491, as amended.

Pursuant to an Order Rescheduling Hearing, a hearing on the Complaint was held on September 25, 1973, in Macon, Georgia. Both parties were represented and were allowed full opportunity to adduce evidence and to examine and cross-examine witnesses. Thereafter, the parties filed briefs which have been duly considered.

Based upon my review of the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations:

Statement of the Case

Jerry Norris, the Complainant herein, was told by a supervisor that the Union was in some way responsible for Norris' failure to receive a promotion. This made Norris unhappy and so he decided to resign from the Union. On February 14, he also executed Standard Form 1188, entitled "Revocation of Voluntary Authorization for Allotment of Compensation for Payment of Employee Organization Dues." The following day he distributed this form to a number of his fellow employees. The distribution took place during working hours and at the job sites of the employees involved.

Word of Complainant's activity reached the Union very quickly and representatives of the Union were dispatched to Complainant's work site the following morning. The purpose of their mission is not in dispute. They believed that Norris was engaging in improper and unlawful activity and they told him so. They also asked him to cease such activities.

To say the least, Norris was unhappy and upset about this confrontation with the Union representatives. He didn't like being told by the Union that he was violating the law and he didn't think they should be interrupting him while carrying out his duties as an acting supervisor. By his own words, Norris "blew his cool." As a result, the discussion became rather heated and the participants found it necessary to raise their voices to be heard. Tempers were short and the discussion did not end on an amicable chord. It is this conduct by the Union representatives on the morning of February 15, 1973

and certain statements allegedly made by them to Norris that form the basis for this proceeding.

The issues to be resolved are as follows:

(1) Whether Norris was a supervisor within the meaning of section 2(c) of the Order.

(2) Whether the distribution of union dues checkoff revocation forms by an employee is a right protected by section 1(a) of Executive Order 11491, as amended.

(3) Whether the distribution of union dues checkoff revocation forms by an employee during duty hours to employees at their official work stations is an activity prohibited by section 20 of the Order. If so, whether a right protected by section 1(a) loses its protected status if exercised in violation of section 20 of the Order.

(4) Whether the Union representatives' conduct--in asking Norris to cease his activities--was a violation of section 19(b) (1) and (3).

(5) Whether a statement by a Union representative--that he would "blackball" Norris should he ever attempt to rejoin the Union--is a violation of section 19(b) (1) of the Order.

Findings of Fact

1. The Respondent Union is the exclusive representative for five bargaining units of employees organized at the U.S. Air Force Warner Robins Air Materiel Area (the Activity) located at Robins Air Force Base, Georgia.

2. Complainant Norris is employed with the Activity as an Aircraft Sheet Metal Mechanic, WG-10 and at the time of the alleged unfair labor practice, was a member in good standing in the largest of the units represented by the Union. This "basewide unit" included all nonprofessional, nonsupervisory General Schedule and Wage Grade Employees at the Activity, excluding Fire Fighters.

3. Activity management had divided the "basewide unit" of which Norris was a member into several directorates by function. Each directorate was in turn divided into various levels of supervision. In descending order of authority these levels were: Division, Branch, Section, Unit and Sub-Unit. Mr. Norris' Position Description 2/ details his place within the Activity's organization as follows: Directorate of Maintenance, Manufacture and Repair Division, Production Branch, Sheet Metal Section, Metal Bond Unit. The Position Description states the purpose of the Aircraft Sheet Metal Mechanic position as being "to perform general aircraft metal work including major structural repairs and modifications." The position entails no administrative or supervisory duties or responsibilities.

4. In addition to his duties as a sheet metal mechanic Mr. Norris served, during the time in question, as the alternate to Mr. Berry, supervisor for Norris' sub-unit. This designation authorized Norris, in Berry's absence, to assign work to employees in the sub-unit, to give job assistance when required, to route work items to other shops in the Activity and to complete the paperwork required for such transfers. While acting as Mr. Berry's alternate Norris had no authority with regard to hirings or layoffs, promotions, suspensions, discipline, grievance adjustment or the granting of leave time.

5. On February 14 Norris executed a Standard Form 1188, entitled "Revocation of Voluntary Authorization for Allotment of Compensation for Payment of Employee Organization Dues." 3/ Execution of this form had the effect of terminating the union dues checkoff from Norris' paycheck effective March 1, 1973. According to Norris, his fellow employees were aware of his unhappiness with the Union. Respondent, in its brief, points out that Norris was not motivated solely, if at all, by a desire to assist his fellow employees but, rather, was motivated by a spirit of vindictiveness. In this regard, the

2/ Complainant's Exhibit No. 1.

3/ Assistant Secretary's Exhibit No. 1(b), Attachment No. 7.

testimony of Norris is that he was once told by his unit supervisor, John Worley, that union disfavor prevented him from receiving a promotion. Also, Shepherd testified that Norris refused to discontinue passing out the form 1188's because the Union had helped him out and he was going to "help them out." While I find merit in Respondent's contention, I don't believe Norris' motive, or motives, in engaging in this particular activity is relevant to a disposition of this matter.

6. On February 14, 1973, Norris was acting as Berry's alternate because of the latter's absence from the work area. There were approximately 16 or 17 employees working with Norris that day in the leading edge sub-unit of the metal band unit. According to Norris, several employees in the sub-unit had previously asked him if he would secure for them copies of Standard Form 1188. Norris had in his possession 8 or 9 copies of the form and at approximately 8:00 or 8:30 A.M. left his assigned duties and approached other employees in the sub-unit asking them if they had requested or now wanted a copy of the form to stop the deduction of union dues from their paychecks. Norris approached the 16 or 17 employees in the sub-unit and several other employees in another area of the metal bond unit. Altogether Norris spent approximately 15 minutes handing out the 8 or 9 copies of Standard Form 1188.

7. Shortly after Norris had completed his distribution of the forms his activities were reported to Gerald Lassiter, division steward of the manufacture and repair division. Lassiter went to the metal bond area and conferred with David Shepherd, the union steward with direct jurisdiction over the work area involved. The following morning, on February 15, at approximately 9:00 A.M. Lassiter and Shepherd, accompanied by Jessie Haney, another union steward, went to the leading edge sub-unit area to question Norris regarding his reported activities. The three union stewards found Norris outside the sub-unit office discussing a work problem with Joseph E. Williams and Jack Howell, employees from another work area in the facility.

8. The evidence regarding what transpired at this first meeting is in conflict. Norris testified that Lassiter approached him and asked him to stop passing out copies

of Form 1188, saying such activity violated Executive Order 11491. Norris recollects that he informed the Union officers that he did not believe he had done anything wrong. There then followed a heated exchange during which Norris claimed Lassiter threatened to blackball him if he attempted to rejoin the Union and promised to do everything he could to keep Norris out of the Union. Williams, who overheard part of the conversation, testified that he recalled hearing the word "blackball" used but did not know in what context. Shepherd, who was present during the exchange, testified that no threats were made and that the word "blackball" was never used.

Norris' testimony, which I credit, was corroborated by a neutral witness, Williams. Furthermore, Lassiter failed to testify about this incident although he was present at the hearing. On the basis of the foregoing, I find that Lassiter told Norris that he would "blackball" him if he left the Union and later tried to rejoin.

9. This confrontation between Norris and the union stewards lasted only five or six minutes and ended with tempers high and without any resolution of the differences among the participants. After the stewards left the metal bond unit Lassiter went to the Union office and related the substance of the meeting with Norris to John Brooks, the Union President. Brooks immediately dispatched Bobby Harnage, an employee of the Union (who also represented Respondent at the hearing), to go to Norris and investigate further his activities of the preceding morning.

10. According to Brooks, his concern over Norris' actions was twofold: Firstly, he was of the opinion that Norris' position as Berry's alternate made him a supervisor under the terms of the Executive Order and therefore his distribution of termination of payroll deduction forms was an unlawful interference by the Activity into Union affairs; secondly, Brooks interpreted a provision of the negotiated agreement between the Activity and Union to permit employees to secure termination forms only from the labor relations officer of the Activity, not from an individual such as Norris.

11. Harnage, Shepherd, and Lassiter returned to the metal bond unit area at approximately 10:00 a.m. They

found Norris outside the sub-unit office and there they continued in a heated fashion the earlier discussion regarding Norris' distribution of the Standard Form 1188.

Darwin L. Peacock, Metal Bond Unit Chief and Norris' supervisor, was in the leading edge area of the shop and was attracted to the sub-unit office area by the loud conversation. At that time Harnage told Norris that he intended to file an unfair labor practice charge against Norris because of his activities earlier that morning. According to Peacock, he suggested that they continue their discussions inside the sub-unit office. Both Norris and Peacock testified that Harnage berated Peacock and accused him of failing in his duties as a supervisor by allowing Norris to pass out the termination forms on paid time. The meeting ended with Harnage again telling Norris that he intended to file an unfair labor practice charge.

12. A complaint based on Mr. Norris' activities was in fact filed by the Union against the Activity in Case No. 40-4889(CA), but was withdrawn prior to hearing.

Discussion

A. The Alleged Supervisory Status of Norris

To properly assess the significance of the Union agent's actions it is first necessary to consider Norris' employment status on the date of the occurrence. Section 2(b) of Executive Order 11491, as amended, defines "employee" for the purposes of the Order as an employee of an agency or a non-appropriated fund instrumentality of the United States, excluding supervisors for the purpose of exclusive recognition or national consultation rights. A supervisor is defined in section 2(c) as follows:

"Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in

connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The authority possessed by Norris when acting as the alternate to his sub-unit supervisor has been previously described in this decision. Suffice to say, Norris' duties as an acting supervisor were precisely those of a more experienced worker being asked to give guidance and instruction to less experienced workers. In such capacity, Norris had very limited responsibility which was exercised, in any event, upon a sporadic basis. Accordingly, I find that Norris was not a supervisor within the meaning of section 2(c) of the Order.

B. Whether the Distribution of Dues Checkoff Revocation Form is a Right Protected by section 1(a) of the Order.

As an "employee" Norris was and is guaranteed certain rights under the Executive Order. Included among these rights are those found in section 1(a) which provides, in pertinent part, that

Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. (emphasis supplied)

Therefore, just as an employee has a right to engage in activity which assists a labor organization, he or she also has a right to engage in activity which, as a practical matter, does not assist a labor organization. This is what is meant by the phrase "refrain from any such activity" in section 1(a). For example, an employee may actively encourage other employees to vote against union organization in the first place. When a union has been certified as bargaining representative, an employee may exercise his right to refrain from union activity by deciding to resign from the union, as in this case. Likewise, if a Union member has made a voluntary allotment of his

wages for the purpose of satisfying his dues-paying obligation to the labor organization under a "checkoff" program established under section 21 of the Order, the Union member may revoke his authorization at 6-month intervals as section 21 provides. 4/

Whatever motives may be ascribed to the actions of Norris in securing copies of Standard Form 1188 at the request of certain of his co-workers and distributing these forms to them, his activity must be viewed as falling within the bounds of section 1(a). Whether in so acting Norris was merely doing a personal favor for those employees who had asked his assistance or was intending thereby to undercut the majority support of the Union, his actions in aid of the exercise of protected rights are themselves protected. Accordingly, I conclude that Norris, in distributing dues checkoff forms, was engaging in a right protected by section 1(a) of the Order.

C. Whether distribution of dues checkoff revocation forms during duty hours is prohibited by section 20.

The Executive Order provides in section 20 that certain union activity, which is otherwise lawful within the meaning of section 1(a), may not be conducted during duty hours. Section 20 reads as follows:

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to

4/ Sec. 21. Allotment of dues. (a) . . .

- (1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or
- (2) the employee has been suspended or expelled from the labor organization.

one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives.

As I read section 20, it clearly means that distribution of dues checkoff revocation forms during duty hours is not permitted. 5/ Indeed, this case presents a good example of why such conduct should not be permitted. To accomplish what he set out to do, Norris himself did the following: (1) he neglected his own official duties (for which he was being paid by his Activity) to set out on his own private mission; and (2) he necessarily interrupted other employees in the performance of their official duties when he asked if they desired the forms. It is this kind of disruptive activity which, in my opinion, section 20 seeks to eliminate.

D. Whether conduct protected by section 1(a) loses its protection if done in violation of section 20.

The question remains, however, as to what one does to an employee found to be engaging in activity prohibited by section 20. The Executive Order does not expressly provide that such conduct must be the subject of disciplinary action or by whom. In the private sector an employer usually has plant rules governing such activity and sometimes these rules are the result of collective bargaining. In any event, one thing is clear: section 20 was placed in the Executive Order for a specific purpose and I find that both Agency management and labor organizations have the obligation and responsibility to ensure that section 20 is observed.

5/ I further find that the distribution of revocation forms by Norris took place at a time when he and his fellow employees were actually engaged in the performance of their duties. In other words, it did not occur during a coffee break, rest period, or other officially recognized nonworking portions of official paid duty hours.

As a practical matter, however, it must be recognized that Agency management, through its supervisory echelon, is obviously in the better position to observe whether or not section 20 is being observed or ignored. Also, it is incumbent upon Agency management to enforce section 20 in an evenhanded manner, or else it might itself be the subject of an unfair labor practice charge.

Accordingly, on the basis of the foregoing, I conclude that conduct normally coming within the purview of section 1(a) of the Order loses its protected status when such conduct also violates section 20.

E. Whether the Union representatives violated sections 19(b) (1) and (3) by their conduct on February 15.

Complainant alleges that Respondent violated section 19(b) (1) of the Order. That section provides that Agency management shall not "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order" (emphasis supplied). I find that Norris, because he was violating section 20, was not engaged in conduct assured by the Order. I further find that the statements made by Respondent's representatives on this occasion were, with one exception, not of such a nature as to amount to interference, restraint, or coercion within the meaning of section 19(b) (1) and in the circumstances of this particular case. 6/

The one exception is the undenied statement attributed to Union representative Lassiter who told Norris he would blackball him should he ever attempt to rejoin the Union. Although Norris was then presently engaged in an unprotected activity, Lassiter's statement applied to Norris' possible

6/ Respondent's contention that employees could only obtain revocation forms through the labor relations office of the Activity is clearly without merit and is hereby rejected. Respondent's contention that it thought Norris was engaged in an unfair labor practice is much more plausible, especially in view of the legitimate issue raised with respect to Norris' alleged supervisory status.

application in the future for readmission to the Union, a right he had under section 19(c). Accordingly, I conclude that Respondent, by reason of Lassiter's statement, interfered with, restrained, and coerced Norris in violation of section 19(b) (1).

In addition to the above, Complainant contends that the actions of the Union agents worked a violation of section 19(b) (3). This section makes it unlawful for a Union to do the following:

Coerce, attempt to coerce, or discipline, fine, or take other economic sanction against, a member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an officer or employee of the United States;

For a violation of this section to be found some nexus between the offensive union conduct and the employee's job performance must be demonstrated.

The evidence adduced at the hearing of this matter fails to establish that a violation of this section of the Order was caused by the Union's actions of February 15. There is no indication in the record that the actions of the Union agents were in any way related to Norris' past work performance or that they were intended or had the effect of impeding or hindering his future work performance. In the absence of such a showing, I recommend that the section 19(b) (3) charge be dismissed. 7/

Recommendations

Having found that the Union has engaged in conduct violative of section 19(b) (1) of the Order, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the purposes of Executive Order 11491.

7/ It seems to me that section 19(b) (3) contemplates the work slowdowns and similar activity that the NLRB found unlawful in such cases as Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, (Wisconsin Motors Corp.), 145 NLRB 1097.

Having found, in addition, that Complainant has not proven a violation of section 19(b) (3) or any other violations of section 19(b) (1) of the Order, I recommend that the Assistant Secretary dismiss that portion of the Complaint alleging such violations.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491 and section 203.25(a) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the American Federation of Government Employees, Local 987 shall:

1. Cease and desist from:

(a) Threatening to deny readmission to membership in American Federation of Government Employees, Local 987 to Jerry Norris, for any reasons other than failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

2. Take the following affirmative action:


(a) Upon application and tender of initiation fees and dues uniformly required, reinstate Jerry Norris to membership in American Federation of Government Employees, Local 987.

(b) Post copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by a representative of American Federation of Government Employees, Local 987, and shall be posted by Respondent for a period of 60 consecutive days in conspicuous places, including its business office, normal meeting places, and all places where notices to members

are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Submit signed copies of said notice to the U.S. Air Force Warner Robins Air Materiel Area, Warner Robins, Georgia, for posting in conspicuous places where unit employees are located where they shall be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 203.26 of the Regulations notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.


FRANCIS E. DOWD
Administrative Law Judge

Dated: April 8, 1974
Washington, D.C.

N O T I C E T O A L L M E M B E R S

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED, LABOR-MANAGEMENT RELATIONS

IN THE FEDERAL SERVICE

We hereby notify you that:

WE WILL NOT threaten to deny readmission to membership in American Federation of Government Employees, Local 987, to Jerry Norris for any reason other than failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership.

WE WILL, upon application and tender of initiation fees and dues uniformly required, reinstate Jerry Norris to membership in American Federation of Government Employees, Local 987.

American Federation of Government
Employees, Local 987

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for the Labor-Management Services Administration, United States Department of Labor, whose address is Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
MID-ATLANTIC SERVICE CENTER
A/SLMR No. 421

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and Chapter No. 071, National Treasury Employees Union (Complainants) against the Internal Revenue Service, Mid-Atlantic Service Center, Philadelphia, Pennsylvania (Respondent). The Complainants alleged that the Respondent violated: (1) Section 19(a)(1) and (6) of the Executive Order by refusing to allow union representation during an alleged "counselling session," and; (2) Section 19(a)(1) of the Order by the alleged interference with, and restraint of, the Union president.

The 19(a)(6) allegation was precipitated by the Respondent's "counseling session" with an employee over her alleged excessive use of leave. The employee previously had undergone a physical examination by the Respondent's physician and was found fit for duty. She also was under the terms of a "leave letter" which required her to produce medical or other acceptable evidence for any absence due to sickness regardless of duration, with failure to comply resulting in the employee being charged with absence without leave. Thereafter, the employee allegedly took sick and under the terms of the leave letter produced a doctor's certificate as justification for time she was away from the job. Upon review of the certificate, the Respondent's physician found only one day's leave to be justified, and recommended that the employee be found absent without leave (AWOL) for the rest of the time. The foregoing decision was discussed by management representatives who were advised by the Respondent's physician that the employee should be counselled with respect to her leave problem. Thereafter, the employee was called to a meeting with the Respondent's employee-relations specialist and her own supervisor but was prevented from having her union representative attend the meeting on the grounds that "the meeting was an informal discussion with an employee about her leave and did not involve a grievance." At the meeting, the employee's leave record was reviewed, she was informed of the reason why the Respondent's physician would not approve her medical certificate, and, in accordance with the findings of the Respondent's physician, she was marked AWOL for part of the period of her absence.

The Administrative Law Judge found controlling the holding in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, in which the Assistant Secretary concluded that certain counselling sessions were not "formal discussions" within the meaning of Section 10(e) of the Order. He noted that the "counselling session" in the instant case did not involve a grievance over the employee's latest request for leave, nor did it result in any adverse action, although the potential for adverse action was present by

her being marked AWOL. The Administrative Law Judge also concluded in this regard that while he was aware that the Union was concerned about the individual applications of leave standards by the different supervisors, this was not the issue at the employee's conference with her superiors, and that the entire discussion at the "counseling session" centered around the individual employee's continued use of leave, and the fact that the Respondent's doctor recommended denial of a portion of her latest request for leave. Accordingly, he concluded that the denial of union representation did not violate Section 19(a)(6) of the Order as the Complainant was not entitled to be represented during the "counseling session," and further, that the denial of such representation did not interfere with any rights assured by the Executive Order, and therefore, did not violate Section 19(a)(1).

The Administrative Law Judge found also that the alleged interference with and restraint of the Union president was not violative of Section 19(a)(1). This allegation arose as the result of an alleged statement by the Respondent's Director to the Complainant's president that she would be sorry if the Union posted bulletins in the main building of the Activity, urging employees to boycott free coffee and cake provided by a vending machine operator to promote its food service operation. The Administrative Law Judge found that under the entire circumstances the statement by the Director was not coercive, as it was not motivated by any animus toward the Union or its officials, and reflected only the Director's overriding desire to solve the food service problem at the facility. In this regard, the Administrative Law Judge concluded that, in the context of the Director's concern that the food service operator would terminate its contract and leave the facility without any food services, the statement was not a threat of reprisal or any retaliation against the Union president or any other Union official, but merely an indication that the Union would have to bear full responsibility for any termination of food service.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the case, including the Complainants' exceptions and supporting brief, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed in its entirety.

A/SLMR No. 421

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
MID-ATLANTIC SERVICE CENTER

Respondent

and

Case No. 20-4025(CA)

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER NO. 071 AND
NATIONAL TREASURY EMPLOYEES UNION 1/

Complainants

DECISION AND ORDER

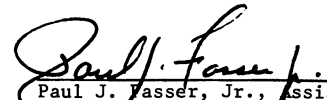
On May 1, 1974, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainants filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, including the Complainants' exceptions and supporting brief, I hereby adopt the findings, conclusions, and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 20-4025(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 26, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ The names of the Complainants appear as amended at the hearing.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



..... :
 In the Matter of :
 :
 INTERNAL REVENUE SERVICE :
 MID-ATLANTIC SERVICE CENTER, :
 Respondent :
 :
 and : Case No. 20-4025 (CA)
 :
 NATIONAL TREASURY EMPLOYEES UNION: :
 and CHAPTER NO. 071, NATIONAL :
 TREASURY EMPLOYEES UNION 1/ :
 Complainants :

Robert M. Tobias, Esq.,
 Washington, D. C.
 For the Complainants

G. Jerry Shaw, Esq.,
 Washington, D. C.
 For the Respondent

Before: GORDON J. MYATT
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a complaint filed on April 9, 1973, under Executive Order 11491, as amended, by National Association of Internal Revenue Employees and its Chapter No. 071 (hereinafter called the Union) against Internal Revenue Service, Mid-Atlantic Service Center (hereinafter called the Respondent), a Notice of Hearing was issued by the Assistant Regional Director for Labor-Management Services for the Philadelphia Region on July 3, 1973. The complaint alleged that the Respondent violated Sections 19(a)(1), (2), and (6) of the Executive Order. 2/

1/ The name of the Complainants appears as amended at the hearing.

2/ At the hearing counsel for the Complainant requested permission to withdraw the allegation that the Respondent violated Section 19(a)(2). Permission was granted and the only issues tried in this matter were the alleged violations of Section 19(a)(1) and 19(a)(6).

A hearing was held in this matter on September 27, 1973 in Philadelphia, Pennsylvania. All parties were represented by counsel and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved. Briefs were filed by the parties and have been duly considered.

Upon the entire record herein, including my observations of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing I make the following findings, conclusions and recommendations:

Findings of Fact

The conduct complained of in this case involves two unrelated issues which the Complainant alleges to be separate violations of the Executive Order. For reasons of clarity and convenience, each will be treated separately herein.

A. The Refusal To Allow Union Representation During An Alleged "Counselling" Session.

Joan Walder had been employed by the Internal Revenue Service since 1966. At the time of the hearing, she was assigned to the Mid-Atlantic Service Center in the Stonite Building. 3/ Since 1967, Ms. Walder has been experiencing a problem regarding excessive use of her leave. The record evidence discloses frequent absences involving the use of annual leave, sick leave and leave without pay. The problem became so acute that her supervisor, Naomi Shepard, placed her under a "leave letter" on January 20, 1971. 4/

Ms. Walder's use of her leave did not improve and her supervisor requested that a physical examination be given by the Respondent's physician to determine if she were fit for duty. This examination was given on May 10, 1972, and

3/ The main facility housing the Service Center is referred to as the Boulevard Building and is approximately two miles from the Stonite facility.

4/ A "leave letter" required the employee to produce medical or other acceptable evidence for any absence due to sickness, regardless of duration. The failure to comply with the conditions of the leave letter would result in the employee being charged with absence without leave and subject to disciplinary action. Normally the conditions of the leave letter were for a period of six months, at which time the employee's leave record would be reviewed.

Ms. Walder was certified by the Respondent's Doctor to be fit for duty. On June 29, 1972 Mrs. Shepard again issued another "leave letter" to Ms. Walder requiring the production of a medical certificate to support any absence due to sickness. In this letter, however, it was stated that Dr. Madianos, the Respondent's physician, would review the certificates and if he recommended that the leave should not be granted, Ms. Walder would be charged absence without leave. The letter also contained a warning that repeated instances of AWOL were grounds for disciplinary action.

Ms. Walder was absent from work on September 8, 1972 due to illness and the entire following week (September 11 through 15). When she returned to work, Ms. Walder submitted a doctor's certificate to her supervisor covering the period September 8 through September 14. The certificate did not relate to her absence on September 15.

In accordance with the terms of the leave letter, the certificate was submitted to Dr. Madianos. He determined that the illness for the week beginning September 11 was unrelated to the illness she suffered on September 8. He recommended approval of the leave for September 8, but disapproval of the absence for the week commencing September 11. The doctor's recommendation was sent to James McNally, an employee relations specialist who worked in the employee-management relations section. McNally informed Robert Stanton, chief of the personnel branch, of the doctor's recommendation regarding Ms. Walder's medical certificate. Stanton and McNally then conferred with Dr. Madianos to determine the basis for his disapproval of the requested leave. The doctor suggested that Ms. Walder be called in and advised that based on her recent fitness for duty examination there was no underlying reason for her constant use of leave due to illness. The doctor indicated that the employee should be told to make an effort to come to work even when she felt some discomfort and to utilize the services of the Respondent's health unit.

After the conference with the doctor, Stanton instructed McNally to call in the employee and her supervisor and to "counsel" the employee on the matters discussed with the doctor. McNally contacted Mrs. Shepard and the meeting was arranged for the afternoon of September 22. Mrs. Shepard

informed Ms. Walder that she was to accompany her to the Boulevard Building for a meeting with McNally. Ms. Walder suspected that this meeting would involve her absence the prior week as she had not received word regarding approval of her medical certificate. She thereupon called Helen McCauley, president of the local chapter of the Union, and asked her to be present at the meeting. Because they did not know each other by sight, Mrs. McCauley arranged for Ms. Walder to identify her when she came to the Boulevard Building for the meeting. Mrs. McCauley worked in the same section where the employee relations specialist's office was located.

During the course of the telephone communications between Mrs. McCauley and Ms. Walder, Mrs. Shepard concluded that the employee was seeking to have the union president represent her at the meeting. She telephoned McNally who in turn passed on the information to Stanton. Stanton told McNally that no disciplinary action was contemplated and there were no issues affecting other employees. He stated that it was to be a counselling session and the Union did not have a right to be present.

When Mrs. Shepard and Ms. Walder entered McNally's office, Mrs. McCauley came in to attend the meeting. McNally told the union president that the meeting was an informal discussion with an employee about her leave and that it did not involve a grievance. He asked Mrs. McCauley to leave the meeting because there was no need for the Union representative to be present. Mrs. McCauley objected to the decision, but left the meeting stating that she would check with the national office of the Union. 5/

During the course of the "counselling" session, McNally and Mrs. Shepard reviewed Ms. Walder's leave record. McNally told the employee the reasons why Dr. Madianos would not

5/ Mrs. McCauley testified that the Union officials were concerned over the Respondent's policy, or lack thereof, regarding the granting of leave. It was apparently the responsibility of the supervisor to approve or disapprove leave requests. According to Mrs. McCauley, each supervisor applied a different standard. She testified that she had represented 6 or 8 employees at formal grievances regarding leave, and that the Union attorneys asked her to hold leave grievances in abeyance until the Respondent developed a firm policy.

approve her medical certificate, and he passed on the doctor's advice that she should make an effort to come to work even when she felt a little discomfort. He also informed the employee that the Respondent did not contemplate any disciplinary action at that time. Mrs. Shepard told the employee that she was going to abide by the doctor's recommendation and would approve the leave for September 8, but would mark the employee AWOL for the week of September 11 through September 15. The meeting concluded and Ms. Walder returned to her job. She has since transferred to another section and her leave record has apparently improved.

Concluding Findings

Counsel for the Complainant, in a well-reasoned brief, makes a cogent argument for the finding of a violation of 19(a)(6). The thrust of the Complainant's contention is that an agency cannot disregard the exclusive representative and deal with employees individually concerning grievances, personnel policies and practices, or other matters affecting general working conditions. United States Army School/ Training Center, Ft. McClellan, Alabama, A/SLMR No. 42. On the basis of the Assistant Secretary's decisions in the Fort Jackson 6/ and Fort Wainwright 7/ cases, the Complainant

6/ Ft. Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242. In this case the activity sent the employee a letter requesting a doctor's certificate for certain leave and demanded the date on which the employee could be expected to return to work. The letter contained a warning that failure to comply with the request "may" result in disciplinary action. At a subsequent meeting regarding the letter the employee accompanied by her union steward insisted that the union president be allowed to attend. Management denied this right and the employee and steward refused to discuss the matter. The Assistant Secretary held this to be a formal discussion within the meaning of Section 10(e) and found that the union president should have been afforded an opportunity to attend. Therefore he found that the activity violated Section 19(a)(6).

7/ U. S. Department of Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278. This case involved

argues that the respondent must afford the Union an opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees. As this right flows to the Union by virtue of Section 10(e) 8/ of the Executive Order, the denial of the right constitutes a violation of Section 19(a)(6). In addition, it is urged that the denial of union representation interferes with the right of the employee affected to assist the labor organization and to be fairly represented by the union, and thereby constitutes a violation of Section 19(a)(1) of the Executive Order.

Were these the only decisions bearing on this issue or were this a case of first impression, I would be persuaded a violation had indeed occurred. But the Complainant's argument fails to take into account a more recent decision of the Assistant Secretary which I find to be squarely in

7/ (con't.)

management refusing to permit the exclusive representative to be present at a meeting held by management for the purposes of discussing the implementation of a Civil Service Commission hearing examiner's recommendation in an EEO matter. The Assistant Secretary found that the meeting constituted a formal discussion which had ramifications on the unit employees concerning personnel practices and policies and general working conditions. Therefore, the failure to allow the labor organization to be present violated the right accorded by Section 10(e) and constituted a violation of Section 19(a)(6).

8/ Section 10(e) provides in pertinent part:

"...The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of the employees in the unit."

point. This decision issued January 8, 1974, in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336. In this latter case the employee was called in for a "counselling session" regarding verbal abuse of a superior who refused to allow him to have a union representative present during a discussion of job changes affecting the employee. A second incident occurred when the employee wore civilian clothes to work contrary to a regulation requiring the wearing of a uniform while at the base. The employee was again called in by a superior for "counselling" and he was denied the right to have a union representative present. The Assistant Secretary held that in each instance the matters discussed related "to an individual employee's alleged shortcomings with respect to the alleged abusive language" and to the employee's "alleged failure to follow a uniform requirement..." The Assistant Secretary held that the incidents "had no wider ramifications than being limited to discussions at a particular time with an individual employee concerning particular incidents as to him." Thus the Assistant Secretary found that the counselling sessions did not constitute formal discussions within the meaning of Section 10(e) of the Order and the denial of representation did not constitute a violation of Section 19(a)(6).

In view of this more recent decision of the Assistant Secretary, I am constrained to find that in the instant case a violation of the Executive Order has not been committed. The "counselling session" of Ms. Walder indeed related to her own particular shortcomings regarding her extensive use of leave over a long period of time. Ms. Walder's continued use of her leave resulted in the Respondent issuing two "leave letters" to her and also requiring her to submit to a physical examination to determine if her use of leave was warranted from a health standpoint. The "counselling session" did not involve a grievance over Ms. Walder's latest request for leave nor did it result in any adverse action--although the potential for adverse action was present by her being marked AWOL. I am fully cognizant of the fact that the Union was concerned about the variance in the application of leave standards by different supervisors, but that was not the issue regarding Ms. Walder's conference with the employee relations specialist. The entire discussion centered around Ms. Walder's continued use of leave and the fact that the doctor recommended denial of a portion of her latest request

for leave. In these circumstances, I cannot draw a distinction between the situation in this case and the situation in the Texas Air National Guard case. Accordingly, I am compelled to hold that the denial of union representation here did not violate Section 19(a)(6) of the Executive Order and find that the Union was not entitled to be represented during the "counselling session". It follows therefore, that the denial of such representation did not interfere with any rights assured Ms. Walder by the Executive Order and thus, did not constitute a violation of 19(a)(1).

B. The Alleged Interference With And Restraint of The Union President.

The second issue involved in this case relates to a dispute between the Union officials and the Respondent regarding the type of food service available to the employees working at the Stonite Building. As previously noted, the Service Center is housed in two separate buildings located several miles apart. The majority of the employees work in the Main or Boulevard Building, and the Respondent is in the process of expanding that facility to enable all of the employees to work in one building. The work force at the Stonite Building has been steadily decreasing as space becomes available in the main facility.

The Boulevard Building contains a cafeteria operated by a private concessionaire call ARA. ^{9/} Over a period of time the employees and the Union officials became dissatisfied with the quality of the food service provided by ARA. The dissatisfaction was frequently expressed by the Union officials in meetings with the management and often to the manager of ARA as well. Feelings often ran high, and ARA on more than one occasion threatened to terminate its contract.

At the Stonite Building a cafeteria had been originally operated by Horn & Hardart until some time in 1969. It was then replaced by two small lunch-type facilities operated by

^{9/} ARA operates the cafeteria under contract with the General Services Administration (GSA). It is clear from the evidence, however, that the Respondent had considerable input in the negotiations between GSA and ARA for the type of food services it wanted provided for its employees.

two blind concessionaires under the sponsorship of the State Agency for the Blind. They served pre-made sandwiches and the like. The volume of business diminished at the Stonite Building as the work force decreased due to the phasing out program of the Respondent. In the late summer of 1972, one of the blind concessionaires left the Stonite Building because of the decline in business. The remaining blind concessionaire became quite concerned over the drop in the volume of business and also threatened to leave.

On October 3, 1972 the remaining blind concessionaire pulled out from the Stonite Building. He gave the Respondent approximately 10 days notice of his intention to leave and he took all of the food service equipment which remained in the building. ^{10/} Because of the inaccessibility to outside eating facilities, management became quite concerned that the employees at Stonite would be without any type of food service. Morrill, Director of the Service Center and a representative of GSA approached officials of ARA in an effort to get that firm to provide food services for the Stonite employees. Because of dissatisfaction with the entire service center contract, the officials of ARA were reluctant to assume this responsibility. The Union officials in meetings with management proposed that ARA operate a complete cafeteria at Stonite with hot entrees. ARA rejected this idea and offered to provide a vending machine type of service. The Union officials then polled the employees of both buildings to determine whether they preferred ARA vending services or no facilities at all. A little less than 50% of the employees responded to the questionnaire. Of this number approximately 1,200 opted for no services at all and 25 were in favor of the vending machines.

On October 30, 1972, there was a meeting between Morrill, a representative of GSA, representatives of ARA, and Mrs. McCauley and O'Shaughnessy ^{11/} of the Union. The Union

^{10/} Although not entirely clear in the record, it is apparent that the equipment was provided by the State Agency for the Blind.

^{11/} O'Shaughnessy was an international vice president of the Union and an employee of the Respondent. Although he was present at several meetings with management, he did not testify in these proceedings.

officials were resisting the vending machine type service. Morrill and the representative of GSA took the position that ARA was the only concessionaire available to provide some type of food service, and that it should be instituted as quickly as possible. Many heated statements were made during the course of the meeting. Mrs. McCauley testified that Morrill stated the Union would be responsible if there were no cafeteria facilities at all at the service center. ^{12/}

Although it was under no obligation to provide food service to the Stonite employees, ARA finally agreed to invest in a vending machine type operation. ARA's officials insisted, however, that Respondent give the operation its full support. ARA installed the vending machines, and as a promotional effort to create good will decided to serve free coffee and cake to the employees of both buildings on November 2, 1972. The Union posted leaflets in the Stonite Building urging the employees to refuse the coffee and cake and to support the local chapter of the Union. The manager of ARA was quite disturbed over the leaflets and confronted Morrill about the situation. He indicated that the boycott by the employees had already taken place at the Stonite Building and he was concerned that the notice would be posted in the Boulevard Building as well. He reminded Morrill that ARA had made a considerable investment in equipment for the Stonite operation and there was now a possibility that the service would be boycotted entirely. The manager threatened to recommend that ARA terminate its contract with the entire Service Center.

Morrill called Mrs. McCauley and O'Shaughnessy to his office. There is some conflict as to what was said during the conversation between them. According to Mrs. McCauley, Morrill wanted to know if the Union were going to post the bulletins in the Main Building. Mrs. McCauley replied that she did not know. She testified that the director then told her that if she did so she would be sorry. Morrill, on the other hand, testified that he reminded Mrs. McCauley and O'Shaughnessy that the employees depended upon the cafeteria

^{12/} Morrill denied making such a statement during the meeting. I do not find it necessary, however, to resolve this minor conflict in the testimony in order to decide the issue here.

for food services and if ARA terminated its contract, there would be no facilities available. He stated that Mrs. McCauley took the position that the employees would rather have no service at all in preference to ARA. He then told Mrs. McCauley that if there were no service at all she might well be sorry for that decision.

Concluding Findings

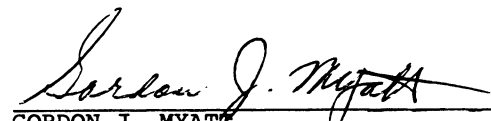
The Complainant takes the position that Morrill's statement to Mrs. McCauley that she would be sorry if she posted the leaflets was inherently coercive and intimidating, and therefore restrained Mrs. McCauley as the Union president in the exercise of her rights under Section 1(a) of the Executive Order. I do not agree. As correctly pointed out in the Complainant's brief, the determination of whether Morrill's statements were coercive must take into careful account the entire circumstances surrounding the making of this statement. The facts clearly show that there had been a long running dispute between the Union officials and the manager of ARA over the operation of the cafeteria services in the Boulevard Building. There is no question that the Union officials were dissatisfied with the quality of the service and voiced their complaints very strongly in meetings with the officials of the Respondent and the officials of ARA. It is equally clear that the Director of the center was concerned about providing some type of food service for the employees, both in the Boulevard Building and the Stonite Building, because of the inaccessibility of eating establishments near the Service Center. There is no indication here that the Director of the Service Center was motivated by any animus toward the Union or the Union officials. Indeed the record reflects many meetings between the Respondent's officials and the Union representatives regarding this problem. The fact that the Respondent decided to go ahead with the vending operation at the Stonite Building against the wishes of the Union does not constitute, in my judgment, union animus. It is obvious that the overriding concern was to provide some type of food services and ARA was the only concessionaire available. When Morrill spoke to Mrs. McCauley it was apparent that he was concerned over the complaints by the ARA manager that the coffee and cake "peace offering" was being boycotted at the urging of the Union. This concern was intensified by the possibility that ARA would terminate its contract at the Service Center and leave that facility void of any food services. Taken in this context, it is quite clear that Morrill

was holding the Union officials responsible if the employees were without any type of food service. There was no threat of reprisal in his statement nor was there any indication that there would be any retaliation against Mrs. McCauley or any other Union official. In my judgment, Morrill was simply stating that the Union would have to bear full responsibility if ARA decided that it would terminate its contract with the Service Center.

Accordingly, I find nothing in these circumstances to indicate that Morrill was threatening Mrs. McCauley, either personally or as the chief representative of the local chapter of the Union. I further find that his statements did not interfere with or restrain Mrs. McCauley in the exercise of any rights assured her under the Executive Order. I shall, therefore, recommend dismissal of this portion of the complaint.

Recommendation

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the complaint herein be dismissed in its entirety.


GORDON J. MYATT
Administrative Law Judge

Dated: May 1, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES NAVY,
NAVAL AIR STATION (NORTH ISLAND),
SAN DIEGO, CALIFORNIA

UNITED STATES NAVY,
NAVAL AIR STATION (NORTH ISLAND),
SAN DIEGO, CALIFORNIA
A/SLMR No. 422

Respondent

and

Case No. 72-4306

ANTONIO G. SERRANO, AN INDIVIDUAL

Complainant

DECISION AND ORDER

On June 14, 1974, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-4306 be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 26, 1974


Paul J. Wasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

This case involved an unfair labor practice complaint filed by Antonio G. Serrano, an individual (Complainant), against the United States Navy, Naval Air Station (North Island), San Diego, California (Respondent). The complaint alleged that the Respondent violated Sections 19(a)(1) and 7(d) of the Executive Order by its refusal to accept a grievance at step one of the agency's grievance procedure by requiring that the Complainant submit his grievance in writing. At the hearing, the complaint was amended to include an alleged violation of Section 19(a)(2) of the Executive Order.

The Administrative Law Judge found that the Complainant had submitted an oral grievance to his immediate supervisor pursuant to the first step of the Respondent's grievance procedure and that this oral grievance was not accepted by his immediate supervisor or the Storage Branch Manager on the basis that the grievance, as well as other matters the Complainant sought to discuss, should be submitted in writing. The Administrative Law Judge concluded that even if the Respondent had, without justification, insisted that the Complainant state his grievance in writing, such a violation of its unilaterally established grievance procedure, in the absence of discriminatory motivation, or disparity of treatment based on union membership considerations, would not violate Section 19(a)(1) or (2) of the Order. In this latter regard, it was found that there was no evidence that the Complainant was discriminated against in regard to hiring, tenure, promotion or other conditions of employment, or that the Respondent interfered with, restrained, or coerced the Complainant in the exercise of his rights in violation of Section 19(a)(1) or (2) of the Executive Order. The Administrative Law Judge also concluded that Section 7(d)(1) of the Order does not confer any rights enforceable under Section 19. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, and noting that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed in its entirety.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



submit his grievance in writing. At the hearing, the complaint was amended, without objection by Respondent, to include an allegation of violation of Section 19(a)(2) of the Executive Order.

A hearing was held in San Diego, California, on December 4, 1973. Complainant's request for extension of time for filing briefs, consented to by Respondent, was granted for good cause. The parties' timely briefs were received on or about February 4, 1974. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence at the hearing, I make the following findings of fact, conclusions and recommendation:

Findings of Fact

1. The Respondent Activity is located on North Island, San Diego, California. Complainant is a civilian employee of the Screening Section of the Supply Department. Complainant is not in a bargaining unit; however he is a member of American Federation of Government Employees, AFL-CIO (hereinafter also referred to as "AFGE"), which represents wage board (blue collar) employees in the same section of the Supply Department, and had assisted the National Representative of AFGE, Mr. Molina, in the handling of bargaining unit grievances for some three to four months prior to the hearing.

2. Complainant testified that on March 26, 1973, he told his immediate supervisor, Mr. Anthony Marusch, that he was grieving about the fact that he and another equipment specialist had to take annual leave while there were warehousemen assigned on a training program doing equipment specialist work. Complainant was very candid about raising other non-grievance matters. He stated, for example,

"...I indicated that I knew he could not do nothing about it or these other matters that I brought up -- the safety and in regard to safety glasses and signs being posted." (Tr. 14; See, also Tr. 20-21)

Complainant wanted to talk to Mr. Donald Brackmann, Storage Branch Manager, and he testified that Mr. Marusch told him in the course of their meeting on March 26, that he would try and set up a meeting with Mr. Brackmann; that on the morning of March 28, Mr. Marusch told him Mr. Brackmann "wanted my grievance in writing" (Tr. 15); that he, Complainant, protested putting his grievance in writing and showed Mr. Marusch NASNI Instruction 12770.1B which provided, in the first step of the grievance procedure that, "An employee shall initiate the informal procedure

.....
In the Matter of: :

UNITED STATES NAVY :
NAVAL AIR STATION (NORTH ISLAND) :
SAN DIEGO, CALIFORNIA, : Case No. 72-4306
Respondent, :
:
and :
:
ANTONIO G. SERRANO, AN INDIVIDUAL, :
Complainant. :
.....

Basil L. Mayes, Esquire
Labor Relations Advisor
Regional Office of Civilian Manpower
Management
Suite 1313
110 West "C" Street
San Diego, California 92101
For the Respondent

Leo Molina, Esquire
National Representative
American Federation of Government
Employees, AFL-CIO
Local 1085
2223 El Cajon Boulevard
San Diego, California 92104
For the Complainant

Before: WILLIAM B. DEVANEY
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 and was initiated by a complaint dated June 12, 1973, and filed June 14, 1973. The complaint alleges violations of Sections 19(a)(1) and 7(d)(1) of the Executive Order by the refusal of Respondent to accept a grievance at step one of the agency's unilateral grievance procedure by requiring that Complainant

by presenting his grievance orally to his supervisor." (Ass't. Sec. Exh. 1(a)). Again, Complainant stated that he told Mr. Marusch, "You can tell him [Mr. Brackmann] that there's other problems that I want to talk to him about, too, in regards to safety." (Tr. 15). Complainant further testified that on the afternoon of March 28, Mr. Marusch told him that "Mr. Brackmann still wants it in writing." (Tr. 15). Complainant took no further action under the grievance procedure but filed an unfair labor practice charge.

3. Complainant's representative, Mr. Molina, in a letter dated June 1, 1973, addressed to Mr. John Shea, U.S. Department of Labor-LMSA made the following request:

"It is further requested that Mr. Serrano's complaint be referred back to the second level of the grievance procedure and that the supervisor be instructed to accept the grievance on an informal basis and to act promptly and fairly on it." (Ass't. Sec. Exh. 1(a), Exhibit E).

Complainant, by letter dated July 12, 1973, addressed to Mr. Shea, concluded with this statement,

"...Therefore, I now request that my complaint not be remanded back to the agency, but adjudicated by the Department of Labor, since management (Captain McKenzie) has chosen to refuse my allegations based on false and irresponsible statements made by his agents." (Ass't. Sec. Exh. 1(a), Exhibit F; Complainant's Exh. 1).

Although Complainant first denied that he stated he was no longer interested in pursuing his grievance, as requested by Mr. Molina, when confronted with the correspondence admitted that he had because he didn't believe the grievance would be handled properly (Tr. 29).

4. Mr. Marusch testified that on March 26, 1973, Complainant asked to talk to him and that Complainant said he was concerned about safety procedures, signs, training programs and incidentals and said "I would like to personally talk with Mr. Brackmann." Mr. Marusch denied that Complainant used the word grievance and/or that Complainant was proceeding under the North Island grievance procedure. Mr. Marusch talked to Mr. Brackmann and told him that Complainant wanted to talk to him about the safety and training program; that Mr. Brackmann said "Real fine" but he would like Mr. Serrano (Complainant) to put down what he wants to discuss in writing so he (Brackmann) can be prepared and discuss the matter with him; that when he told Complainant that Mr. Brackmann would like to have the matters written down so he could prepare and discuss them with him, Complainant got upset and used a little

absence language. Mr. Marusch admitted that Complainant quoted a directive of some sort. Mr. Marusch denied that he had a second conversation with Complainant on March 28.

5. Mr. Glen Silvers, also an equipment specialist, was called as a witness by Complainant. Mr. Silvers first testified that Mr. Marusch used the word "grievance" but immediately retracted and said that Mr. Marusch asked Complainant what he wanted to discuss with Mr. Brackmann and then said; "Well, put it in writing" (Tr. 33).

6. Mr. Brackmann testified that when Mr. Marusch talked to him on March 26, he asked what Complainant wanted to talk about; that Mr. Marusch said Complainant wanted to talk about a number of things including safety, some detail procedures and other items; that he told Mr. Marusch to ask Complainant to scribble down the items he wanted to discuss so that he (Brackmann) could get the necessary documents, or preparation, so that he could discuss the matters with Complainant. Mr. Brackmann stated that Mr. Marusch did not use the word "grievance" and he stated that he had never neglected or refused to discuss a grievance with Complainant. On cross-examination, Mr. Brackmann stated that under the North Island grievance procedure if the immediate supervisor is unable to resolve the problem that the employee brings, he is to refer it to whomever does have the authority to resolve the problem, and admitted that that was what Mr. Marusch was doing when he called to talk about Complainant's problems. Nevertheless, Mr. Brackmann testified that he did not insist on having Complainant's grievance in writing; that he simply asked for a list of subjects that Complainant wished to discuss.

7. After the unfair labor practice charge was filed, a meeting was scheduled for May 2, 1973, to discuss the matter. Complainant's representative, Mr. Molina, suffered a heart attack and was hospitalized and on or about April 25, Mr. Brackmann, having learned of Mr. Molina's illness, saw Complainant and asked if he wanted another representative, or if he wanted to discuss the unfair labor practice charge with Mr. Brackmann at that time. Complainant declined to discuss the matter at that time and said he wanted to go forward with the meeting already scheduled for May 2. On or about April 27, 1973, Mr. Dave Johnson, of the Industrial Relations Department, called Complainant and asked if he would meet with Mr. Brackmann and officials from the IRD office. Complainant told Mr. Johnson that he had already talked to Mr. Brackmann, and had told Mr. Brackmann that he wanted his representative present at the meeting already set for May 2. Complainant further testified that Mr. Ron Groat, also of the IRD office, thereafter contacted him and again asked if he would meet with Mr. Brackmann and officials from IRD. Complainant responded "No, we will meet on the 2nd of May." (Tr. 17).

8. Without explanation, Respondent cancelled the meeting scheduled for May 2, 1973, for the purported reason that,

"...attempts were made informally to resolve the matter or to at least discuss the basis for it... When the attempts were rebuffed, the meeting that had been scheduled for May 2 was cancelled..." (Ass't. Sec. Exh. 1(a), Exhibit B, letter dated July 5, 1973, addressed to Area Administrator and signed by Capt. Robert P. McKenzie; Tr. 87-88).

Conclusions

I find that Complainant presented an oral grievance to his immediate supervisor; that, presumably, the grievance concerned the forced taking of annual leave; and that both Mr. Marusch and Mr. Brackmann knew that Complainant had a grievance which he sought to bring under the North Island grievance procedure. I further find that in addition to a grievance, Complainant requested, through his immediate supervisor Mr. Marusch, a meeting with Mr. Brackmann to discuss other matters about which he stated he was not grieving. As a result, Mr. Brackmann, while indicating a complete willingness to discuss any problem with Complainant, was uncertain what subjects Complainant wished to discuss and asked that Complainant write down what he wanted to talk about. Complainant construed this request as a demand that he reduce his grievance to writing. Mr. Marusch admitted that Complainant quoted a directive which Complainant further identified as NASNI Instruction 12770.1B, and specifically that portion which provided that a grievance in the first step "shall" be presented "orally". Neither Complainant nor Respondent did anything to resolve the matter. Complainant, while insisting that he had a right to present his grievance orally, continued to renew his request to talk to Mr. Brackmann about matters other than his grievance and never indicated any willingness to jot down the subjects, other than his grievance, that he wanted to talk about. Respondent never suggested that Complainant simply list the subjects other than his grievance that he wanted to discuss with Mr. Brackmann. From all of the testimony and evidence I find that Respondent did, knowingly, insist that Complainant state in writing what his grievance was, as well as insist that Complainant state in writing the other subjects he wished to discuss with Mr. Brackmann. While I have found that Respondent knew that Complainant was presenting a grievance under the North Island grievance procedure, it was far from clear what Complainant was grieving about, in part, because Claimant requested a meeting with Mr. Brackmann about a variety of matters most of which he was not presenting as grievances, and, in part, because, even from Complainant's testimony, it was not clear what his grievance was. Thus, he testified that

his grievance was "the fact that we were to take 40 hours annual leave, but we had warehousemen in our section doing equipment specialist work" (Tr. 14); but he stated he "didn't believe it proper for... [equipment specialists] to open boxes, which calls for a warehousemen's job" (Tr. 14); and he stated, referring to Mr. Marusch, "he had tried to resolve matters regarding safety" (Tr. 21), "We had talked of this as privately between him and myself previously, and not in a grieving manner and had discussed the situation. I finally decided to file a grievance after much thought" (Tr. 21).

Of course, a provision, such as North Island's, which provides that grievances shall be presented orally, designed to simplify and to expedite the presentation of grievances, became an acute deterrent to expeditation here. On the one hand, Claimant passionately embraced "shall" present his grievance "orally" as a sacred right on which he insisted to the point that he refused to put in writing the matters, apart from his grievance, that he wished to discuss. On the other hand, Respondent's representatives showed no true willingness to reach a satisfactory solution and Respondent's act of cancelling the scheduled meeting of May 2, 1973, was improvident and ill-advised and the asserted justification therefor was a discredit to Respondent.

Deplorable as the action of Respondent was in cancelling the meeting of May 2, 1973, there is no evidenced indicating that Respondent thereby violated Sections 19(a)(1) or 19(a)(2) of the Executive Order. The purpose of the meeting scheduled for May 2, 1973, was to attempt informally to resolve the unfair labor practice charge as required by Section 203.2(a)(4) of the Regulations. One would have to be callous and totally insensitive to purpose and intent of Section 203.2(a)(4) to equate Respondent's action with compliance with "attempt informally to resolve" the unfair labor practice. A meeting had been scheduled for this purpose for May 2. Prior thereto, Respondent on three occasions asked Complainant if he wanted to discuss the matter prior to May 2 and on each occasion Complainant stated that he would discuss the matter at the meeting already scheduled for May 2. To conclude, as Respondent asserted in its letter of July 5, 1973, to the Area Administrator (Ass't. Sec. Exh. 1(a), Exhibit B), that "attempts were made informally to resolve the matter or to at least discuss the basis for it", would make a hollow mockery of Section 203.2(a)(4). The further assertion that "...the attempts were rebuffed", as justification for cancellation of the meeting scheduled for May 2, is as absurd as it is false. Although I find that Respondent made no attempt informally to resolve the unfair labor practice, there was no contention that the refusal to attempt informally to resolve the matter constituted an unfair labor practice. Indeed, the gravamen of the complaint was that Respondent violated Sections 19(a)(1) and (2) and 7(d)(1) of the Executive Order by its refusal to accept the oral grievance. As the charged unfair labor practice had already occurred, the refusal to attempt to resolve the unfair labor practice informally did not cause, or bring about, the act - refusal to accept, in violation of Respondent's own unilateral grievance procedure, an

oral grievance - alleged to have constituted the unfair labor practice. It appears that the requirement of Section 203.2(a) (4), that the parties attempt informally to resolve the matter, is an administrative requirement prior to issuance of a notice of hearing and that non-compliance would not per se, constitute an unfair labor practice; however, as this issue is not before me in this proceeding, no determination of that question is made.

The "forced annual leave" decision applied to all employees of the Material Division (Ass't. Sec. Exh. 1(a), letter announcement dated 15 March 1973, signed by Captain R. B. Polk); the detail of employees to screening duties was in operation by September 1972 to meet a then existing high work volume (Tr. 55); Respondent never refused to meet with Complainant; etc. In short, there was, no evidence that Respondent ever discriminated in regard to hiring, tenure, promotion, or other conditions of employment which encouraged or discouraged Complainant's membership in a labor organization; or that Respondent interfered with, restrained, or coerced Complainant in the exercise of his rights, in violation of Section 19(a)(1) or (2) of the Executive Order, except that Respondent did refuse to accept Complainant's oral grievance and insisted that Complainant state his grievance in writing, contrary to Respondent's unilateral grievance procedure.

As noted above, Complainant created a situation that invited the action Respondent took, namely, to request that Complainant state in writing what he wanted to discuss, including the statement of his grievance in writing. But even if Respondent had, without such justification, insisted that Complainant state his grievance in writing, such violation of its unilaterally established grievance procedure, in the absence of discriminatory motivation or disparity of treatment based on union membership considerations, would not thereby violate Section 19(a)(1) or (2). Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, affirmed in pertinent part, FLRC No. 74A-3; In the Matter of: General Services Administration, Region 7, Forth Worth, Texas, Case Nos. 63-4757(CA) and 63-4758(CA) (Report and Recommendation of Administrative Law Judge, dated May 17, 1974).

With respect to Section 7(d)(1), that section of the Order does not confer any rights enforceable under Section 19. Internal Revenue Service, Chicago District and National Association of Internal Revenue Employees, et al., A/SLMR No. 279; U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278; U.S. Department of the Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR. No. 280.

Recommendation

Having found that Respondent had not engaged in conduct prohibited by Section 19(a)(1) and (2) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated June 14, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SEATTLE REGIONAL OFFICE,
SMALL BUSINESS ADMINISTRATION,
SEATTLE, WASHINGTON
A/SLMR No. 423

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3196 (Complainant) against the Seattle Regional Office, Small Business Administration, Seattle, Washington (Respondent) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by the unilateral withdrawal of an agreement during the course of negotiations regarding dues withholding and administrative leave and by conditioning such withdrawal upon the Complainant's modification of its position during negotiations with respect to certain impasse items. It also was alleged that the Respondent violated Section 19(a)(1) and (2) of the Order on the basis that its conduct as described above was directed toward discouraging membership in a labor organization by discriminating against employees with respect to their terms and conditions of employment.

The evidence established that the Respondent and the Complainant commenced negotiations in January 1973, and reached an impasse on four issues on or about April 25, 1973. On April 25, 1973, the Respondent withdrew its prior agreement with respect to an administrative leave provision based on its determination that the terms of the provision were in conflict with policies set forth in the Federal Personnel Manual. At the same time, the Respondent withdrew its previous agreement with respect to a dues checkoff withholding article based on a study being conducted by its central office on the cost of dues checkoff to the Agency which it believed would possibly result in a change in Agency policy prior to consummation of the agreement. The Complainant contended that the Respondent's action in withdrawing these provisions was violative of the Order because such action was contrary to the terms of the parties' Memorandum of Understanding which the Complainant claimed precluded either party from withdrawing agreed-upon items, absent the mutual consent of both parties.

The Administrative Law Judge concluded that because the provision on administrative leave was in conflict with the policies set forth in the Federal Personnel Manual and Section 12 of the Order, the Respondent's withdrawal of its agreement as to this provision was not violative of the Order. Further, although finding that under the terms of the parties' Memorandum of Understanding one party could not unilaterally withdraw from consideration items previously agreed upon between the parties, the Administrative Law Judge concluded that the Respondent's withdrawal of the dues withholding article was not violative of the Order. In this latter regard, he noted, among other things, that the Respondent acted in good faith throughout the

negotiations and did all that could be reasonably expected or it to arrive at a final agreement; that the Respondent reached an agreement with the Complainant on the issue of the dues withholding by reinstating its prior agreement; and that the Respondent continued its efforts to reach an agreement with the Complainant even after the latter terminated the negotiations. Accordingly, he concluded that the 19(a)(1) and (6) allegations in the complaint were without merit and should be dismissed.

As to the alleged violation of Section 19(a)(2) of the Order, the Administrative Law Judge found that there was no evidence that the Respondent had engaged in any discriminatory conduct against employees which was designed to encourage or discourage membership in a labor organization. Under these circumstances, he recommended dismissal of the 19(a)(2) allegation.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge. However, in reaching his decision, the Assistant Secretary did not adopt the Administrative Law Judge's finding that in withdrawing its previous agreement to a provision concerning dues withholding, the Respondent breached the terms of the parties' Memorandum of Understanding. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

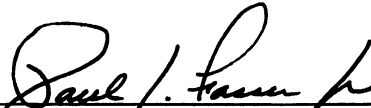
IT IS HEREBY ORDERED that the complaint in Case No. 71-2709 be, and it hereby is, dismissed.

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SEATTLE REGIONAL OFFICE,
SMALL BUSINESS ADMINISTRATION,
SEATTLE, WASHINGTON

Dated, Washington, D.C.
August 26, 1974

Respondent


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

and

Case No. 71-2709

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3196

Complainant

3

DECISION AND ORDER

On May 6, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge. 1/

1/ In agreement with the Administrative Law Judge, I find that under all of the circumstances of this case, the Respondent negotiated in good faith and did not act in a manner inconsistent with its bargaining obligations under the Order when it withdrew previously agreed-upon provisions while negotiations still were in progress. However, in reaching the decision herein, I do not adopt the Administrative Law Judge's finding that in withdrawing its previous agreement to a provision concerning dues withholding, the Respondent breached the terms of the parties' Memorandum of Understanding.



Statement of the Case

This proceeding arose upon the filing of an unfair labor practice complaint on August 21, 1973, by the American Federation of Government Employees (AFL-CIO) Local Union 3196, Seattle, Washington (hereinafter referred to as Complainant and/or Union) against the Seattle Regional Office Small Business Administration (hereinafter referred to as the Respondent), alleging that the Respondent engaged in certain conduct violative of Sections 19(a)(1), (2) and (6) of Executive Order 11491 (hereinafter called the Order). Essentially, the complaint charges that:

(1) The Small Business Administration through its Chief Negotiator, Agent and Acting Regional Counsel, Dulcie Young, since about May 14, 1973, engaged in conduct violative of Sections 19(a)(1) and (6) of the Order by the unilateral withdrawal of an agreement during the course of negotiations regarding the withholding of dues and administrative leave for Local 3196 Union employees.

(2) The Activity further violated Sections 19(a)(1) and (6) of the Order when its agents conditioned negotiations with respect to certain impassed items to withdraw its agreement on dues withholding and administrative leave positions unless the exclusive representative would modify its demands at the negotiating table with respect to certain impassed items; and

(3) The Respondent violated Section 19(a)(1) and (2) of the Order as its conduct had the aim or object of discouraging membership in a labor organization by discriminating against employees within the exclusive unit from enjoying certain terms and conditions of employment including but not limited to administrative leave and having their dues withheld.

A hearing was held in the above-captioned matter on January 24, and 25, 1974, in Seattle, Washington. The parties through their counsel and/or representatives were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues herein and to present oral argument and file briefs in support of their positions. A brief from the Respondent was submitted for consideration of the undersigned.

1/ The Complainant had also alleged a violation of Section 19(a)(5) of the Order but this was withdrawn prior to the hearing and is not considered in this proceeding. See Withdrawal Request and Approval, Complainant's Exhibit No. 1.

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In the Matter of
Seattle Regional Office
Small Business Administration
Seattle, Washington, Respondent Case No. 71-2709
and
American Federation of
Government Employees
Local 3196
Seattle, Washington, Complainant
.....

Appearances:

Carson L. Standifer
National Representative
American Federation of Government
Employees
4614 East 143rd Street
Tacoma, Washington 98446 For the Complainant

Ernest J. Norman, Esquire
Small Business Administration
1441 - L Street, N.W.
Washington, D.C. 20416 For the Respondent

BEFORE: RHEA M. BURROW
Administrative Law Judge

Upon the entire record herein, including my observation of the witnesses and their demeanor and upon the relevant evidence introduced at the hearing, I make the following findings, conclusions and recommendation.

I

Findings of Fact

(1) For about three years prior to the hearing, the Complainant has been certified as the exclusive bargaining representative of all non-professional and professional employees in a non-supervisory capacity at the Small Business Administration Regional Office in Seattle, Washington.

(2) In September 1972 the Complainant and the Respondent negotiated a Memorandum of Understanding ^{2/} (herein called MOU) to serve as the ground rules regarding negotiations for a collective bargaining agreement between the parties.

(3) The MOU was signed on September 27, 1972, by Dulcie C. Young, Chief Negotiator for Respondent and Nicholas Kondur, Alternate Chief Negotiator and President of AFGE Local 3196 for the Complainant.

It provided, inter alia, that: (1) each party would have four members, including the Chief Negotiator, comprising its membership committee; (2) the Chief Negotiator of each party would be the official spokesman to commit his team to a course of action; (3) upon reaching an agreement on each article, the Chief Negotiators would signify the agreement by initialing the agreed-upon item; however, this did not preclude the parties from reconsidering or revising the agreed upon items until a final agreement was reached; (4) no part of the MOU was binding on the parties until agreement was reached on the entire memorandum and it had been approved by the person designated by management to so approve, and ratified by the membership of the Local; (5) the MOU provided for impasse items to be set aside, submitted to Federal Mediation, and Conciliation Service for Mediation and ultimately to the Federal Services Impasses Panel if not resolved by the Mediator.

(4) Negotiations for a collective bargaining agreement commenced in early January 1973. Each side was represented by four members including its Chief Negotiator. Nicholas Kondur was initially the Chief Negotiator for Complainant,

^{2/} Complainant's Exhibit No. 2.

but was later replaced by union representative Carson L. Standifer; Dulcie Young was the Chief Negotiator for the Respondent. There were a number of formal bargaining sessions between January 8 and April 25, 1973, and the parties as of the latter date had six items remaining upon which they had not reached an agreement. It was concluded at the close of the April 25, 1973, session that the services of a Federal Mediator were essential and arrangements were made to secure one. Four of the six items in controversy were presented by Complainant and included: (1) hours of work; (2) reprimands and admonishments; (3) merit promotion; and (4) compulsory arbitration. The two items proffered by the Respondent as being in dispute were Administrative leave and dues withholding. Tentative approval as to the latter two items had been withdrawn at the April 25, 1973, session; the reason advanced for tentative withdrawal action as to dues withholding was that a study was being conducted by the Central Office as to dues deduction cost to the Agency and the information as to cost limitations of 7-1/2 to 12 cents per week, would reflect a possible change in agency policy before consummation of the contract; as to Administrative leave, the Respondent's Chief Negotiator testified that a Civil Service Commission representative had called her attention to a Comptroller General's decision which was incorporated into the Federal Personnel Manual that precluded the type of agreement that the parties had initialed. ^{3/}

(5) The negotiating teams for Complainant and Respondent met in a mediation session with Commissioner Barry Toner, Federal Mediator and Conciliation Service on May 7, 1973, and at this session two articles, hours of work and reprimands and admonishments were resolved. ^{4/} The second session on May 14 with the mediator was spent with the Complainant stating its position and for the third session on May 21, the Mediator had requested written position statements that were to be discussed; at this session, the Respondent changed or made concessions with regard to the remaining four controverted articles as follows: (a) On dues withholding, it adopted the two-cent

^{3/} See Respondent's Exhibit No. 4.

^{4/} The substance of the two items that were resolved at this session are in Respondent's Exhibit No. 8, Article XII, Sections (a) page 9 and Article XXVI, page 18; also Complainant's witness Robert F. Armour testified that these two issues were resolved. Transcript page 85.

per member deduction as initially proposed by the Complainant; 5/ (b) on leave policy its prior position on seminar leave was changed from zero to eight hours; (c) on merit promotions it changed its position so there would be no deletion of a name from the referred list where the selecting official requested reconsideration of a candidate and the panel added that candidate to the list; it also agreed to change its proposal on temporary promotions from a permissive basis only at the discretion of the agency and covering a 60-day period, to consideration of temporary promotions on a mandatory basis; and (d) it proposed several alternatives for consideration as to negotiated grievance, particularly the question of arbitration. The last meeting with the negotiating teams was on June 5, 1973, and at this meeting the Complainant insisted on compulsory arbitration of the entire contract. The parties did agree to the Mediator's suggestion that binding arbitration on specified issues be considered as opposed to the contract in its entirety and that thereafter only the Chief Negotiators meet with the Mediator. I find that as of the May 21, 1973, meeting the question of dues withholding was no longer an item of controversy between the Complainant and Respondent.

(6) Between June 5 and the middle of September 1973, the Chief Negotiators met with the Federal Mediator about five times. The remaining issues in controversy were discussed with respect to leave policy, merit promotion and negotiated grievance procedure. Dulcie C. Young expressed an opinion that an agreement was reached and testified as follows:

"On leave policy we ended up with no hours. Let me give an explanation on that. I had last offered eight hours; then I offered sixteen as long as there was a condition in it that this would be all of the seminar leave offered.

"Mr. Standifer then voluntarily abandoned it because he objected to the limitation of this, would be all, and felt he would be better advised to rely on our existing SOP's which also provided for seminar leave, and pursue in the event he felt so inclined a grievance under the agency procedure for abuse of discretion, so that was voluntary abandoned....

5/ The reported Central Office Cost study had been stated to reflect an outside cost of 12 cents per member and later 7-1/2 cents. However, at the time additional studies were reported as being in progress and Respondent withdrew its position contesting the dues deduction cost that it had initialed pursuant to the MOU.

On merit promotion the Union's proposal to drop one name from the referred list when an additional name had been added upon the request of the selecting official was adopted in the final contract, and the second point in controversy on the merit promotions, the Union's proposal for mandatory temporary promotions was adopted, and the period was three pay periods.

"Q. Finally, the last article which was negotiated grievance procedure. What's the final resolution between parties or that?"

"A. Advisory arbitration with a one-year reopening clause for negotiation."

The Union Chief Negotiator testified as follows when called as a witnesses to the Respondent:

"Q. Did you not call the Mediator at one point and said the agreement had been reached?"

"A. Based on an oral discussion with Ms. Young, based on that discussion, I called the Federal Mediator and I said, 'as soon as she gives one the written language, orally we have discussed it; we have worked this thing out, and when that written language come down and I review it to make sure it states that we have agreement, ' I said, ' we're all through.'"

A Letter dated November 19, 1973, regarding the general agreement between Complainant and Respondent was sent to the Complainant's Chief Negotiator inviting comment as to earlier discussions regarding a negotiated Grievance Procedure Article. No reply was received and on November 30, a copy of the contract as drafted was sent to Complainant's Chief Negotiator. A further letter was sent to him on December 20, 1973, 6/ and on January 8, 1974, the Respondent advised the Commissioner of the Federal Mediation and Conciliation Service by letter 7/ that she had been unable to get a response from Complainant regarding their agreement.

At the beginning of the second day of hearing on February 5, 1974, the Complainant requested and was granted time to discuss, with Respondent's counsel a proposed article in the contract on

6/ The three letters herein are in Respondents Exhibit No. 6.

7/ Respondent's Exhibit No. 7.

leave policy concerning administrative leave in hope of reaching a settlement in the matter. The following ensued:

Judge Burrow: "I take it that's the only proposition we have left? On every other point there is substantial agreement.

Mr. Standifer: Yes, sir...."

After granting time to consider the proposal and a counter-proposal the following transpired:

Judge Burrow: "Do you want to comment on the counter-proposal, Mr. Standifer?"

Mr. Standifer: "Only in respect that we are in agreement with the management's counter-proposal as stated into the record...."

Judge Burrow: "The Complainant was given opportunity to caucus, do you have a report as to the status of your---"

Mr. Standifer: "Yes, we caucused on the management's proposal on advisory arbitration, and we found in that proposal a paragraph that we had never agreed to and couldn't possibly live with and there is no way we can accept that portion of the advisory arbitration article.

Mr. Norman: "Well, I'm afraid at this point in time--the--after making a good faith effort to resolve this as to what we thought was in dispute, the article dealing with seminar time that we will withdraw our offer of settlement and continue with the hearing."

I find that the item relating to leave policy as tentatively agreed to by the Respondent with the Complainant was withdrawn because it was subsequently found to be in violation of existing law and regulations and was not conditioned on a demand by Complainant to modify its position with respect to certain impasse items. Further, I find that after tentative withdrawal of the items of dues withholding and administrative or seminar leave the parties reached an agreement on both of these articles.

Conclusions

Section 11(a) of the Order provides that: "An agency and labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate on agreement, or any question arising thereunder; determine appropriate techniques, consistent with Section 17 of the Order, to assist in such negotiation and execute a written agreement or memorandum of understanding."

Section 12 of the Order provides in part that each agreement between an agency and a labor organization is subject to the following requirements: "(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level."

It is contemplated under Section 11 of the Order, that an agency and a recognized union shall meet and confer with the aim of negotiating a collective bargaining agreement. While there are limitations placed on matters which may be properly negotiated, permissible subjects may form the content of a contract when agreed upon between the parties. The obligation to meet and confer carries with it the duty to reduce to writing, and sign, the terms and conditions of employment assented to and finalized, during such negotiations. While there is no requirement to agree on proposals or concessions, a party may not properly refuse to sign an agreement once it is reached. Such refusal is violative of Section 19(a)(6) of the Order. Headquarters U.S. Army Aviation Systems Command, A/SLMR No. 168. Such refusal on the part of the Union would likewise be a violation of the Order

since under Section 19(b)(6) it has a corresponding duty to consult, confer and negotiate with an agency as required by the Order.

In the case at bar, the record shows that as of April 25, 1973, the Complainant's and Respondent's Chief Negotiators had previously initialed all except four of the proposed articles of the MOU leading to a collective bargaining agreement. Of the agreed upon items, the Union with the permission of Respondent had been permitted to change its position on two articles that were no longer in dispute.^{8/} but when the Respondent asserted the same right on April 25, 1973, it was charged with an unfair labor practice. Despite the tentative withdrawal of the items of dues withholding and administrative leave the Respondent maintains that it continued to negotiate in good faith until an agreement on those was reached; it reduced the contract to writing, but the Complainant refused thereafter to consider or comment on it or to return it to the Respondent.

An issue thus presented for determination is when and under what circumstances, if any, a Chief Negotiator may in good faith withdraw from consideration, a previously agreed upon item in the MOU.

The Respondent argues that the MOU providing that:

When a point or subpoint of an agreement has been reached and initialed by the chief negotiators signifying their approval, this will not preclude them from reconsidering or revising the agreed upon items until final agreement is reached.

permits the unilateral withdrawal of a contract proposal item at any time prior to final agreement.

I find and conclude from the record that Young on behalf of the management team and Standifer for the Union's team were vested and cloaked with the authority to negotiate and agree upon the terms of a contract between the parties. I do not accept the contention that under the terms of their MOU one party could unilaterally withdraw from consideration items in toto previously agreed upon between the parties. Allowing withdrawal at will of previously agreed upon items by either party could make a mockery and travesty of the bargaining process.

It is inherent that bargaining procedures be flexible to permit reconciliation of differences between the negotiating parties. Memoranda of understanding should be interpreted

^{8/} The Respondent's position was that it did not question the Union's right to do so in view of the MOU provision that by initialing the agreed upon item, this did not preclude the parties from reconsidering or revising the agreed upon items until a final agreement was reached. It maintained it had the same right as it had conceded to the Union.

in their broad and overall rather than narrow concept to allow that flexibility necessary to carry out the intent of the parties in reaching an understanding on an agreement. While the MOU did not preclude reconsideration or revision of agreed upon items until final agreement was reached, such was designed to permit change or refinement in language to reconcile it with other articles that might be in conflict rather than affording one party the privilege of withdrawing the substance of a previously agreed upon item. I conclude that the MOU per se did not allow the Respondent to withdraw its approval of the two previously agreed upon items dues withholding and administrative leave from consideration in reaching a collective bargaining agreement.

In the negotiation of agreements, Section 11 of the Order requires that the parties meet at reasonable times and confer in good faith. Section 12 of the Order specifies that in matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequent published agency policies and regulations required by law or by regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level. Applying Section 12 provisions of the Order to the facts in the case at bar, it is evident that the MOU as it is related to approval of 40 hours administrative leave for one individual and delegating to the Union the authority to dispense such leave was contra to the Federal Personnel Manual provision requiring that: "...agencies determine administratively the situations in which they will excuse employees from duty without charge to leave" ^{9/} and Subchapter S-1(b)(2) stating that: "The Comptroller General issues decisions on questions concerning leave and these decisions are binding on all agencies." Since the supplement specifies a Comptroller General's opinion which prohibits more than eight hours of administrative leave per employee representative to attend union sponsored seminar, the Leave Policy Article agreed upon by the Respondent violated the Comptroller General's opinion and the Section 12 provisions of the Order. I conclude that where an agreement has been reached in a MOU article that is in violation of the Order, existing laws, personnel policies set forth in the Federal Personnel Manual such article is a proper matter for withdrawal by an agency and referral for further consideration by the Chief Negotiators; this is obviously so where as here, the substance of the Article itself reveals it is contra to law, regulations, the controlling agreement or this Order and not negotiable thus obviating the necessity for a higher agency level review or an appeal to the Counsel under the provisions of Section 11(c) of the Order.

^{9/} Federal Personnel Manual Supplement 990-2, Book 630, Subchapter S-11-5(a); Respondent's Exhibit No. 4.

As to withdrawal of the item in the MOU meeting to dues withholding at the April 25, 1973 session, I conclude that the Respondent's action was made in good faith but was at least premature; in this situation there were no written agency regulations or published policies to establish that the dues withholding agreed upon in the MOU was in violation of the Order, existing laws, or personnel policies set forth in the Federal Personnel Manual; while there was testimony that a cost study as to dues withholding was being made the results of such study had not crystalized in more than an estimate varying from 7 1/2 to 12 cents.

Not every breach of agreement or premature action by a party to an agreement or memoranda constitutes a violation of the Order. In ascertaining whether there is a violation of the Order, the overall conduct of the parties will be examined in the light of the alleged circumstances as they relate to the total picture or structure of events rather than to an isolated happening. When examined in this light it is concluded: (a) the Respondent acted in good faith prior to April 25, 1973 and this is undisputed; (b) based on its interpretation of the MOU between the parties the Respondent raised the issue of dues withholding in good faith and sought to withdraw this item which had previously been agreed upon between the parties from the list of Agreed Articles; (c) At the first meeting with the Federal Mediator on May 7, 1973, the Respondent manifested good faith efforts to resolve the six formerly unresolved Articles by acceding to the Union's position as to Hours of Work and Reprimands; (d) On subsequent occasions Respondent's advanced various alternatives to issues in controversy demonstrating flexibility in attitude and a willingness to compromise steadfast positions assumed by it and the Union; (e) Specifically, the Respondent reached an agreement with the Union regarding the item of dues withholding by agreeing that the per member deduction would be restored to two cents for the duration of the contract as comprehended in the original agreement before the withdrawal action on April 25, 1973; 10/

10/ Also, see transcript P.P. 109, 110 wherein the President of Local 3196 testified that he recalled the Union Chief Negotiator informing him that all unresolved issues had been settled except as to arbitration and in this regard the agency wanted a period of advisory arbitration rather than compulsory.

The withdrawal of the previously agreed upon and aforementioned specific Articles of Agreement by the Agency on April 25, 1973 were not predicated on demands made by the Complainant at the negotiating table with respect to certain items it had impasse as alleged in the complaint; (g) The Respondent reduced the collective bargaining agreement to writing and sent it to the complainant's Chief Negotiator for comment, response and/or signature before referring it to a higher agency level of approval; (h) The Respondent's continued efforts to consult, confer and negotiate regarding the collective bargaining agreement were thwarted by the Complainant's Chief Negotiator when he broke off relationship with Respondent and failed to respond to phone calls and letters sent to him regarding the collective bargaining agreement they were attempting to negotiate; (i) The Respondent is found to have acted in good faith throughout the bargaining sessions and did all that could be reasonably expected of it to expedite a final agreement.

In view of the foregoing, I conclude that the Respondent did not refuse to consult, confer or negotiate in good faith under Section 19(a) (6) of the Order nor did it engage in conduct violative of Section 19(a) (1) of the Order by interfering with, restraining or coercing employees of the Complainant in the exercise of rights assured by this Order. 11/

I further conclude that the evidence presented does not sustain the alleged violation of Section 19(a) (2) of the Order providing that Agency Management shall not "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion or other conditions of employment." Throughout the negotiations the Respondent is shown to have bargained in good faith and there are no actions shown to have been committed by it which had the effect of encouraging or discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment. The controversial items of per member dues deduction costs and administrative leave for union sponsored seminars did not interfere with continuing uninterrupted collective bargaining sessions or otherwise result in discrimination related to hiring, tenure, promotion or other conditions of employment.

11/ Section 1(a) of the Order provides in part that:
 "Each employee of the executive branch of the Federal Government has the right freely and without fear or penalty or reprisal to form, join and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right...."

Based on the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated Sections 19(a)(1), (2) and (6) of the Order.

Recommendation

Upon the basis of the above findings, conclusions, and the entire record, I recommend that the Assistant Secretary dismiss the complaint herein against the Respondent in its entirety.



Rhea M. Burrow
Administrative Law Judge

Dated: May 6, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,
SALISBURY, NORTH CAROLINA
A/SLMR No. 424

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1738, (Complainant), the exclusive representative of certain professional employees including nurses of the Veterans Administration Hospital, Salisbury, North Carolina (Respondent). It was alleged that the Respondent violated Section 19(a)(1) and (3) of the Order by granting certain of its nurses administrative leave to attend a professional workshop conference conducted by the North Carolina States Nurses' Association (NCSNA), an affiliate of the American Nurses' Association, which was permitted to intervene in the proceedings as a Party in Interest.

The evidence revealed that the Respondent has a policy of granting administrative leave to its professional employees, including nurses, to attend educational conferences and workshops and that pursuant to this policy it granted administrative leave to certain of its nurses to attend a professional workshop conducted by the NCSNA. The evidence also revealed that the NCSNA did not attempt to engage in membership solicitation at the workshop and that its only contact with the Respondent was through an announcement mailed to some 615 other individuals and installations setting forth the program of the workshop and containing information concerning such matters as the registration fees for attending nurses. Additionally, there was no evidence that the NCSNA had attempted to interfere with the bargaining relationship between the Respondent and the Complainant.

The Administrative Law Judge found that the Respondent's policy of permitting its professional employees to attend strictly professional meetings or workshops conducted by professional associations that are labor organizations within the meaning of the Order is not per se violative of the Order. He further found that as the evidence revealed that the subject matter of the workshop was strictly professional in nature and there was no evidence that the Respondent consulted or dealt with the NCSNA in derogation of its collective bargaining obligation owed to the Complainant, the Respondent did not violate the Order by according its nurses administrative leave to attend the workshop. In this connection, he noted that there was no significant contact between the Respondent and the NCSNA regarding the workshop other than the mailed announcement and that the Respondent's action in granting the administrative leave was consistent with the negotiated agreement between the Respondent and the Complainant which encouraged the Respondent's supervisors to schedule tours of duty to accommodate professional employees desiring to take advantage of educational opportunities judged to be of career value.

Accordingly, the Administrative Law Judge concluded that the Complainant had not sustained its burden of proving by a preponderance of the evidence that the Respondent violated Section 19(a)(1) and (3) of the Order.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the case, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 424

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
SALISBURY, NORTH CAROLINA

Respondent

and

Case No. 40-4955(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1738

Complainant

and

NORTH CAROLINA STATE NURSES'
ASSOCIATION

Party in Interest

DECISION AND ORDER

On April 4, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations. Further, the Respondent and Party in Interest were granted leave to file answering briefs to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, including the exceptions and supporting

brief filed by the Complainant, and the answering briefs to the Complainant's exceptions filed by the Respondent and the Party in Interest, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge.

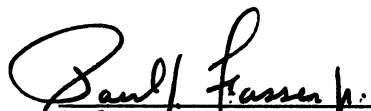
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-4955(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 27, 1974


Paul J. Fasser, Jr., Assistant Secretary
of Labor for Labor-Management Relations

.....
In the Matter of :

Veterans Administration Hospital :
Salisbury, North Carolina, :
Respondent : Case No. 40-4955(CA)

and :

American Federation of Government :
Employees, Local 1738, :
Complainant :

and :

North Carolina State Nurses' Association, :
Party in Interest :
:
.....

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BEFORE: RHEA M. BURROW
Administrative Law Judge

1/ In agreement with the Administrative Law Judge, I find on the basis of the record herein that the Respondent did not violate the Order when it extended leave to certain of its employees to attend a professional work conference sponsored by the Party in Interest.

This proceeding arose under Executive Order 11491 (hereinafter called the Order) pursuant to a Notice of Hearing issued September 21, 1973, by the Assistant Regional Director, U.S. Department of Labor, Labor Management Services Administration, Atlanta Region in which the Veterans Administration Hospital, Salisbury, North Carolina was designated as the Respondent, American Federation of Government Employees' Local 1738 as Complainant, and North Carolina State Nurses' Association as Party in Interest in this proceeding.

On July 16, 1973, a complaint was filed by the American Federation of Government Employees on behalf of Local 1738, Salisbury, North Carolina (herein referred to as AFGE and/or Complainant) against Veterans Administration Hospital, Salisbury, North Carolina (herein called Respondent). The Complainant charged the Respondent with having violated Sections 19(a)(1) and (3) of the Order. Essentially the Complainant charged that on April 16, 1973, Pat Hayes of the North Carolina State Nurses Association (hereinafter called NCSNA), an affiliate of the American Nurses' Association (hereinafter called ANA) issued a memorandum to all Psychiatric-Mental Health Nurses in North Carolina announcing a workshop conference scheduled to be held on May 24-25, 1973; some of the broader objectives suggested for the group to consider included: (1) to become involved in state but national issues affecting psychiatric-mental health nurses now and in the future so that group consensus and pressure can be exerted to bring about predictable change; (2) to share clinical practice roles in order to decrease isolation, increase identity with nursing and improve nursing practices; (3) to distribute and keep current a peer consultation list. Membership in the group was mentioned and all psychiatric-mental health nurses were invited to attend. 1/ A flyer attached to the memorandum specified that the workshop conference would be held at Reidsville, North Carolina on May 24 and 25, 1973, and specified the topic for discussion. On April 27, 1973, Ruby Miller 2/ addressed a reference slip to Mrs. Brandt 3/ and attached it to the April 16, 1973, announcement and flyer stating: "administrative leave will be granted where nurses can be spared. No funds available to defray expenses. Submit names of interested parties to Miss Ruby Miller by

- 1/ The memorandum, Complainant Exhibit 3-B, stated that membership in the conference group was open to any member of NCSNA who holds a position in the mental health field who was interested in this area of nursing practice but that the program sessions were open to any nurse whether or not she holds membership in NCSNA.
- 2/ Ruby Miller was identified during the hearing as being Associate Chief, Nursing Service for Education at Salisbury VA Hospital and a member of ANA.
- 3/ Identified during the hearing as Wanda Brandt, one of nine head nurses at VA Hospital, Salisbury, North Carolina; she was not a member of ANA.

May 9, 1973." 4/ The action by the Veterans Administration in granting administrative leave to employees to attend the workshop conference and soliciting participants on behalf of NCSNA was alleged to constitute unfair labor practice violations since AFGE Local 1738 was the exclusive representative of employees at the Salisbury VA Hospital and ANA as well as its affiliate the NCSNA were recognized labor organizations within the federal sector.

A hearing was held in the above-captioned matter on December 4 and 5, 1973, at Salisbury, North Carolina. All parties were represented by counsel who were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues herein. Oral argument was waived. Briefs were submitted by counsel for all parties within the extended time allotted and have been considered by the undersigned.

Upon the entire record herein, including my observation of the witnesses and their demeanor and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendations.

I

Procedural Matters

At the beginning of the hearing the Complainant moved to dismiss the NCSNA as a Party in Interest to the proceeding or in the alternative for clarification of its position status. The status of NCSNA was discussed at the hearing. 2/ The motion to dismiss was denied to permit litigation of all issues and have a complete record; the parties were directed to brief me further on this issue for my final decision and recommendation to the Assistant Secretary. After reviewing the record, I reaffirm my denial of Complainant's motion to dismiss NCSNA as a Party in Interest for reasons including: (a) the matters specified in the complaint were such that the position of NCSNA was essential to complete investigation of the allegations made; (b) NCSNA was a proper party designated by the Assistant Regional Director (formerly Regional Administrator) pursuant to 29 C.F.R., Part II, Section 201.21 of the Regulations of the Assistant Secretary; and (c) the proceeding before me is not the appropriate forum for dismissal of a Party in Interest designated by the Assistant Regional Director.

I also reaffirm my denial of Complainant's motion first made at the hearing to add alleged violations under Section 19(a)(2), (5) and (6) of the Order to those in the complaint; there had never been any charge with respect to these alleged violations which were more than six months after occurrence of the alleged unfair labor practice; the complaint did not specify Sections other than 19(a)(1) and (3) of the Order to have been violated and no satisfactory explanation was proffered as to the delay in waiting until the day of the hearing to propose the

4/ See also Complainant Exhibit No. 3-A.

3/ I did not consider it necessary to consider the NCSNA motion to dismiss Complainant's motion to eliminate NCSNA as a Party in Interest in

amendment to include alleged violations of Sections 19(a)(2), (5) and (6) of the Order. Since there had been no prior notice to the parties to the preceeding and no investigation or compliance with applicable regulations ^{6/} to matters alleged in the proposed amendment, I was of the opinion that the motion was part of an attempt to delay the proceeding and an abuse of the administrative process of the Assistant Secretary. Thus, I did not consider it appropriate to permit the amendment adding three substantive violations of Section 19(a) of the Order made for the first time at the hearing, absent a compelling reason. I will recommend that the Complainant's motion to add violations of Section 19(a)(2), (5) and (6) to the complaint be denied.

The Complainant also moved during the hearing to amend its complaint to include allegations of unfair labor practices relating to the Winston-Salem conference on May 1, 1973. After entertaining objections from counsel for Respondent and the Party in Interest, I initially denied the motion but later during the course of the hearing permitted evidence as to the May 1 meeting for background information. Upon renewal of the motion the parties were advised that I would reserve judgment as to further consideration of the issue and to argue the motion in their post-hearing briefs. ^{7/}

Despite the fact that the motion for amendment included an additional incident of Section 19(a)(1) and (3) violations of the Order, it occurred more than six months before the motion and hearing; there had been no prior charge filed directly with the party or parties against whom the charge was directed and there had been no attempt to resolve the matter by the parties or investigation thereof by the Assistant Regional Director. Under the circumstances and in the absence of any compelling reason to explain the belated motion to amend the complaint to include the Winston-Salem Conference on May 1, 1973, I find

footnote cont.d'

order to intervene at the hearing under Section 203.11 of the Regulations, inasmuch as it had already been designated as a Party in Interest by the Assistant Regional Director, or to exercise discretion under Section 203.18 and 203.15(g) and (n) to permit intervention at the hearing.

^{6/} See 29 C.F.R., Part II, Section 203.3, 203.4, 203.5(a)(2) and (b) and 203.9(a)(4), (b) and (c).

^{7/} Testimony of the President of AFGE Local 1738 and documentary evidence submitted show that Complainant was aware of the Reidsville and Winston-Salem conferences in June 1973 and there had been no change in situation prior to or within a reasonable period after filing of the complaint which would have precluded disclosure and investigation of the charges by the Assistant Regional Director had such been alleged.

that the matter was not properly before me because the pre-complaint charge and requirements of Section 203.2 and 203.3^{8/} of the regulations of the Assistant Secretary for Labor Management Relations were not complied with by the Complainant and I will recommend that the motion to amend in this matter be denied.

II

Basic Issue

Essentially, the basic issue to be resolved is:

Whether the Respondent violated Sections 19(a)(1) and (3) of the Order by granting administrative leave to certain of its employees to attend a professional workshop sponsored by the North Carolina State Nurses' Association an affiliate of the American Nurses' Association.

Incidental to this issue is the question of whether the policy of the Respondent with respect to educational meetings sponsored by the ANA and its affiliates including NCSNA is in violation of the Executive Order.

^{8/} Section 203.2 provides that:

"Any charge of an unfair labor practice occurring after January 1, 1970, shall be filed directly with the party or parties against whom the charge is directed within six (6) months of the occurrence of the alleged unfair practice. The alleged unfair labor practice shall be investigated by the parties involved and informal attempts to resolve the matter shall be made by the parties. If informal attempts are unsuccessful in disposing of the matter within thirty (30) days, (a) the parties may agree to stipulate the facts to the Assistant Secretary and request a decision without a hearing or (b) a party may file a complaint requesting the Assistant Secretary to issue a decision in the matter: Provided, however, that a complaint to the Assistant Secretary shall not be considered timely unless filed within nine (9) months of the occurrence of the alleged unfair labor practice or within thirty (30) days of the receipt of the charging party of the final decision whichever is the shorter period of time.

Section 203.3 provides in part that a complaint alleging a violation of Section 19 of the Order shall be submitted on forms prescribed by the Assistant Secretary and shall contain the following:

"(c) a clear and concise statement of the facts constituting the alleged unfair labor practice, including the time and place of occurrence of the particular acts and a statement of the portion or portions of the Order alleged to have been violated."

The policy of the Respondent's Department of Medicine and Surgery with respect to granting administrative leave for attendance of its professional employees at educational conferences is of record. ^{9/} It contends that contrary to Complainant's effort to characterize its action as soliciting employees to attend a meeting or meetings of a rival labor organization, it is clear that Respondent was simply following a longstanding policy of permitting its nurses to attend worthwhile educational programs, when they could be spared, in an effort to enhance their ability to deliver patient care.

The Complainant urges that the Respondent's policy of permitting its employees to attend NCSNA workshop conference on administrative leave constitutes a violation of Section 19(a)(3) of the Order. It is further urged that such policy encourages membership by Respondent's employees in ANA and its affiliate NCSNA and discourages membership in other labor organizations such as the Complainant which holds exclusive recognition at Salisbury, North Carolina VA Hospital and this also interferes with its rights under Section 19(a)(1) of the Order.

Counsel for NCSNA opines that the policy of Respondent with respect to educational meetings sponsored by the ANA and its affiliates does not violate the Executive Order. It is stated that there is a matter for resolution of whether a policy will be adopted which will seriously prejudice the rights of ANA and its affiliates such as NCSNA to conduct continuing education not only for the professional nurses of the Respondent but for nurses employed throughout the Federal Government.

III
Provisions of the Order

Section 19(a) of the Order provides that agency management shall not -

"(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;...

"(3) sponsor, control, or otherwise assist a labor organization...."

^{9/} Respondent Exhibit No. 2, pp 7-9.

Section 7(d) provides that recognition of a labor organization does not -

"3. ~~preclude~~ an agency from consulting or dealing with a religious, social, fraternal, professional ^{10/} or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members. Consultations and dealings under subparagraph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) of this section, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees."

10/ Professional was added to the types of lawful associations not qualified as labor organization by Executive Order 11616 on August 26, 1971, which amended Executive Order 11491. In the recommendation for amendment of Section 7(d)(3) it was stated:

"In some instances, agencies may be overly fearful of violating the rights of recognized labor organizations and unnecessarily refrain from proper dealings with professional associations on purely professional matters. To maintain such communications and to avoid further misunderstandings, we recommend that 'professional' be explicitly included among the types of associations listed in Section 7(d)(3) with which an agency may have limited dealings not inconsistent with the rights of recognized labor organizations.

IV

Background Information and Facts

The material facts in this proceeding are not in essential dispute, many having been stipulated or uncontradicted at the hearing and are found to be as follows: AFGE Local 1738 has been since 1964 the recognized labor organization in a unit of all employees except professionals at Respondent's Salisbury, North Carolina hospital, and since 1966 has been recognized in a unit of professionals including nurses at this installation. A collectively bargained agreement is currently in effect for the professional unit.

NCSNA and its parent ANA are now both labor organizations within the meaning of Executive Order 11491, as amended, ^{11/} such status having been acquired sometime prior to 1968. NCSNA has since at least 1968 been the recognized labor organization in a unit consisting of nurses at Respondent's installation at Fayetteville, North Carolina and this is the only facility of Respondent in which NCSNA holds recognition in North Carolina.

Veterans Administration nursing service was established in 1922 Beatrice E. James, Chief of Nursing Service Region 3, which includes Salisbury, North Carolina testified that basic education as a nurse is just the beginning and you must have not only in-service but continuing education programs to maintain professional competence within the service. The Respondent conducts its own educational programs to achieve this objective and since 1926 has, in addition, granted its nurses authorized absence to attend programs conducted by other organizations, including since at least 1952 the ANA and its affiliates such as NCSNA.

Prior to 1967 the Respondent and its Salisbury facility encouraged the participation of its nurses in the professional activities of the ANA. ^{12/} However, after an ANA constituent State Nurses' Association was officially recognized by the Veterans Administration as a labor organization, the Chief Medical Director issued on April 14, 1967,

11/ Labor organization as defined under Section 2(e) of the Order "means a lawful organization of any kind in which employees participate and which exist for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions to their employees."

12/ A 1963 Professional Service Letter - No. 63-2 stated in part: "The American Nurses' Association purposes include 'to foster high standards of nursing practice and to promote the professional and educational advancement of nurses.' Please bring to the attention of all nurses the fact that these goals of the Association are uniquely in harmony with the Department's basic

Letter No. 67-12 stating in part:

"2. The provision of Chapter 20, Part I, MP-5, Employee Organization will henceforth apply to ANA and its constituents. In keeping with VA policies, no interference, restraint, coercion, or discrimination shall be practiced in the VA to encourage or discourage membership in the Association. No internal ANA business such as the solicitation of membership or dues collection shall be conducted on official time.

"3. Excused absence without charge to leave for attendance at ANA meetings where the subject of the meeting is primarily professional may continue to be granted in accordance with MP-5, Part II, Chapter 7, and MP-3, Part II, Chapter 3. Where the subject of the meeting is primarily concerned with internal organization business of ANA, excused absence is not authorized. Similarly, central office will continue to authorize, when possible, support of travel and per diem costs and fees for meetings which are primarily professional in nature but will not approve requests for meetings which are primarily concerned with internal organization business of ANA."

This policy was reemphasized in clarification letters issued November 5, 1968, and July 26, 1973. ^{13/}

Footnote cont.'d.

policy concerning professional relationships and that participation in the Nurses's Association professional activities should lead to improvements in nursing care practices. To the latter end, you will recall that present policy also authorizes hospital directors to excuse the absences of nurses to attend national, state, and local professional meetings without charge to leave."

13/ Respondent's Exhibit 1-D and 1-E. Also DMES Supplement to MP-5, Part II, Chapter 7, Change 1, Paragraph h(2) which provides:

"Education and Training. Heads of field stations or their staff are authorized to approve without charge to leave the absence of physicians, dentists, and nurses...and career interns and career residents...to attend educational conferences, seminars, courses of instruction, etc....Such absences may be authorized provided the employee can be spared and no expenditure of government funds other than salary is involved....In approving requests for authorized absences for educational purposes, consideration will be given to the type of program, the potential value to the VA of such attendance and the value to be derived from establishing and maintaining a liaison between colleges or universities and the Department of Medicine and Surgery."

Ruby Miller, Associate Chief, Nursing Service for Education, testified in substance that she received all announcements from non-VA organizations sent to the hospital concerning their educational programs. When an announcement was received, she, in consultation with the Chief Nurse and Assistant Chief Nurse, evaluated the program as to its potential benefits relating to continuing education of the nurses and better care as to the needs of patients. No regard was given to the identity of the sponsor. On those announcements with programs indicated and found to be worthwhile, ^{14/} copies were made and transmitted to nursing supervisors in the areas of activity relating to the program content. Thus distribution, whether general or limited, depended on the program content. The supervisors, upon receipt of the announcement and attachments concerning the meeting brought the matter to the attention of their nurses advising that if they wished to attend and could be spared they would be granted authorized leave. ^{15/} A nurse expressing her wish to attend submitted a memorandum to her head nurse who in turn indicated whether she could be spared; it was then forwarded to the Chief, Nursing Service. If the nurse could be spared she was granted administrative leave to attend. Nurses attending such programs reported on what they had learned at subsequent monthly general nurses' meetings.

VI

Facts Relating to the Specific Conferences or Workshops

A. Reidsville Conference

The principal distinction between the Winston-Salem Conference held on May 1, 1973, and the Reidsville Workshop on May 24, 25, 1973, was that the former was sponsored by the NCSNA and the latter by a conference group of the NCSNA.

Within the NCSNA there are five conference groups designated to improve nursing practice in a given area of clinical specialty and provide a program of continuing education in that specialty. The

^{14/} Nothing was done if the program was considered unworthwhile.

^{15/} Testimony at the hearing revealed the methods of notice of a conference would be an announcement at a general meeting of nurses, posting on the nurses' bulletin board, or by word passed along to ward nurses by a supervisor or associate nurse who had seen or learned of the announcement.

Psychiatric-Mental Health Conference Group was one of the five groups; it sponsored the workshop on May 24 and 25, 1973, in Reidsville, North Carolina. ^{16/} It planned the program and the NCSNA assisted in the selection of a suitable place to hold the workshop conference, the typing and mailing of the announcements with attachments and provision of educational materials used at the conference. The notices announcing the meeting with program attachment contained information as to the registration fee and a blank requisition form. Faculty for the conference program was determined on the basis of the persons having the best expertise to present the subject and was not limited to membership in any organization or association. The broad objective heretofore set forth in the complaint was also specified. Patricia Hayes testified that in addition to being a laboratory assistant at the School of Nursing, University of North Carolina, she was presently chairman of the Psychiatric-Mental Health Conference Group of NCSNA; she related that the first objective or item listed in the announcement also mentioned in the complaint had referred to preparation by ANA of some standards on psychiatric-mental health, but the material and standards did not arrive in time for use at the meeting and item No.1 was not discussed at the Reidsville conference; the second and third were to prepare a list of nurses who agreed to act as consultants in response to people who were lonely and needed their services in delivery of patient care and to share clinical practice roles by having closer identity with patients who were free to call on them for services. The announcement with attachments was then mailed to 615 individuals and installations including the Salisbury VA hospital. There was no other contact made by the conference group or the NCSNA with Respondent's Salisbury hospital relating to the Reidsville conference workshop. The Respondent reproduced a sufficient number of the announcements and programs for notice to its supervisors. When the completed registration form was received from the ward nurses and forwarded to NCSNA a second mailing was made by NCSNA directly to the registrant nurse; it contained additional information as to the Reidsville workshop and a map as to its location. There were 59 nurses reported to have attended the conference including two non-supervisory nurses and one head nurse from the Respondent's Salisbury hospital. The complainant offered the testimony of Venita Yancey and Joan Hart Brockman who attended the Reidsville conference. One learned of the conference from her head nurse and the other from her ward coordinator. Each testified the conference was educationally beneficial. Neither recalled seeing any ANA or NCSNA membership applications at the meeting and there was no reference to membership having been mentioned at any of the conference discussions.

^{16/} Party in Interest Exhibit No. 2 and Complainant Exhibit No. 3(b) and (c).

b. The Winston-Salem Conference

Testimony regarding this conference was permitted for background information. This conference was sponsored by the NCSNA and was held on May 1, 1973; it was one of a series of three in North Carolina for the purpose of disseminating information compiled in a research book project relating to "Operation Input" sponsored by the NCSNA in collaboration with the North Carolina Board of Nursing and the School of Nursing of the University of North Carolina. ^{17/} The project had been funded in part with funds granted by the United States Department of Health, Education and Welfare to the Regional Medical Program and to the research project at the University of North Carolina at Chapel Hill which made the project possible. Announcement of the workshop conference was mailed by the sponsor to all schools of nursing, hospitals (including Respondent's hospital at Salisbury), and health care facilities employing nurses in the State of North Carolina. As at Reidsville, no contact was made by NCSNA, other than mailing the announcement to Respondent Salisbury Hospital and any of the other installations or facilities. It was estimated that 110 to 115 registrants attended including several from Salisbury. There was no charge for this session as registrants paid for their own lunch and the expenses of the NCSNA staff were paid by the association. Three staff nurses employed at Salisbury who attended the conference testified at the hearing. Their testimony was similar to that involving the Reidsville workshop. All said that the conference was beneficial to their continuing education as nurses. No one testified that ANA membership applications were contained in the package they had received before the meeting but one or more of the witnesses mentioned that such were available along with other publications and materials on an entrance desk at the conference.

There was no reference to membership having been mentioned or discussed at any group meeting or discussion at either the Reidsville or Winston-Salem conferences and none of the witnesses testified that they were urged to join the ANA or NCSNA.

Francis N. Miller, NCSNA Executive Director, testified that all material, flyers, announcements, registration forms, etc., for the May 1973 meeting were typed, printed, collated and mailed by the NCSNA state office staff. Its staff also handled the bookkeeping functions for both meetings, obtaining the meeting place and making hotel or lodging arrangements. NCSNA accepted the pre-registrations, reproduced special material for those meetings, furnished standard materials including membership forms that were used at the meetings. The costs of putting on the program and determining the registration fee was also done by NCSNA. There was no charge for the May 1 meeting as registrants paid their own luncheon expense.

^{17/} Party in Interest Exhibit No. 7.

VII

Discussion and Conclusion

This controversy concerns whether an agency of the Federal Government, in this case the Respondent Salisbury Veterans Administration Hospital, may, without violating the Order, grant its nursing personnel composed of a professional unit represented by Complainant, administrative leave to attend an educational meeting or workshop conference sponsored in whole or in part by a professional association also recognized as a labor organization. It has been stipulated that the May 24-25 conference at Reidsville, North Carolina, was sponsored by a conference group of the NCSNA and the latter is recognized as a labor union under the Order.

The Complainant urges that Section 7(d)(3) of the Order providing that:

"Recognition of a labor organization does not--

(3) preclude an agency from consulting or dealing with a religious, social, fraternal, professional or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members. Consultations and dealings under subparagraph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) ^{18/} of this section, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees."

means just what it says and the conditioning words, "not qualified as a labor organization" eliminates all labor organizations from being dealt with under this section.

^{18/} Section 7(e) and (f) of the Order provides:

"(e) an agency shall establish a system for intra-management communication and consultation with its supervisors or association of supervisors. These communications and consultations shall have as their purposes the improvement of agency operations, the improvement of working conditions of supervisors, the exchange of information, the improvement of managerial effectiveness and establishment of policies that best serve the public interest in accomplishing the mission of the agency.

"(f) informal recognition or formal recognition shall not be awarded."

The Party in Interest states that unless the policy of Respondent is violative of the Order--a conclusion clearly not called for by reasons which have been advanced, there is no basis for finding a violation of the Order by the Respondent. The policy of the Respondent with respect to its dealing with all organization including professional associations such as NCSNA both prior to and after the latter was recognized as a labor organization has previously been set forth; ^{19/}

In Internal Revenue Service, Chicago District, A/SLMR, No. 279 the Assistant Secretary adopted the findings of the Administrative Law Judge "...that Section 7(d)(1) of the Order does not confer rights on employees but simply disavows taking away certain rights that may be conferred elsewhere by law or regulation." I am of the opinion that the same applies to Section 7(d)(3) as expressed by the Administrative Law Judge in his decision upon which A/SLMR No. 279 was based. Section 7(d)(3) provides that exclusive recognition does not preclude dealing with religious, professional, or other lawful associations not qualified as a labor organization concerning matters of particular applicability to members of such associations. Surely, it is not argued that Section 7(d)(3) confers on such associations the right to be dealt with concerning such matters; it is simply not precluded. The provisions of Section 7(d)(1) concerning the selection of a representative in a grievance proceeding, are the same, mutatis mutandis, as the provisions of Sections 7(d)(2) and 7(d)(3). These provisions speak as to what they do not do. They do not preclude certain conduct by executive agencies. They do not thereby create any rights in the organizations or their employees to engage in that conduct.

In Federal Aviation Administration, Atlanta, ATC Tower, A/SLMR No. 300, the Assistant Secretary held that the Air Traffic Control Association, Inc., (ATCA) had materially changed its organizations and operations since the issuance of A/SLMR No. 10, and that its current relationship with the Federal Aviation Administration is consistent with that permitted a professional association under Section 7(d)(3) of the Order. Further, it was stated:

"In finding that the Administrative Law Judge had too narrowly interpreted the types of 'consultations' and 'dealings' which a professional association and an agency or an activity may properly engage in under Section 7(d)(3) without causing the professional association to assume the characteristics of a labor organization within the meaning of Section 2(e) of the Order, the Assistant Secretary noted that ATCA's consultations and dealings with the FAA did not assume the character of formal consultations of general employee-management policy. With respect to such dealings he observed that the pertinent issue is not the amount of contact between a professional association and an agency or activity, but, rather, the nature of their consultations and dealings. To put a more restrictive meaning on the consultations and

^{19/} See footnotes 11 and 12, supra.

dealings permitted a professional association under Section 7(d)(3) would, in the Assistant Secretary's view render that Section nugatory and be inconsistent with the intent of the Order as expressed in the Report and Recommendations (1971) of the Federal Labor Relations Council."

It has been long well established that an activity's reliance on agency directives does not divest the Assistant Secretary of authority to find violation of Section 19(a) of the Executive Order. (Charleston Naval Shipyard, A/SLMR, No. 1). When the Respondent's policy relating to attendance of its employees at professional meetings or conferences is examined, it is not materially different from that expressed by the Assistant Secretary in Federal Aviation Administration, Atlanta ATC Tower, A/SLMR, No. 300. While the most utmost care must be exercised by an agency to assure that the nature of its contacts between a professional association that is also a labor organization do not assume the character of formal consultation on matters of general employee-management policy, I do not find it a per-se violation of the Order for agency professional employees to attend professional workshop conferences related to their career educational and professional development. Thus, I do not find the Respondent's policy of permitting its professional employees to attend a strictly professional meeting or conference of a professional Association which is also a labor organization as being in violation of Section 19(a)(1) and (3) of the Order.

I also find that there were no consultations or dealings by it with the Respondent which assumed the character of formal consultations of general employee-management policy. All matters at Reidsville, were sponsored by the Psychiatric-Mental Health Group and were for all practical purposes herein concerned entirely of a professional nature. I further find that there were no consultations or dealings between Respondent and NCSNA which extended to areas where recognition of the interests of one employee group could result in discrimination against or injury to the interests of other employees.

The Supplemental Agreement for Professional Unit signed by representatives of the Agency and AFGE Local 1738 approved during 1970 contains the following provision in Section XII, entitled Selection of Tours of Duty, Paragraph 9:

"When practicable, supervisors with the concurrence of the appropriate division of service chief are encouraged to schedule an employee's hours of duty so that he may take advantage of educational opportunities which are judged to be of career value. An exception to the scheduling provisions of this agreement may be made for this purpose." ^{20/}

^{20/} Complainant Exhibit No. 4.

The undisputed evidence as it relates to the policy of Respondent agency was that it had been granting to its professional nurses since 1926, when they could be spared, administrative leave to attend worthwhile educational programs of career value designated to improve or enhance their ability to deliver better patient care. Sponsors of such programs were immaterial; many conferences had been promoted in whole or part by VA and non-VA hospitals, educational institutions such as state universities and various professional organizations and associations including ANA and NCSNA since at least 1952. It is interesting to note that some of the witnesses who attended the conferences in May 1973 were unaware as to what organization was sponsoring the respective program, but all testified as to the enrichment and educational value they derived by having attended. I find that the subject matter of the May 1973 workshop conference was of a professional and educational nature related to improvement of nursing care and practice and there were no dealings or consultations by the Respondent with the NCSNA in conflict with the collective bargaining agreement.

The Respondent Agency had the responsibility under Section 12(b) of the Order to maintain the efficiency of government operations extended to it and to determine the methods, means and personnel by which its operations were to be conducted. Payment of salary for administrative leave to agency professional employees to attend worthwhile educational programs of career value is a matter of privilege reserved to agency management under that Section. This is particularly so where there is no direct or significant contact between the agency and program sponsor and the only benefit involved is salary paid directly to professionals for the administrative leave granted to attend a professional meeting. The registration charge was paid by the employee to cover the expense of the meeting and there was no payment by the Respondent of any sum inuring to the benefit of the Psychiatric-Mental Health Conference Group or the NCSNA. The matter of privilege with regard to payment does not extend to whether the granting of administrative leave may be in violation of the Order. However, in this case, it is noted that the collective bargaining agreement between the parties provided for and encouraged tours of duty to accommodate employees desiring to take advantage of educational opportunities judged to be of career value.

In any event, Section XII, paragraph 9 of the collective bargaining agreement between Respondent and Complainant encouraged agency chiefs or supervisors to schedule its employees hours of duty to take advantage of educational opportunities judged to be of career value. The uncontradicted testimony shows that the conference or programs sponsored by the NCSNA in May 1973 met this test.

On the basis of the foregoing and the entire record, I find:

1. That the policy of Respondent with respect to granting administrative leave to its professional nursing employees represented by Complainant to attend educational meetings sponsored by organizations and associations including the NCSNA was not in violation of Section 19(a)(3) of the Order.

2. There were no consultations and dealings by NCSNA with the Veterans Administration which assumed the character of formal consultations of general employee-management policy or which extended to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees.

3. That the grant of administrative leave by the Respondent to its agency professional employees was in conformity with and not in violation of the collective bargaining agreement between Complainant and Respondent whereby agency supervisors were encouraged to schedule employees' hours of duty to take advantage of educational opportunities judged to be of career value; the Respondent is not found to have sponsored, controlled or given assistance to a labor organization in violation of Section 19(a)(3) of the Order; and

4. That Respondent's agency management did not violate Section 19(a)(1) of the Order by interfering with, restraining, or coercing any of its employees in the exercise of rights assured them under the Order. 21/

Conclusion

In view of the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(1) and (3) of the Order. 22/

21/ Employee rights are set forth in Section 1(a) of the Order wherein it is provided that:

"Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and any such employee shall be protected in the exercise of this right...."

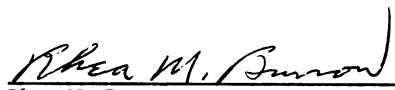
22/ Section 203.14 of the Regulations of the Assistant Secretary for Labor Management Relations provides:

"A Complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

Recommendations

Upon the basis of the above findings, conclusion, and the entire record, I recommend that the Assistant Secretary:

1. Deny the Complainant's motion to dismiss the NCSNA as a Party in Interest to this proceeding;
2. Deny the Complainant's motion to amend the complaint by adding alleged violations of Section 19(a)(2), (5), and (6) of the Order to those specified in the complaint;
3. Deny the Complainant's motion to amend its complaint to include allegations of an unfair labor practice incident occurring more than six months prior to the hearing and relating to the Winston-Salem, North Carolina conference held on May 1, 1973; and
4. Dismiss on the merits the complaint alleging violations of Section 19(a)(1) and (3) of the Order.


 Rhea M. Burrow
 Administrative Law Judge

Dated: April 4, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND REMAND OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PUGET SOUND NAVAL SHIPYARD,
 DEPARTMENT OF THE NAVY,
 BREMERTON, WASHINGTON
 A/SLMR No. 425

This case involved an unfair labor practice complaint filed by the Bremerton Metal Trades Council on behalf of its affiliate member American Federation of Government Employees, Local 48, AFL-CIO, (Complainant) against Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington (Respondent) alleging that the latter violated Section 19(a)(1) and (2) of the Order by denying a promotion to one of its employees because of his union activities.

The evidence revealed that the Assistant Regional Director issued to the Complainant a number of blank Requests for Production of Documents two days prior to the commencement of the hearing in the instant case and that Complainant, after filling in such Requests, served them on Respondent on the day prior to the hearing. At the hearing, the Respondent made a Motion to Quash the Requests contending, among other things, that the Requests were not issued in accordance with Section 206.7(b) and (c) of the Assistant Secretary's Regulations. The Administrative Law Judge denied the Motion to Quash on the grounds that it was not his function to determine the propriety of the Assistant Regional Director's actions in issuing the Requests and that he was not then in a position to ascertain the reasons for the Assistant Regional Director's actions. Thereafter, and pursuant to a motion by the Complainant, the Administrative Law Judge issued his own Requests for the Production of Documents covering the same documents previously requested except those he determined were readily obtainable by the Complainant.

The Respondent refused to comply with the Requests issued by the Administrative Law Judge contending that the Administrative Law Judge was without jurisdiction to issue such Requests to Produce as long as the Requests issued by the Assistant Regional Director were outstanding. In reaching his decision in this matter, the Administrative Law Judge excluded from evidence all of the documents which Respondent sought to introduce which were covered by his Requests to Produce but under the circumstances decided not to exclude any of the evidence related to such documents. Also, while finding that there was insufficient evidence to establish that the employee involved was denied a promotion because of his union activities, the Administrative Law Judge recommended that the Respondent be required to promote the employee because of its failure to comply with his Requests to Produce Documents.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY,
BREMERTON, WASHINGTON

Respondent

and

Case No. 71-2572

BREMERTON METAL TRADES COUNCIL
ON BEHALF OF ITS AFFILIATE MEMBER
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 48, AFL-CIO

Complainant

DECISION AND REMAND

On April 29, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not violated Section 19(a)(1) and (2) of the Order by its failure to promote James M. Byrd to the position of Metal Inspector "A" as alleged in the complaint. However, based on, among other things, the Respondent's "patently unjustified" refusal to honor Requests for Production of Documents issued by the Administrative Law Judge, the latter recommended that the Respondent be required to promote Byrd to the above-noted position. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Report and Recommendations and a supporting brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing. Except as provided below, the rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations only to the extent consistent herein.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent's refusal to comply with the Administrative Law Judge's Requests for the Production of Documents was patently unjustified. Also, while the Assistant Secretary agreed with the Administrative Law Judge's decision to exclude from evidence all of the documents sought by the Administrative Law Judge which Respondent attempted to introduce in its own case, he found that under the circumstances which revealed Respondent had no justifiable reason for failing to comply with the instant Requests, that all written and oral evidence related to the documents covered by the Requests should have been excluded pursuant to Section 206.7(e) of the Assistant Secretary's Regulations and not considered in the determination of the case. In this connection, he noted that the Assistant Secretary lacks subpoena enforcement powers, and concluded that it is necessary to utilize all means available to the Assistant Secretary under Section 206.7(e) to secure the cooperation of parties with, among others, Administrative Law Judges and Hearing Officers, in their efforts to perform their responsibility of developing complete and accurate records upon which decisions by the Assistant Secretary can be based.

Regarding the Administrative Law Judge's recommendation that the Respondent be required to promote the employee involved because of its failure to comply with the Requests to Produce Documents, the Assistant Secretary concluded that such a remedy based solely on a failure to comply with the Assistant Secretary's Regulations was punitive in nature and would not effectuate the purpose and policies of the Order.

Noting that in his Report and Recommendations the Administrative Law Judge relied on certain written and oral evidence which was related to the documents which Respondent refused to produce, the Assistant Secretary remanded the case to the Administrative Law Judge for the purpose of issuing a Supplemental Report and Recommendations without considering such related evidence.

On October 23, 1973, two days prior to the commencement of the hearing in this matter, the Assistant Regional Director issued to the Complainant a number of blank Requests for Production of Documents. The Complainant filled in the blank Requests and served them on the Respondent near the close of business on the next day, October 24, 1973. After the hearing opened, the Respondent filed a Motion to Quash the Requests with the Administrative Law Judge contending, among other things, that the Requests were void as they were not issued in compliance with Sections 206.7(b) and (c) of the Assistant Secretary's Regulations. The Administrative Law Judge denied the Motion to Quash on the grounds that it was not his function to determine the propriety of the actions of the Assistant Regional Director and that he was not then in a position to ascertain the reasons for the Assistant Regional Director's actions. Notwithstanding the Administrative Law Judge's ruling denying the Motion to Quash, the Respondent continued in its refusal to produce the documents on the ground that the Requests were void. Thereafter, pursuant to a request of the Complainant and in accordance with the Assistant Secretary's Regulations, the Administrative Law Judge issued his own Requests for Production of Documents covering all of the documents previously requested except those he determined were readily obtainable by the Complainant.

The Respondent refused to comply with the Requests issued by the Administrative Law Judge and refused to produce the documents sought herein, except those it chose to introduce in its own case. It contended, in essence, that the Administrative Law Judge was without jurisdiction to issue such Requests so long as the Requests issued by the Assistant Regional Director were outstanding. ^{1/} In view of the Respondent's refusal to comply with his Request to Produce Documents, the Administrative Law Judge excluded from evidence all of the documents which the Respondent sought to introduce in connection with its own case which were covered by his Requests to Produce but, under the particular circumstances, decided not to exclude the Respondent's evidence which was related to such documents. Also, while finding that there was insufficient evidence to establish that Byrd was denied a promotion because of his union activities, the Administrative Law Judge recommended that the Respondent be required to promote Byrd as a remedy for its failure to comply with his Requests to Produce Documents.

^{1/} In agreement with the Administrative Law Judge, I find no merit in Respondent's contention that the continued existence of the Requests issued by the Assistant Regional Director deprived the Administrative Law Judge of the authority to issue his own Requests.

In agreement with the Administrative Law Judge, I find that the Respondent's refusal to comply with the Administrative Law Judge's Requests to Produce Documents was patently unjustified. In my view, such indefensible conduct as was displayed by the Respondent in its refusal to produce the documents requested by the Administrative Law Judge must not be allowed to impede the Assistant Secretary and Administrative Law Judges in their efforts to secure documentary evidence which is deemed material and relevant to the matters being considered. Any policy to the contrary would permit parties effectively to interfere with the process established by the Assistant Secretary in the exercise of his authority under the Executive Order. In this connection, it should be noted that the Assistant Secretary lacks subpoena enforcement power and, thus, must rely on the cooperation of the parties with, among others, Administrative Law Judges and Hearing Officers in their efforts to perform their responsibility of developing complete and accurate records upon which decisions by the Assistant Secretary can be based. ^{2/} In these circumstances, I find that it is necessary to utilize all means available to the Assistant Secretary under Section 206.7(e) of the Assistant Secretary's Regulations to discourage parties from withholding documentary evidence where, as here, such evidence has been properly requested by an Administrative Law Judge. ^{3/} As noted above, I agree with the Administrative Law Judge that the arguments advanced by the Respondent to support its refusal to comply with the Administrative Law Judge's Requests were unjustified in that they had no relation to the ultimate issue of whether or not the Complainant and the Administrative Law Judge were entitled to the documents sought in the Requests. And while I agree with the Administrative Law Judge's decision to exclude all of the documents sought by the Administrative Law Judge which the Respondent sought to introduce in its own case, under the circumstances herein which reveal that the Respondent had no justifiable reason for failing to comply with the Requests, I find that all written and oral evidence related to those documents covered by such Requests should have been excluded from the record by the Administrative Law Judge pursuant to Section 206.7(e)

^{2/} Cf. United States Customs Service, Region IX, Chicago, Illinois, A/SLMR No. 210.

^{3/} Section 206.7(e) of the Assistant Secretary's Regulations provides in pertinent part, "If any party, officer or official of any party fails to comply with such Request(s) . . . the Assistant Regional Director for Labor-Management Services, Hearing Officer, Administrative Law Judge, or the Assistant Secretary may disregard all related evidence offered by the party failing to comply, or take such other action as may be appropriate."

of the Assistant Secretary's Regulations and not considered in the determination of this matter. 4/



Noting that in his Report and Recommendations the Administrative Law Judge relied on certain written and oral evidence which was related to the documents which the Respondent refused to produce pursuant to the Administrative Law Judge's Requests to Produce, I shall remand the case to the Administrative Law Judge for the purpose of issuing a Supplemental Report and Recommendations, without considering such related evidence. In this regard, both parties shall be afforded the opportunity to submit briefs, at a time specified by the Administrative Law Judge, on the issue as to which evidence is related to the subject documents as well as the effect the exclusion of such evidence may have on the merits of the instant case.

ORDER

IT IS HEREBY ORDERED that this proceeding be, and it hereby is, remanded to the Administrative Law Judge for the purpose of preparing a Supplemental Report and Recommendations consistent with the above decision, and submitting such Supplemental Report and Recommendations to the Assistant Secretary in accordance with Section 203.22 of the Assistant Secretary's Regulations.

Dated, Washington, D. C.
August 28 1974

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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In the Matter of :
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 PUGET SOUND NAVAL SHIPYARD :
 DEPARTMENT OF THE NAVY :
 BREMERTON, WASHINGTON, :
 Respondent :
 :
 and : Case No. 71-2572
 :
 :
 BREMERTON METAL TRADES COUNCIL :
 on behalf of its affiliate member :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 48, AFL-CIO, :
 Complainant :
 :

H. Tim Hoffman
Averbuck & Hoffman
Oakland, California 94612
For the Complainant

Stuart M. Foss
Labor Relations Advisor
Office of Civilian Manpower Management
Department of the Navy
Washington, D. C. 20390
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated March 2, 1973 and filed March 5, 1973. It alleges that Respondent violated Sections 19(a)(1) and (2) of the Executive Order. The violation was alleged to consist of promoting several employees on or about September 5, 1972, to the position of Metals Inspector "A" but not including James M. Byrd among those promoted because of his union activities.

4/ With respect to the Administrative Law Judge's recommendation that, notwithstanding the fact that the evidence established the Respondent did not violate the Order when it refused to promote Byrd, the Respondent should be ordered to promote him because of its failure to comply with the Requests to Produce Documents, in my view, such a remedy based solely on a failure to comply with the Assistant Secretary's Regulations is punitive in nature and would not effectuate the purpose and policies of the Order. Therefore, I do not adopt the Administrative Law Judge's findings and recommendations in this regard.

The Area Administrator investigated the complaint and reported to the Assistant Regional Director. On March 26, 1973, the Respondent filed with the Assistant Regional Director (then the Regional Administrator) a Motion to Dismiss. On August 30, 1973 the Assistant Regional Director issued a Notice of Hearing to be held on October 25, 1973 in Seattle, Washington. The same day he referred the Motion to Dismiss to the Administrative Law Judge. By an Amended Notice of Hearing the place of the hearing was changed to Bremerton, Washington.

Hearings were held in Bremerton on October 25, October 26, and November 13, 1973. Both sides were represented by counsel. Pursuant to extensions of time granted therefor, the parties filed timely briefs on February 11, 1974.

Requests for Production of Witnesses and Documents

The hearings in this case were scheduled by the Notice of Hearing on August 30, 1973 to begin, and did begin, on October 25, 1973. On Friday, October 19, 1973, counsel for the Complainant (whose office is in Oakland, California) called the office of the Assistant Regional Director in San Francisco and stated that he had recently been retained and wanted some Requests for the Production of Documents. The person to whom he spoke told him that the entire professional staff was out of town, that the following Monday (October 22) was a federal legal holiday, and that a member of the professional staff would call him back on Tuesday. On October 23, 1973 an official of the San Francisco office returned the call. When told what Complainant's counsel wanted, he said he would have the Requests made out and signed in blank and sent to the office of counsel for the Complainant, and that Complainant's counsel could fill in the names of the witnesses and documents requested. Complainant's counsel sent for the blank Requests, signed by the Assistant Regional Director, and received them the same day, October 23, 1973.

Complainant's counsel filled in six blank requests, three in the form of Requests to specified individuals to appear at the hearing in Bremerton, Washington at 10:00 a.m. on October 25, 1973 and three others in the form of Requests to certain individuals to appear and bring with them documents described therein. The next day, October 24, the Requests were served on Respondent at 4:00 p.m. The Respondent's official business day ended at 4:30 p.m. The Requests were that the individuals appear at 10:00 a.m. October 25.

After the opening of the hearing on October 25, the Respondent filed with me a copy of a Motion to Quash the

Requests to produce signed by the Assistant Regional Director. A copy had been served on the Complainant the evening before. The Motion to Quash was based on the grounds that they were not issued in accordance with the Regulations (Section 206.7), that they allowed insufficient time for compliance, that the Requests for Production of documents were a "fishing expedition", and that the Requests were served on the wrong persons. This last ground was later waived.

Section 206.7 of the Regulations provided in part at the time here pertinent:

"(a) Regional Administrators, Hearing Officers, or Hearing Examiners, as appropriate, upon their own motion, or upon motion of any parties to a proceeding, may issue a Request for Appearance of Witnesses or Request for Production of Documents at a hearing held pursuant to Parts 202, 203, and 205 of this chapter.

"(b) A party's motion to a Regional Administrator shall be in writing and filed with the Regional Administrator not less than ten (10) 1/ days prior to the opening of a hearing or with a Hearing Officer or Hearing Examiner during the hearing, and shall name and identify the witness(es) or document(s) sought, or both, and state the reasons therefor. Simultaneously with the filing of the motion with the Regional Administrator, copies shall be served on the other parties and a written statement of such service shall be filed with the Regional Administrator.

"(c) Within five (5) days after service of the Motion, a party may file its objection to the motion with the Regional Administrator and state its reasons therefor. Simultaneously with the filing of the objection with the Regional Administrator, copies shall be served on the other parties and a written statement of such service shall be filed with the Regional Administrator."

At the hearing I ruled that it was not my function to review the actions of the Assistant Regional Director; that I did not know why he acted as he did and was not then in a position to ascertain his reasons. Therefore, I denied the Motion to Quash. However, since it was within my function to

1/ By amendment of November 8, 1973, this ten-day period was changed to fifteen days. 38 Fed. Reg. 30875.

pass on what sanctions, if any, should be imposed for non-compliance, I announced that I would not impose any sanction for noncompliance with certain parts of the Requests to Produce Documents and would reserve judgment on what sanctions, if any, to impose for not complying with the remainder of the Requests to Produce issued by the Assistant Regional Director.

Subsequently the Respondent stated that it would comply with the Requests to Produce Witnesses but would not comply with the Requests to Produce Documents on the ground that they were void for not having been issued in compliance with Sections 206.7(b) and (c). 2/ The refusal to produce the documents at the hearing pursuant to the Requests was not on the ground that there was inadequate time to do so but on the ground that the Requests were void. However, it stated that it intended to offer some of the requested documents in evidence as part of Respondent's case.

Thereafter the Complainant moved that pursuant to Sections 206.7(a) and (b) the Administrative Law Judge issue a Request for the production of the same documents as had been requested in the Requests of the Assistant Regional Director. The Respondent did not oppose the granting of the Motion on the ground that there would be insufficient time to comply with such Requests by the time the hearing began on the merits; I made it plain I would be sympathetic with such a contention. The only grounds of opposition were that I was without jurisdiction to issue such Requests while the Requests of the Assistant Regional Director were outstanding and not complied with 3/ and that the Regulations permitted moving for the issuance of such Requests by the Assistant Regional Director or the Administrative Law Judge but not both. 4/ I granted the motion and made the Requests. 5/

The Respondent agreed to produce, and did produce, the witnesses. But it adhered to its position not to produce the documents, except such of them as it chose to introduce as part of its own case. Such of the documents as were produced were produced only as part of Respondent's defense.

Although I ruled that the Requests of the Assistant Regional Director were not nullities (or, as Respondent contended, "void

2/ Tr. 79-81.

3/ Tr. 98-99, 102.

4/ Tr. 97.

5/ Tr. 90-102.

ab initio"), its position that they were invalid is not devoid of any merit. Respectable authority could be cited on either side of that question. Which procedural steps are jurisdictional prerequisites to further steps, and what time limitations are jurisdictional, are seldom clear. The wide disparity between the procedure specified for obtaining Requests from an Assistant Regional Director and the procedure for obtaining Requests from an Administrative Law Judge indicates that compliance with the former is not jurisdictional. But the question is not free of doubt. Hence I would impose only a slight sanction for noncompliance with the Requests of the Assistant Regional Director. I have little doubt of the sincerity of the refusal to comply with those Requests.

The refusal to comply with the Requests of the Administrative Law Judge stands on a different footing. The argument that I was without jurisdiction to make the Requests because the Assistant Regional Director's Requests were outstanding and not complied with is virtually incomprehensible. The Respondent took the position that if I would quash the Requests of the Assistant Regional Director I would then have jurisdiction to issue my own Requests. But the Respondent's argument was that the Requests from the Regional office were nullities, or, as he stated it a number of times, "void ab initio". It is difficult to comprehend the rationale behind an argument that the existence of a void document deprives the Administrative Law Judge of jurisdiction he would otherwise have. I find this argument to be without substance.

The argument that Section 206.7 of the Regulations authorizes motions for Requests to be made to an Assistant Regional Director or to an Administrative Law Judge, but not both, is of a similar nature. The Respondent's position is that the motion made to the Regional office was invalid because not in writing and not made with service and notice as prescribed in the Regulations. It is difficult to comprehend the rationale behind an argument that an invalid motion made to the Regional office renders invalid what would otherwise be a valid motion made to an Administrative Law Judge who could entertain the motion. I find this argument to be without substance. Also, I do not read the opening words of Section 206.7(a) to be in the disjunctive. The phrase "Regional Administrators, Hearing Officers, or Hearing Examiners" does not reasonably mean that the motion may properly be addressed to only one of them in the same case. I conclude that if a motion is made to one and is ineffectual, another motion may be made to another who has authority to entertain it.

Additionally, an Administrative Law Judge is given authority by Section 206.7(a) to issue Requests on his own motion. The existence of such authority would go far toward validating a Request for Production of Documents issued after an invalid

application therefor. But I have found above that the application was not invalid.

With respect to the refusal to comply with the Requests for Production of Documents, there remains the question of what sanctions should be imposed.

The Requests to Produce witnesses and documents issued by the Assistant Regional Director are in evidence as Exhibits C1 through C6. The Requests issued by the Administrative Law Judge were oral; they adopted the Requests issued by the Regional office with specified exceptions.

In the course of presenting its evidence in support of the defense to the Complaint, the Respondent offered a number of exhibits in evidence. Some of them were documents called for by the Requests which the Respondent refused to produce pursuant to the Requests but later offered as part of its evidence. Exhibits R3, R5, and R9 were called for by paragraph 3 of Exhibit C5. Exhibit R10 was called for by paragraph 5 of Exhibit C5. Exhibits R11 through R16 were called for by paragraph 3 of Exhibit C5. Other exhibits offered by the Respondent are claimed by the Complainant to have been called for by the Requests but I find that these additional Respondent exhibits either were not called for or were called for only by Requests of the Assistant Regional Director with respect to which I held I would not impose any sanction for failure to produce.

Section 206.7(e) of the Regulations provides in part:

"...If any party, or officer, or official of any party fails to comply with such Request(s)...the Regional Administrator, Hearing Officer, Hearing Examiner, or the Assistant Secretary may disregard all related evidence offered by the party failing to comply or take such other action as may be appropriate."

The Complainant objected to the receipt in evidence of Exhibits R3, 5, and 9 through 16 on the ground that they had been called for by the Requests for Production and had not been produced pursuant to the Requests. I received those Exhibits in evidence with the express caveat that in writing my Report and Recommendation I might decide, under the above-quoted provision, not to give them any consideration.

I now decide not to give Exhibits 3, 5, and 9 through 16 any consideration. The facts found below are found without consideration of those exhibits. However, even disregarding those Exhibits but considering related testimony, as is seen below, I conclude that the Complainant has failed, so far as

the record shows the facts, to sustain its burden of proof under Section 203.14 of the Regulations. The reasons for considering the related testimony, and the question of what, if any, further sanction should be imposed for failure to comply with the Requests of the Administrative Law Judge, are discussed below under the caption Discussion and Conclusions.

Facts

James M. Byrd was employed by the Respondent on January 27, 1969 as a Metals Inspector "B" in the Nondestructive Testing Division. The grades of Metals Inspector, in ascending order, are Metals Inspector Helper, Metals Inspector "C", Metals Inspector "B", and Metals Inspector "A". Classifications of Metals Inspector higher than "A" are supervisory positions.

Prior to his employment by the Respondent Shipyard, Byrd had been employed as a Metals Inspector by the Pearl Harbor Naval Shipyard. He commenced his employment there in October 1964 as a Helper. In April 1965 he was promoted to Metals Inspector "C", in November 1965 he was promoted to Metals Inspector "B", and on December 1, 1968 he was promoted to Metals Inspector "A". On December 13, 1968 he resigned from his employment at the Pearl Harbor Naval Shipyard to return to the continental United States.

To be qualified as a Metals Inspector, an employee needs a degree of expertise in several fields. An employee's qualification in the various fields is determined by examination and accreditation. Byrd was qualified at both Pearl Harbor Naval Shipyard and Puget Sound Naval Shipyard as a nuclear and non-nuclear radiographer, in magnetic particle inspection method, and in nuclear and non-nuclear liquid penetrant inspection method. In addition, he was qualified at Puget Sound to be radiographer in charge, and sometimes acted in that capacity. Although the standards for the grade of Metals Inspector "A" required somewhat more versatility at Puget Sound than at Pearl Harbor, Byrd was qualified for that grade at either Shipyard.

In June 1969 Byrd joined Local 48 of the American Federation of Government Employees. Local 48 is a component of Bremerton Metal Trades Council, AFL-CIO. The Council is the exclusive representative of certain of Respondent's employees, including Metals Inspectors. Byrd was Executive Vice President of Local 48 in 1972, Chief Steward from late 1970 through 1972, and a shop steward thereafter. In his capacity as Chief Steward, Byrd processed about twelve informal grievances, about half of them to the first line supervisor and department head, and about half of those to the Shipyard Commander. Stewards could engage in union business during working hours. They were always, upon request, given time to do this but not always at the times requested. Byrd spent about four hours per week of

working time on union business. The Chief Steward of the International Association of Machinists, another component of the Metal Trades Council, spent about half his working time on union business.

In August 1969 there were promotions to Metals Inspector "A". Byrd applied for the promotion. He was rated ineligible and not promoted. He filed an informal grievance for not having been promoted. Local 48 declined to pursue the grievance and Byrd enlisted the assistance of a Vice President of A.F.G.E., Morten J. Davis. They went to the Industrial Relations Office, and spoke to James Rich. Rich said that since Byrd had been a Metals Inspector "A" at Pearl Harbor, although briefly, his rating as ineligible for that position at Puget Sound had been a mistake. He said that because of the error the next time there were promotions to Metals Inspector "A" Byrd would be given "priority consideration." A formal grievance was not presented.

The next time there were promotions to Metals Inspector "A" was in September 1972. Byrd was not given priority consideration. The record does not show what position Rich held in the Industrial Relations Office or that he ever made a record or told anyone that Byrd should be given priority consideration because of the error in August 1969. There is nothing in the record that indicates that the error, or Rich's not telling anyone that Byrd should be given priority consideration the next time because of the error, was motivated by Byrd's union activities. At the time Byrd had been a member of Local 48 for two months.

The Incident of February 4, 1971

On February 4, 1971, in the course of performing his work as a Metals Inspector "B", Byrd was inspecting a heavy casting. To complete his inspection it was necessary that the casting be inverted. He spoke to Lyle Clark, his immediate supervisor at the time. Byrd called Alfred D. Malloy, a union steward, to be present. During the discussion Reynold E. Lewis, Senior Supervisor, Inspector of Metals, came by on a normal tour of his work area. Lewis was Byrd's third tier supervisor. Clark offered Byrd help in turning over the casting but Byrd said he thought it was rigger's work. In the course of the conversation Clark and Malloy turned over the casting.

After Clark left the discussion, Lewis (the third tier supervisor), continued talking with Byrd and Malloy. Lewis made a comment which Byrd and Malloy understood to mean that when the time came for rating Metals Inspectors "B" for promotion to "A" Byrd could not be well rated because he was absent so much of the time on union business and therefore needed more than normal supervision. Needing "more than normal supervision"

is one of the standard criteria for evaluating people for promotion to Metals Inspector "A". Lewis testified that he did say that Byrd required more than normal supervision; he had been so told by Byrd's immediate supervisors. Lewis testified that he had no recollection of his having said that his view was predicated in any part on Byrd's union activities, and if what he said was so understood, it was not so intended.

In corroboration of Byrd's recollection of that conversation, Complainant introduced Exhibit C8. That was a photocopy (the original was displayed at the hearing) of a page in a small notebook that Byrd carried with him in which he recorded all sorts of matters that occurred that he wanted to record, including such matters as his wife telling him to pick up a loaf of bread on the way home. Exhibit C8 was a note he wrote in that notebook within an hour after the conversation on February 4, 1971 and promptly showed to Malloy. It is handwritten, and reads as follows:

"Feb. 4, 1971.

Mr. Lewis made the statement that I required more than normal supervision (because of union activities) and that when rates came out People who didn't require more than normal supervision would be rated. Witnessed by Al Malloy, shop steward."

Byrd testified that the parenthetical phrase "because of union activities" was placed in parentheses because that was his way of emphasizing words in what he wrote. If that is Byrd's way of emphasizing words in what he writes, it is an extremely unusual form of emphasis, if not unique to Byrd.

I find that Lewis on February 4, 1971 said to Byrd that Byrd would not be rated highly for promotion to Metals Inspector "A", when the occasion should arise, because Byrd required more than normal supervision; and that although Lewis did not say or mean that Byrd's need for more than normal supervision was because of Byrd's union activities, Byrd and Malloy understood Lewis so to imply.

Malloy, the shop steward, testified that he knew Lewis fairly well, and that he believed that Lewis was neither opposed to nor in favor of unions, and that Lewis was neutral on the matter. Lewis testified that he thought unions were necessary. Before he reached his present position, he had been a member of two unions, one for two and a half years and the other for eight years. In the latter union he had been Treasurer for three years. I find that Lewis did not say or mean to imply that Byrd, should the occasion arise, would not be well rated for promotion because of his union activities, and that Lewis did not have an anti-union animus. I find further that if Lewis believed that Byrd should not be highly

rated for promotion, because of his union activities or for any other reason, there is nothing in the record to support a conclusion that he ever communicated such view to anyone other than Byrd and Malloy.

The September 1972 Promotions

In August 1972 the Respondent decided to promote six Metals Inspectors "B" to Metals Inspectors "A". Normally about one-third of the 75 Metals Inspectors in the Nondestructive Testing Division were Metals Inspectors "A", but with the inevitable turnover in so large a number, the ratio fluctuated somewhat. Announcement was made of the proposed promotions and 24 Metals Inspectors "B", including Byrd, put in applications for the promotion. At about the same time announcement was made of proposed promotions to Metals Inspector "B".

In rating applicants for promotion, two kinds of evaluation are made. One, by a "subject matter expert", rates the value of the applicant's experience. The other rating is of the applicant's personal qualifications as distinguished from his experience.

The promotions to Metals Inspector "A" were made on September 5, 1972. Byrd was not included among the six promoted. Lewis was neither the subject matter expert on the promotions to Metals Inspector "A" nor did he rate the applicants' personal qualifications. He was the subject matter expert on the promotions to Metals Inspector "B", in which Byrd was not involved. When Byrd made some inquiries at the Industrial Relations Office about the promotions, he was told by some unidentified person there that Lewis was the subject matter expert on the promotions to Metals Inspector "A". This was simply an error. Lewis played no part in the evaluating or selecting of applicants for promotion to Metals Inspector "A".

Those who rated Byrd's qualifications for promotion were Lyle Clark and Joseph L. Maggi. Clark had been Byrd's immediate supervisor for two years and Maggi for part of the remaining time Byrd had been employed.

Clark was of the view that while Byrd had the technical capabilities for being a good Metals Inspector "A", he was deficient in some aspects of the application of his abilities. He believed he had more trouble than with other inspectors in getting Byrd to complete a job without coming back to him with minor and even petty questions or other details, that Byrd lacked initiative, and that he (Clark) spent much more time with Byrd than with other inspectors for Byrd to finish a job. He rated Byrd poorly on ability to perform his work without more than normal supervision and less than satisfactory in dealing with others on the job. Some other employees had complained about working with Byrd because they felt he raised too many picayune matters.

Maggi was also of the view that in performing his work Byrd raised too many minor problems but improved after Maggi spoke to him about it. Both Clark and Maggi testified, and I find, that neither Lewis nor anyone else suggested to them or spoke to them about how they should rate Byrd, that they did not know about the conversation of February 4, 1971, of Lewis, Byrd, and Malloy, and that they gave no consideration to Byrd being a union steward or Byrd's other union activities.

The ratings by the supervisors of the 24 who were considered for promotion to Metals Inspector "A" were evaluated by a Rating Panel of three members. Two of them were the subject matter experts for the promotion. One of the two, Robert A. Flomer, testified. He testified that Lewis did not influence their ratings or try to do so, but on another occasion had said that inspectors taking compensated time off from work to spend it on such matters as the union or the recreation association affected costs by increasing overhead. Flomer thought Byrd was highly qualified and gave him a high score for technical ability but a lower score for getting work done without supervision. He had reached that conclusion from Byrd's ratings by his supervisors and from personal observation in the shop. He testified also that Byrd too often went to his supervisors on matters he should have resolved himself. He had also heard complaints by mechanics who did the work Byrd inspected that Byrd was excessively insistent on literal perfection. Lewis also testified about such complaints.

Of the 24 who were considered for promotion to Metals Inspector "A", seventeen, including Byrd, were rated highly qualified, but Byrd was rated fifteenth of the seventeen. Six were promoted. Four of them were qualified as radiographers-in-charge; in Byrd's own shop only he and Lewis were so qualified. All six had more seniority than Byrd, but seniority is not a factor in promotion unless everything else is equal. The six finally selected were the six most highly rated by the Rating Panel.

Discussion and Conclusions

The Evidence in the Record.

The problem in this case is not simply to determine whether Byrd was better qualified for promotion than the six who were promoted (or any one of them), and therefore should have been promoted. We do not sit in general review of the conduct of an agency or an activity in selecting employees for promotion. The issue is much narrower. The complaint alleges a violation of Sections 19(a)(1) and (2) of Executive Order 11491, as amended. The issue, then, is to determine whether Byrd was not promoted to interfere with, restrain, or coerce him in the exercise of a right assured by the Order

("the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization"), or to discourage membership in a labor organization by discrimination in promotion. If not promoting Byrd was the result of anything else, however reprehensible or meritorious, it was not a violation of the Executive Order.

To ascertain what motivated Byrd's non-selection for promotion, let us look at what the officials who participated in the selection of those to be promoted did, and what motivated them.

The selecting official was Commander Horwath, the Quality Assurance Officer. He selected the six who were rated the best qualified by the Rating Panel. There is not a word in the record about Commander Horwath other than that he was the Quality Assurance Officer, did the selecting, and selected the six most highly rated by the Rating Panel. No violation of the Executive Order can be found in such conduct. It does not appear that he had a bias for or against Byrd or unions or union activities.

Nor is there anything to indicate that any member of the Rating Panel acted in contravention of the Executive Order, either as members of the Panel or as subject matter experts. There is nothing to indicate that any of them acted on the basis of anything other than the ratings before them and their sincere belief of the relative merits of the persons being considered. That one or more of them may have, or have not, departed from a strict application of the Federal Personnel Manual is irrelevant to this proceeding so long as the departure, if there was any, was not motivated by union considerations or foreseeably and reasonably could have had an impact on union membership or activities.

The supervisors who rated Byrd's abilities were not shown to have any improper motives or otherwise to have acted improperly. There is nothing in the record to indicate that Clark or Maggi had any bias with respect to unions or were influenced in any part by Byrd's union activities. Maggi, indeed, appeared to be sympathetic toward Byrd; he simply thought that while Byrd was well qualified some others were better qualified. There is nothing to indicate such belief was not sincere. Clark was of the view that while Byrd had excellent technical qualifications he was lacking in initiative, was overly technical in the application of inspection standards, created dissatisfaction among other employees, and required too much of Clark's time to get a job done. There is nothing in the record to indicate such views were not sincerely held by Clark and very little to indicate they were not justified. Others apparently shared at least some of those views.

The only person about whom there is any evidence that he expressed views which, if carried out, would be violative of Section 19(a)(1) or 19(a)(2) was Lewis, Byrd's third tier supervisor. It was testified by Byrd and Malloy that on February 4, 1971 Lewis said that when promotions to Metals Inspector "A" came around Byrd would not be rated qualified because he required more than normal supervision because of his union activities. I have found that Lewis did not make or intend such statement although Byrd and Malloy understood him so to imply.

But even if Lewis did make such statement, the subsequent non-promotion of Byrd would not be a violation of the Executive Order. 6/ First, it was an isolated instance of an expression of anti-union views nineteen months before the alleged discriminatory action. And second, Lewis was not shown to have had anything to do with the promotions nineteen months later, and much to show that he did not. Those who did participate in the promotion actions uniformly testified they knew nothing about Lewis' alleged statement of February 4, 1971 and were not influenced by Lewis in the actions they took nor did Lewis try to influence or persuade them. The Complainant's argument is little more than an argument that on February 4, 1971 Lewis, a supervisor, predicted that when promotions came Byrd would not be promoted because of his union activities; nineteen months later, when promotions came, Byrd was not promoted (by others); ergo, Byrd was not promoted because of his union activities. That such an argument reaches a non sequitur need not be explicated.

On the basis of the record, the Complainant has not sustained its burden of showing that Byrd was not given a promotion because of his union activities.

Respondent's Refusal to Comply with Requests for the Production of Documents.

In the discussion, supra, under the caption "Requests for Production of Witnesses and Documents", I concluded that while we should disregard certain exhibits introduced by the Respondent because of the Respondent's recalcitrance in not producing those documents pursuant to the Requests, we should not disregard all related evidence.

6/ The statement may have been a violation when made, if made, but that was too long before the filing of the complaint to constitute a cognizable violation of the Executive Order. 29 C.F.R. Sec. 203.2(b).

To disregard all related evidence would result in a decision contrary to what we know are the facts. For example, Byrd and Boyd testified that someone in the Industrial Relations Office told them, after the promotions had been made, in answer to a question, that Lewis had been the subject matter expert on the promotions to Metals Inspector "A". The names of the subject matter experts could reasonably be found to be included in the documents requested to be produced by Robert Britten, Director of Industrial Relations. Exhibit C5. To disregard all Respondent's evidence on the identity of the subject matter expert would leave us only with uncertain evidence that it was Lewis and that he therefore played a part in the determination of the promotions to "A". But the evidence is overwhelming that Lewis was not the subject matter expert in the "A" promotions. He was the subject matter expert in the concurrent promotions to Metals Inspector "B", promotions having nothing to do with this case. The statement made by an unidentified employee in the Industrial Relations Office to Byrd and Boyd that Lewis was the subject matter expert in the "A" promotions, was simply a mistake. We should not permit the Respondent's contumacy to close our minds so that we accept as fact what we know not to be fact.

Nevertheless, I believe it would be appropriate to order that the Respondent promote James M. Byrd to the grade of Metals Inspector "A". See last sentence of Section 206.7(e) and Section 203.25(b) of the Regulations. I reach such conclusion on two bases.

I have concluded above that the refusal to comply with my Requests for Production of Documents was patently unjustified, whatever doubts there may be about the Requests of the Assistant Regional Director. To dismiss the complaint for failure of proof would permit unjustified recalcitrance to pass without meaningful sanction. To require the Respondent to promote Byrd would not require it to promote a person unqualified to be promoted. Byrd is concededly highly qualified for the higher position. The Respondent does not want to promote Byrd because it found six others more highly qualified. The normal complement of "A" inspectors is about one-third of all inspectors, or about 25 "A" inspectors, but it fluctuates above or below one-third because of turnover. To require the Respondent to promote Byrd would not unduly prejudice the public interest but would require Respondent to do something significant it does not want to do and would be a meaningful sanction.

There is an alternative basis for requiring Respondent to promote Byrd. We know what is contained in the requested documents Respondent introduced in support of its own case, but we do not know what is in the other documents Respondent refused to produce. They may have contained information that would have destroyed Respondent's case. I cannot find as a fact that

they do, because I do not know, but they may have. It is the Respondent that has prevented us from knowing. In such circumstances it is fair to assume that the missing documents show that Byrd was denied promotion because of his union activities. I make this assumption not because I believe it to be a fact, but because Respondent's recalcitrance makes it fair to make that assumption, and it produces an equitable result. Thus the decision is made as though the missing documents proved Complainant's case, regardless of any belief in whether they do.

This reaches the same result as "presuming" that the withheld documents would have established Complainant's case or destroyed Respondent's case. I do not base my conclusion in terms of "presumption". Normally, the refusal of a party to produce documents containing evidence of a fact raises a presumption that the fact is against him. In legal parlance, a "presumption" is "an inference...of...fact drawn by a process of probable reasoning..." Bouvier's Law Dictionary, Third Revision. I cannot, in this case, say that the probable reason for Respondent's not producing the requested documents was that they contain explosive information. To be sure, they conceivably do. But I do not know, and my speculation, in light of the demeanor of Respondent's counsel and witnesses, is that they do not contain such information. I believe it more likely than not that Respondent's recalcitrance was motivated by obstinacy resulting from being incensed with the manner in which the Requests were issued by the Regional office and the manner in which Complainant used them.

Thus I do not presume a fact I believe is likely not so. I believe this case presents a situation in which a "presumption of law" should be imposed, i.e., an inference to be accepted regardless of the fact, from motives of legal policy. In this case, not to make such presumption of law would, or could, frustrate the operation of Section 206.7 of the Regulations. I believe that making such presumption of law falls within the permissible actions to be taken under that portion of the last sentence of Section 206.7(e) which authorizes us to "take such other action as may be appropriate." Such action is appropriate where the legal theories advanced in justification of not complying with the Requests of the Administrative Law Judge are not only wrong but utterly untenable, and taking such action is necessary to effectuate significant remedial action.

In this case, where we order remedial action not to vindicate the substantive provisions of the Executive Order but to vindicate the legal procedures under the Order, a requirement of the posting of a notice by the Activity would be inappropriate. The posting of a notice is usually appropriate in

cases in which an actual violation of substantive provisions of the Executive Order is found. That is not this case. There is no reason to believe that anyone was or might have been intimidated in the exercise of rights granted by the Executive Order by Respondent's refusal to follow the prescribed procedures of the Regulations in the processing of a complaint of violation of Section 19(a) of the Order. The posting of a notice that henceforth they will comply with the procedures including lawful Requests for Production, would approach the meaningless. The fact of requiring the Activity to promote Byrd would be wholesome.

Recommendation

I recommend that the Activity be ordered to promote Byrd to Metals Inspector "A".



MILTON KRAMER
Administrative Law Judge

DATED: April 29, 1974
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND REMAND OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ACADEMY OF HEALTH SCIENCES,
U.S. ARMY,
FORT SAM HOUSTON, TEXAS

HEADQUARTERS, U.S. ARMY,
HEALTH SERVICES COMMAND,
FORT SAM HOUSTON, TEXAS
A/SLMR No. 426

The Petitioner, National Federation of Federal Employees, Local 28 (NFFE), sought an election in two units, one consisting of all General Schedule (GS) employees of the Academy of Health Sciences, U.S. Army, Fort Sam Houston, Texas, and the other consisting of all GS employees of the Headquarters, U.S. Army, Health Services Command, Fort Sam Houston, Texas. The Activity contended that the appropriate unit should include the Headquarters, Health Services Command, and its four subordinate organizational entities located at Fort Sam Houston, which would include the Academy of Health Sciences.

The Assistant Secretary found that the evidence adduced during the hearing in this case did not provide a sufficient basis upon which a decision could be made regarding the appropriateness of the claimed units. In this regard, the Assistant Secretary noted that there was insufficient evidence with respect to the duties, classifications, skills, supervision, transfer and work contacts of the employees in the units sought. He also noted that there was insufficient evidence to enable him to determine whether or not an agreement bar existed with respect to certain employees of the Academy of Health Sciences.

In these circumstances, the Assistant Secretary remanded the matter to the Assistant Regional Director for the purpose of securing additional evidence in accordance with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ACADEMY OF HEALTH SCIENCES,
U.S. ARMY,
FORT SAM HOUSTON, TEXAS 1/

Activity

and

Case No. 63-4764(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 28

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO 2/

Intervenor

HEADQUARTERS, U.S. ARMY,
HEALTH SERVICES COMMAND,
FORT SAM HOUSTON, TEXAS 3/

Activity

and

Case No. 63-4776(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 28

Petitioner

DECISION AND REMAND

Upon petitions duly filed under Section 6 of Executive Order II491, as amended, a consolidated hearing was held before Hearing Officer A. J. Lewis. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Intervenor appears as amended at the hearing.

3/ The name of the Activity appears as amended at the hearing.

Upon the entire record in these cases, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activities.

2. In Case No. 63-4764(RO), the National Federation of Federal Employees, Local 28, herein called NFFE, seeks an election in a unit of all General Schedule (GS) professional and nonprofessional employees employed at the Academy of Health Sciences, Fort Sam Houston, Texas, excluding supervisors, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and all Wage Grade (WG) employees.

In Case No. 63-4776(RO), the NFFE seeks an election in a unit of all GS professional and nonprofessional employees employed by the Headquarters, Health Services Command, Fort Sam Houston, Texas, excluding supervisors, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and all WG employees.

The Activity contends that a single unit including both GS and WG employees assigned to all medical activities located at Fort Sam Houston under the jurisdiction of the U.S. Army Health Services Command is appropriate. This unit would encompass the Headquarters, Health Services Command, and four subordinate organizational entities, including the Academy of Health Sciences. The Intervenor in Case No. 63-4764(RO), the American Federation of Government Employees, AFL-CIO, herein called AFGE, takes the position that the appropriate unit should consist of all employees serviced by the Civilian Personnel Office at Fort Sam Houston who are not presently represented in exclusively recognized units. Additionally, the AFGE contends that certain employees of the Academy of Health Sciences are subject to an agreement bar which would exclude them from any unit found to be appropriate.

The record reveals that, pursuant to a major Army-wide reorganization entitled "Operation Steadfast," most of which was effective on July 1, 1973, the U.S. Army Health Services Command was created. The newly created organization has the mission of health care delivery throughout the United States and is comprised of a Headquarters at Fort Sam Houston and 58 subordinate elements, four of which are located at Fort Sam Houston. The four subordinate elements located at Fort Sam Houston are the Academy of Health Sciences, the Brooke Army Medical Center, the U.S. Army Regional Dental Activity, and the U.S. Army Medical Laboratory (Regional).

The Headquarters, Health Services Command, is a new organization staffed with employees transferred from the Office of the Surgeon General, Washington, D.C., reassigned from other organizations located at Fort Sam Houston, transferred from the Brooke Army Medical Center Management Information Systems Office, and a number of newly hired employees. The record reveals that it has approximately 377 GS employees. The Academy of Health Sciences, consisting of 317 GS and 40 WG employees, was staffed with employees of the former U.S. Army Medical Training Center. which had

been a part of the Headquarters, Fort Sam Houston Command, and employees of the former U.S. Army Medical Field Service School and other former Brooke Army National Center education and training elements. The Brooke Army Medical Center, with 753 GS and 300 WG employees, existed prior to the implementation of Operation Steadfast, but in its previous configuration included a number of employees and functions which were transferred to other organizational entities as a result of the reorganization. The record does not disclose any instances of employees having been transferred into the Brooke Army Medical Center as a result of the reorganization. The U.S. Army Regional Dental Activity, with 6 GS employees, and the U.S. Army Medical Laboratory (Regional), with 34 GS and 5 WG employees, were transferred intact to the Health Services Command. The evidence establishes that the commanding officer of each of the four subordinate elements at Fort Sam Houston reports to the Commander of the Health Services Command, who, in turn, reports to the U.S. Army Chief of Staff.

Also located at Fort Sam Houston is the Institute of Surgical Research. This organization is not a component of the Health Services Command, but rather is a separate entity and reports to the Surgeon General, Department of the Army. The record is unclear as to what the mission of the Institute of Surgical Research is and gives no indication as to the number, types or duties of the employees under its jurisdiction.

Prior to the implementation of Operation Steadfast, the AFGE held exclusive recognition for several units including certain employees now employed by the Health Services Command. Specifically, a unit of approximately 1200 GS and WG employees of Headquarters, Fort Sam Houston, Fifth Army, was represented by AFGE Local 2154. Also, AFGE Local 2169 held exclusive recognition for two units at the Brooke Army Medical Center: a unit of approximately 310 WG employees and a unit of approximately 125 GS nursing assistants. The record reveals that there was no negotiated agreement covering the employees in the latter two units in effect at the time of the filing of the petitions in the instant cases, and, therefore, such employees would not be barred from being included in any unit found to be appropriate on the basis of an agreement bar.

With respect to the unit represented by AFGE Local 2154, the record reveals that prior to the implementation of Operation Steadfast the U.S. Army Medical Training Center was part of Headquarters, Fort Sam Houston, and, as such, its approximately 35 employees were represented by AFGE Local 2154. As a result of the reorganization, the Medical Training Center became a part of the Academy of Health Sciences. An agreement covering AFGE Local 2154's unit of employees of Headquarters, Fort Sam Houston, expired on March 15, 1973, but was extended until July 1, 1973, the effective date of the reorganization. The record reveals that a successor agreement between the parties was signed at the local level by the Headquarters, Fort Sam Houston and the AFGE on April 25, 1973, and was approved by Headquarters, Department of the Army, on November 1, 1973. Thus, any employees within this unit would not be eligible for inclusion in a unit of employees of the Academy of Health Sciences because the instant petition for the employees of the Academy of Health Sciences was filed on

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November 19, 1973, subsequent to the initial signing of the above-noted agreement. However, inasmuch as the evidence in the record is insufficient to determine whether the relocation of the employees of the Medical Training Center constitutes a functional relocation of a portion of the exclusively recognized unit, I shall make no finding at this time concerning whether or not an agreement bar exists precluding the inclusion of these employees in any unit found appropriate.

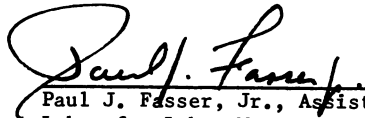
There are substantial ambiguities regarding the composition of the petitioned for units. Thus, sufficient information upon which to make a decision is lacking with respect to the duties of the employees in the claimed units and their relationship to one another. In this regard, there is no information with regard to the number of employees within each subdivision of the Headquarters, Health Services Command and the Academy of Health Sciences, their job titles and classifications, the type of work they perform and the skills involved, their supervision, the extent of work contact between GS and WG employees, the extent, if any, of interchange and transfers within the Headquarters, Health Services Command and the Academy of Health Sciences, and the employees' working conditions. Likewise, the record is devoid of information concerning the degree of interchange, if any, work contacts and any other indicia of a community of interest between the employees of the Headquarters' organization and the employees of its four subsidiary entities located at Fort Sam Houston. Further, as noted above, the record is insufficient to determine whether or not an agreement bar exists with respect to the employees of the former Medical Training Center now employed by the Academy of Health Sciences.

Under all of these circumstances, I find that the record does not provide an adequate basis upon which to determine the appropriateness of the units being sought. Therefore, I shall remand the subject cases to the appropriate Assistant Regional Director for the purpose of reopening the record in order to secure additional evidence as to the appropriateness of the claimed units.

ORDER

IT IS HEREBY ORDERED that the subject cases be, and they hereby are, remanded to the appropriate Assistant Regional Director.

Dated, Washington, D.C.
September 4, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO (District Nine)

Respondent

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO (District Nine)

and

and

Case No. S-E-3
(63-4032)

DIRECTOR, OFFICE OF LABOR-MANAGEMENT
AND WELFARE-PENSION REPORTS,
UNITED STATES DEPARTMENT OF LABOR
A/SLMR No. 427

DIRECTOR, OFFICE OF LABOR-MANAGEMENT
AND WELFARE-PENSION REPORTS,
UNITED STATES DEPARTMENT OF LABOR

Complainant

In the subject case an Administrative Law Judge issued his Report and Recommendation recommending that the complaint in this matter, filed by the Director, Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor (Director) pursuant to Section 204.66 and 204.67 of the Assistant Secretary's Regulations, be dismissed.

DECISION AND ORDER

In the complaint, the Director alleged that the election of delegates to the National Convention of the American Federation of Government Employees, AFL-CIO (District Nine) (AFGE) by certain locals in District Nine was in violation of the Order and requested that the election of the AFGE's Vice-President of the Ninth District be set aside and that the AFGE be ordered to hold a new election for Vice-President of the Ninth District, including the election of delegates.

On July 29, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding recommending that the complaint be dismissed.

Thereafter, the Director and the AFGE entered into a Stipulation in which the AFGE, without conceding that the previously held election was in violation of the Order, agreed to conduct its next regularly scheduled election for District Nine Vice-President with the technical assistance of the Office of Labor-Management and Welfare-Pension Reports and agreed that such election would be in accordance with the Executive Order, the Assistant Secretary's Regulations, and, so far as lawful and practicable, the provisions of its Constitution. The Administrative Law Judge thereupon cancelled the previously scheduled hearings in this matter and directed the parties to advise him, after the next election of delegates in District Nine and the next election for District Nine Vice-President, as to whether the terms of the Stipulation were carried out. The Director and the AFGE subsequently advised the Administrative Law Judge that the terms of the Stipulation had been carried out and requested that the complaint be dismissed.

This proceeding was instituted by a complaint filed by the Director on January 29, 1973, in accordance with Sections 204.66 and 204.67 of the Assistant Secretary's Regulations and Executive Order 11491, as amended. In the complaint, the Director alleged, among other things, that there was probable cause to believe that the Respondent had violated the Executive Order and Section 204.29 of the Assistant Secretary's Regulations based on the conduct of its May 6, 1972, election in that it failed to elect its officers either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot. Specifically, it was alleged that the Respondent's election for National Vice-President was improper in that delegates to the National Convention who voted in the May 6, 1972, election were not elected by secret ballot. The Director requested, among other things, that the Respondent's May 6, 1972, election be declared null and void and that the Respondent be directed to hold a new election for Vice-President of the Ninth District including election of delegates under the direction of the Director.

Upon consideration of all of the foregoing, the Assistant Secretary adopted the recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

Thereafter, on July 25, 1973, the Respondent entered into a Stipulation with the Director in which, without conceding that the 1972 election for the office of National Vice-President for District Nine was in violation of the Order, it agreed, among other things, that the next regularly scheduled

election of delegates in District Nine would be conducted with the technical assistance of the Office of Labor-Management and Welfare-Pension Reports and would be in accordance with the provisions of the Order, the Assistant Secretary's Regulations, and, so far as lawful and practicable, the provisions of the Respondent's Constitution.

In view of the Stipulation, on August 31, 1973, the Administrative Law Judge cancelled the scheduled hearings and ordered that he be advised, after the next election of delegates in District Nine and the next election for District Nine Vice-President, as to whether the terms of the Stipulation were carried out.

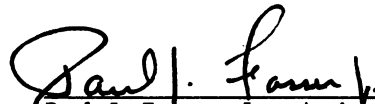
Subsequently, on July 18, 1974, the Respondent and the Director entered into a "Joint Attestation of Compliance and Request for Dismissal of Complaint" in which the parties jointly advised the Administrative Law Judge that the terms of the Stipulation had been carried out and requested that the complaint be dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendation, the Stipulation and "Joint Attestation of Compliance and Request for Dismissal of Complaint" upon which it is based, and the entire record in the subject case, I hereby adopt the recommendation of the Administrative Law Judge that the complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. S-E-3 (63-4032) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



..... :
In the Matter of :
 :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO (District Nine) :
 : Case No. S-E-3
Respondent :
..... :

Report and Recommendation

In this case a complaint was filed by the Director, Office of Labor-Management and Welfare-Pension Reports, and received in the Office of Administrative Law Judges on February 5, 1973. The complaint alleged, inter alia, that the election of delegates in 1972 to the National Convention of Respondent by certain locals in District Nine of Respondent was in violation of Executive Order 11491 as amended, and asked that the election of Respondent's Vice-President of the Ninth District be set aside and that Respondent be ordered to hold a new election for Vice-President of the Ninth District, including election of delegates, and that such elections be held under the direction of the Director.

On March 12, 1973 the Respondent filed an answer denying some allegations of the complaint and raising a number of affirmative defenses. On the same day it filed a Motion to Dismiss, a Motion to Strike, and a Motion to Sever certain issues. Each of the Motions contained a request for oral argument prior to the case being scheduled for evidentiary hearing. On March 23, 1973 the requests for oral argument were granted and hearing on the Motions scheduled for April 19, 1973. On April 6, 1973 the Complainant filed Objections to each of the Motions.

On April 19, 1973 oral argument was heard. An oral Order on the Motions was made the same day, and a written Order issued on April 23, 1973, denying the Motion to Dismiss, denying the Motion to Sever, and denying in part the Motion to Strike and granting it in part.

On April 19, 1973 a prehearing conference was held to discuss dates and places for hearings for the introduction of evidence. On May 1, 1973 a Notice of Hearings was issued for evidentiary hearings at five localities on eleven dates between September 11 and October 25, 1975.

On August 10, 1973 the parties filed a Stipulation which was approved by the Administrative Law Judge the same day. The Stipulation provided for what the parties agreed was the appropriate remedial action for the violations alleged in the complaint. It included a provision that the next scheduled election of delegates in District Nine and the next regularly scheduled election for District Nine Vice-President would be conducted in a prescribed manner. It included also a provision that upon fulfillment of the substantive terms of the Stipulation the complaint should be dismissed.

On August 13, 1973 the Administrative Law Judge issued an Order cancelling the scheduled hearings and directing that promptly after the next election of delegates in District Nine and the next election for District Nine Vice-President the parties advise him whether the terms of the Stipulation had been carried out.

On July 19, 1974 the parties filed a "Joint Attestation of Compliance and Request for Dismissal of Complaint", and supporting documents.

Accordingly, I recommend that the complaint be dismissed.



MILTON KRAMER
Administrative Law Judge

DATED: July 29, 1974
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL RESEARCH SERVICE,
PLUM ISLAND ANIMAL DISEASE CENTER
A/SLMR No. 428

This case involved a petition for clarification of unit filed by the U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, seeking clarification of the status of three employee classifications. The unit involved currently is represented by Local 1940, American Federation of Government Employees, AFL-CIO (AFGE). Contrary to the view of the Activity, the AFGE contended that the employees classified as Secretary to the Activity's Director, Secretary to the Chief, Engineering and Plan Management Group, and clerk-typist for the Administrative Officer, should be included in the unit.

The Assistant Secretary found that the secretaries to the Activity's Director and Chief, Engineering and Plan Management Group were confidential employees. In this respect, it was noted that the Secretary to the Activity's Director attends staff meetings at which labor relations policies are discussed, prepares and types memoranda of these meetings and correspondence concerning labor relations policy, and has access, not normally granted to other members of the bargaining unit, to personnel files of bargaining unit members. With regard to the Secretary to the Chief, Engineering and Plan Management Group, it was noted that the incumbent prepares correspondence, memoranda and reports in connection with grievances and negotiations and has access to certain information concerning grievances, wage surveys and reports which pertains to labor-management relations and which are not available to the AFGE or to members of the bargaining unit. Also noted was the fact that her immediate supervisor, the Chief, Engineering and Plan Management Group, in addition to supervising or directing more than half of the employees in the bargaining unit, is responsible for the formal and informal processing of grievances under the Activity's grievance procedure, prepares investigative reports in connection with grievances, is a member of the Activity's negotiating team, and prepares confidential wage reports and surveys to be used by management in formulating its position for negotiations.

The Assistant Secretary further found that the clerk-typist who performs administrative services for both the Administrative Officer and the Office Services Manager was not acting in a confidential capacity to persons who formulate and effectuate policies in the field of labor relations and should be included within the bargaining unit. In this regard, he noted that mere access to personnel or statistical information would not be deemed sufficient to establish that an employee is serving in a confidential capacity under the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL RESEARCH SERVICE,
PLUM ISLAND ANIMAL DISEASE CENTER

Activity-Petitioner

and

Case No. 30-5468(CU)

LOCAL 1940, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Adam J. Conti. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, seeks clarification of an exclusively recognized unit. Specifically, it seeks to clarify the existing unit by excluding three secretarial or clerical employees as confidential employees. ^{1/} The current exclusively recognized unit includes the three disputed employees. Local 1940, American Federation of Government Employees, AFL-CIO, herein called AFGE, contends that the three employees involved do not perform confidential labor-management duties which would require that they should be excluded from the unit.

The Petitioner is engaged in the research of animal diseases and has the responsibility for developing information on animal diseases which might enter the country. Since 1963 the AFGE has been the exclusive bargaining representative for the employees of the Petitioner. The three employee classifications involved in the instant petition are the Secretary to the Petitioner's Director; the Secretary to the Chief, Engineering and Plan Management Group; and a clerk-typist for the Administrative Officer.

^{1/} At the hearing, the Petitioner excluded from the coverage of its petition a fourth employee position which presently is vacant.

The evidence establishes that the Secretary to the Petitioner's Director attends supervisory staff meetings held every four to six weeks at which labor relations policies are discussed, that the incumbent prepares and types memoranda of these meetings and correspondence concerning labor relations policy for the Director's signature, and that she has access, not normally granted to other members of the bargaining unit, to personnel files of bargaining unit members. Moreover, the position description for this position describes the job as a "confidential" position.

With regard to the Secretary to the Chief, Engineering and Plan Management Group, the record reveals that the Chief is responsible for the direction or supervision of more than half of the employees in the bargaining unit and that he is responsible for the formal and informal processing of grievances under the existing grievance procedure. Further, he prepares memoranda and investigative reports in connection with grievances and, as a member of the Petitioner's negotiating team, participates in negotiations and prepares confidential wage reports and surveys to be used by management in formulating its position for negotiations. The Secretary to the Chief prepares correspondence, memoranda and reports involving the above functions and has access to certain information concerning grievances, wage reports and surveys which pertains to labor-management relations and which is not available to the AFGE or to members of the bargaining unit.

Under the above circumstances, I find that the Secretaries to the Petitioner's Director and Chief, Engineering and Plan Management Group, act in confidential capacities with respect to officials who formulate or effectuate general labor relations policies and that they have regular access to confidential labor relations materials and to office and personnel files not available to other employees in the unit. It has been found previously that it would effectuate the purposes and policies of the Order if employees, such as the Secretary to the Director and Secretary to the Chief, Engineering and Plan Management Group, who assist and act in a confidential capacity to persons who formulate and effectuate management policies in the field of labor relations, were excluded from exclusive bargaining units. ^{2/} Accordingly, I find that the job classifications of Secretary to the Director and Secretary to the Chief, Engineering and Plan Management Group should be excluded from the unit.

^{2/} See Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230; Department of Treasury, Division of Disbursement, Birmingham, Alabama, A/SLMR No. 217; Department of Interior, Bureau of Land Management District Office, Lakeview, Oregon, A/SLMR No. 212; United States Custom Service, Region IX, Chicago, Illinois, A/SLMR No. 210; The Department of the Treasury, U.S. Savings Bonds Division, A/SLMR No. 185; St. Louis Region, United States Civil Service Commission, St. Louis, Missouri, A/SLMR No. 162; and Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

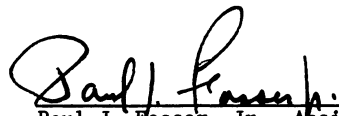
The record indicates that the clerk-typist for the Administrative Officer is under the direct supervision of the Office Services Manager and performs administrative services for both the Administrative Officer and the Office Services Manager. The Administrative Officer is primarily responsible for the budget and staffing levels of the Petitioner. He also acts as a member of the management negotiating team, attends staff meetings, provides input on staffing and budget matters and, on occasion, gathers information pertaining to employee grievances. The evidence establishes that the incumbent clerk-typist handles correspondence for the Administrative Officer relating to personnel staffing and budgetary matters used in contract negotiations and that she also handles a wide range of administrative, accounting and procurement matters for the Office Services Manager which requires access to records and files. In addition, she works closely with the Accounting Technician in compiling other reports and she codes procurement actions for budget and accounting purposes.

Under all of the circumstances, I do not consider the clerk-typist for the Administrative Officer to be an employee who assists or acts in a confidential capacity to persons who formulate and effectuate policies in the field of labor relations. As has been previously found, mere access to personnel or statistical information would not be deemed sufficient to establish that an employee is serving in a confidential capacity under the Order. ^{3/} Nor, in the circumstances of this case, do I find that the incumbent's handling of correspondence which ultimately may be utilized in contract negotiations warrants her exclusion from the unit. Accordingly, I find that the job classification of clerk-typist for the Administrative Officer should be included in the unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein in which exclusive recognition was granted on June 21, 1963, to Local 1940, American Federation of Government Employees, AFL-CIO, at the U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, Orient Point, New York, be, and it hereby is, clarified by excluding from said unit the employee job classifications, Secretary to the Director of the Plum Island Animal Disease Center and Secretary to the Chief, Engineering and Plan Management Group, and by including in said unit the clerk-typist for the Administrative Officer.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

^{3/} See Virginia National Guard Headquarters, 4th Battalion, 11th Artillery, cited above.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
LAS VEGAS AIR TRAFFIC CONTROL TOWER,
LAS VEGAS, NEVADA
A/SLMR No. 429

This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization, affiliated with Marine Engineers Beneficial Association, AFL-CIO (PATCO) against Department of Transportation, Federal Aviation Administration, Las Vegas Air Traffic Control Tower (Respondent) alleging that the Respondent violated Section 19(a)(1) of the Order by refusing to accord Harry Hicks, an employee, the right to have a representative of the PATCO present during a proceeding before the Respondent's Facility Review Board, which proceeding allegedly constituted a formal discussion within the meaning of Section 10(e) of the Order. The Respondent denied Hicks' request for representation by the PATCO during his appearance before the Facility Review Board which was conducting an investigation of a system error in which Hicks had been involved. The evidence established that the function of the Facility Review Board, consisting of five members, two of whom are required to be nonsupervisory, is wholly investigative and that it has no authority to recommend human corrective action.

The Administrative Law Judge concluded that the proceedings before the Facility Review Board did not constitute a formal discussion within the meaning of Section 10(e) of the Order. He noted that such investigation did not concern a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the unit and recommended that the complaint be dismissed. He further concluded that even if the Respondent had violated the Order as alleged, he would recommend dismissal of the complaint because the matter had been rendered moot in view of the fact that the Respondent's employees now have the right to union representation in appearances before the Facility Review Board.

Noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's finding that the proceedings before the Facility Review Board did not constitute a formal discussion within the meaning of Section 10(e) of the Order. Under these circumstances, the Assistant Secretary found that the Respondent's denial of union representation during Controller Hicks' appearance before the Board was not violative of Section 19(a)(1) of the Order. In view of this disposition, the Assistant Secretary found it unnecessary to decide whether the matter involved herein had been rendered moot.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
LAS VEGAS AIR TRAFFIC CONTROL TOWER,
LAS VEGAS, NEVADA

Respondent

and

Case No. 72-4176

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, AFFILIATED WITH
MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO
SAN FRANCISCO, CALIFORNIA

Complainant

DECISION AND ORDER

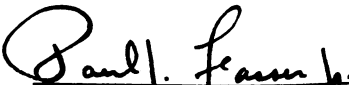
On July 16, 1974, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I find, in agreement with the Administrative Law Judge, that under the circumstances, the proceedings before the Facility Review Board did not constitute a formal discussion within the meaning of Section 10(e) of the Order and that the denial of union representation while Controller Hicks was appearing before the Board was not violative of Section 19(a)(1) of the Order. 1/

1/ In view of this disposition, I find it unnecessary to decide whether, as concluded by the Administrative Law Judge, the Respondent's action in changing its policy to permit representation before the Facility Review Board rendered moot further proceedings in this matter.

IT IS HEREBY ORDERED that the complaint in Case No. 72-4176 be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491, as amended. The issue presented is whether the Agency, Federal Aviation Administration, (FAA) violated the Order by refusing to permit an employee to have union representation when appearing before a Facility Review Board convened to investigate a system error. It was stipulated that a system error occurred on February 23, 1973 (Tr. 11) and it is conceded that, at the time in question, the responsibility of the Facility Review Board was to investigate and identify the cause of the system error and that the Facilities Review Board did not have the authority to, and did not in this instance, recommend disciplinary action (Brief of Complainant, pp. 4,5).

The complaint herein, dated May 4, 1973, and filed May 7, 1973, and the amended complaint, dated May 9, 1973, and filed May 11, 1973, alleged a violation of Section 19(a)(1) of the Order. A hearing was held in Las Vegas, Nevada, on December 11, 1973, at which both parties were represented and timely briefs were thereafter submitted. Upon the basis of the entire record in this case, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The facts are not in dispute and no creditability issues are involved. The following findings reflect the essential facts involved.

1. Professional Air Traffic Controllers Organization, Affiliated with Marine Engineers Beneficial Association, AFL-CIO (PATCO), was certified as the exclusive representative of Air Traffic Controllers in the Las Vegas Tower on August 20, 1972. 1/ Negotiations for a national agreement were in progress as of February 23, 1973, but no agreement had been reached as of that date. The first contract covering Las Vegas was signed April 4, 1973.

1/ Mr. Reazin's letter to the Area Administrator, dated May 4, 1973, (Ass't. Sec. Exh. 1(a), Exh. A, Attachment 1) states that the date of certification was October 20, 1972. The date of certification is not in issue. Accordingly, as both Messrs. Reazin and Embrey indicated an August, 1972, date as the date of certification (Tr. 12), August 20, 1972, is assumed for present purposes to be correct.

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In the Matter of: :
: :
DEPARTMENT OF TRANSPORTATION :
FEDERAL AVIATION ADMINISTRATION :
LAS VEGAS AIR TRAFFIC CONTROL TOWER :
LAS VEGAS, NEVADA, :
Respondent, :
: :
and : Case No. 72-4176
: :
PROFESSIONAL AIR TRAFFIC :
CONTROLLERS ORGANIZATION :
AFFILIATED WITH MARINE ENGINEERS :
BENEFICIAL ASSOCIATION, AFL-CIO :
SAN FRANCISCO, CALIFORNIA, :
Complainant. :
.....

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BEFORE: WILLIAM B. DEVANEY
Administrative Law Judge

2. On Friday, February 23, 1973, at approximately 10:15 a.m., a system error 2/ occurred in which Mr. Harry Hicks, then an Air Traffic Controller in the Las Vegas Air Traffic Control Tower, was involved. The system error took place about one minute after Mr. Hicks had been relieved at the combined radar positions (arrival East and departure West) by Controller Albert Gemoats and while Controller Hicks was standing behind Controller Gemoats. When the system error occurred, the coordinator, a team supervisor, immediately stood up and went to the Assistant Chief. Mr. Hicks was asked to make a statement of the system error about two hours after the error occurred and was then removed from Radar Control duties and assigned to Flight Data duties, (non-control). The compensation for Flight Data was the same as the compensation for Radar Control.

3. The Air Traffic System Error Reporting Program is set forth in FAA Order 8020.3 and Attachment 1 thereto (Res. Exh. 1) 3/ dated December 16, 1965. On February 1, 1973, 4/ Order 8020.3 was amended and revised to specifically provide that Facility Review Boards shall not make recommendations for human corrective action (Res. Exh. 2). Pursuant to Order 8020.3, the Chief of the Las Vegas Control Tower designated the members of the Facility Review Board on January 24, 1973 (LASZ.2R, Res. Exh. 3). Mr. Hicks was an alternate member.

When a system error occurs, it is investigated by the Facility Review Board, the membership of which is constituted on a continuing basis, in accordance with the procedures and guidelines set forth in Order 8020.3. The Facility Review Board consists of five members, two of whom must be non-supervisory controllers. The Facility Review Board conducts a group investigation and the members reach a consensus as to the facts surrounding the incident. The report of the Board is ordinarily, and was

2/ Not explained on the record; but stated in Complainant's Brief, at p.2, to have involved an impermissible separation between two airplanes.

3/ This cancelled Order OA 8020.3, dated October 29, 1963.

4/ The following appears on line 2 of the text of Respondent's Exhibit 2, "CNL 1 SEP 73." (See, also Ass't. Sec. Exh. 1(a) Exh. B, attachment 1). The testimony of all parties, as well as Mr. Stuart A. Hayter's letter to the Area Administrator, dated June 1, 1973 (Ass't. Sec. Exh. 1(a), Exhibit D at p.2), conclusively establishes in this proceeding that the amendment was deemed by all parties hereto as effective February 1, 1973, and the quoted phrase will be disregarded for all purposes herein, and no determination of the meaning of, or explanation for, the phrase is to be implied.

in the case of the system error of February 23, 1973, written by the Chairman. After the report of the Board is written, it is submitted to the Facility Chief who must agree, or not agree, with the findings of the Board. The report, with or without agreement of the Facility Chief, is forwarded to the Regional Review Committee for review, although the extent of review is uncertain since the Regional Review Committee can not overrule or change the findings of the Facility Review Board.

4. In anticipation of the convening of the Facility Review Board to investigate the system error of February 23, 1973, on February 24, 1973, Mr. Hicks submitted a request, in writing, to Mr. Stuart A. Hayter, Chief, Las Vegas Control Tower, for PATCO representation while appearing before the Facility Review Board. (Ass't. Sec. Exh. 1(a), Exhibit A, attachment 3) 5/ This request was denied, verbally, by Mr. Hayter on February 26, 1973. The President of the PATCO Las Vegas Tower Local, Mr. Norman R. Fischer, also asked Mr. Hayter for permission to represent Mr. Hicks before the Facility Review Board, if it should become necessary for Mr. Hicks to appear before it, and Mr. Hayter denied Mr. Fischer's request.

5. The Facility Review Board convened on February 26, 1973, to investigate the system error of February 23, 1973, and Mr. Hicks appeared before the Board, without representation and under protest, on February 26, 1973. Mr. Hicks had already submitted a written statement, as noted above, and members of the Board asked questions. Other persons were called before the Facility Review Board, including Mr. Gemoats. Mr. Gemoats did not request representation and there was no indication that any person, other than Mr. Hicks or Mr. Fischer on his behalf, requested representation while appearing before the Facility Review Board. Only members of the Facility Review Board were present during the appearance of any witnesses.

6. Mr. Hicks testified that Facility Review Boards meet to determine facts (Tr. 18), although he further stated that their determinations lead to disciplinary action in the case of a person who is found to be negligent or who is found to be lacking

5/ The letter, on its face, went well beyond the allegations of the complaint and the testimony of Messrs. Hicks and Fischer in support of the more limited allegations of the complaint. For the purposes of this proceeding, the request will be assumed, as alleged in the complaint and testimony, to have been merely a request for representation while appearing before the Facility Review Board. No evidence or testimony was presented with regard to any other, or broader, request.

in his operational techniques. 6/ The President of the PATCO local, Mr. Fischer, testified that a Facility Review Board is a fact finding procedure by management of the control facility and that after the fact finding by the Board is made, someone else in management makes a decision as to whether any disciplinary action should be taken (Tr. 42-43).

Not only was FAA Order 8020.3 amended February 1, 1973, prior to the convening of the Facility Review Board to investigate the system error of February 23, 1973, to rescind any authority by a Facility Review Board to recommend any human corrective action (Res. Exh. 2), but the evidence is both clear and without contradiction that: a) this was fully understood prior to the proceedings of February 26, 1973; and b) the Facility Review Board, in its report concerning the system error of February 23, 1973, did not make any recommendation for human corrective action.

7. Mr. Hicks testified that he "was very satisfied with the results of the findings of the Review Board" (Tr. 19, 21-22).

8. The February 1, 1973, amendment of FAA Order 8020.3 placed in each Facility Chief the exclusive authority for initiating corrective actions, including, if appropriate immediate disciplinary action (Res. Exh. 2). Mr. Stuart Hayter, Chief of the Las Vegas Control Tower, testified that in making a decision as to whether disciplinary action is called for, as a result of a system error, he does rely upon "the report - System Error report itself 7/. My own personal investigation which could include and does generally include reviewing the voice recordings, the documents involved, speaking personally with the people involved. A fairly total investigation if you want to call it that." (Tr. 76-77).

6/ See, Ass't. Sec. Exh. 1(a), Exhibit C, attachment 5.

7/ The Report of the Facility Review Board does not identify individuals by name but only by a key code.

Some little time after February 26, 1973, 8/ Mr. Hayter issued a formal written reprimand to Mr. Hicks and directed that he be placed in remedial training. (Tr. 21) 9/. Subsequently, Mr. Hicks bid, and was selected for, a position at the Redding, California, Air Traffic Control Tower as an Air Traffic Controller.

9. On or before January 4, 1973, PATCO had submitted in its national negotiations, inter alia, a proposal that the Agency acknowledge the right of the Union and its representatives to participate in any aircraft accident/incident investigation. (Res. Exh. 4, "Article XL"). On June 20, 1973, the Agency in a general notice to all ATC facilities directed, inter alia, that upon request an employee be permitted representation while appearing before a Facility Review Board. (Comp. Exh. 1). 10/

8/ Neither the date of the report nor the date of the disciplinary action taken with respect to Mr. Hicks was disclosed at the hearing. Mr. Hicks testified only that "After the Review Board, my status remained more or less in limbo for a considerable period of time. I do not remember that exact length of time, but it was a time sufficient that a controller would lose his proficiency; whatever proficiency he might have had." (Tr. 20-21). The date of Mr. Hayter's action, but not the date of the Facility Review Board's report, is stated in Mr. Reazin's letter of May 4, 1973, to the Area Administrator (Ass't. Sec. Exh. 1(a), Exhibit A, attachment 1) as March 16, 1973.

9/ Cf., Ass't. Sec. Exh. 1(a), Exhibit A, attachment 1; See, also, Ass't. Sec. Exh. 1(a), Exhibit C, attachment 5.

10/ Respondent's Exhibit 4 was received over the objection of Complainant and Complainant's Exhibit 1 was received over the objection of Respondent. It is true, of course, that both exhibits involved, or led to, directly or indirectly, evidence of an event after the date of the alleged unfair labor practice; however, neither exhibit was received to establish, nor could either constitute evidence of, an unfair labor practice prior to the date thereof. Respondent's Exhibit 4, as of February 26, 1973, establishes only that as of that date PATCO had requested a provision affirming its right to participate in "incident" investigation and that Respondent had not, as of February 26, 1973, agreed to the proposal. To support Respondent's assertion "...that the Complainant is attempting to accomplish by the unfair labor practice route, that which it was unable to accomplish by collective bargaining process," reference would have to be made to the fact that a contract was signed on April 4, 1973, without such a provision. Accordingly, the

10. Mr. Hicks and Complainant were fully aware of the right to grieve the reprimand and direction of remedial training under the Agency's grievance procedure, and the right of representation in any such grievance procedure was conceded. There was no evidence as to whether any grievance was ever filed.

Conclusions

PATCO was the certified bargaining representative of air controllers in the Las Vegas Air Traffic Control Tower from and after August 20, 1972, and national negotiations were in progress as of February, 1973, but the first collective bargaining contract covering the Las Vegas facility was not signed until April 4, 1973. A system error occurred on February 23, 1973, in which Mr. Hicks, a controller and member of the PATCO bargaining unit, was involved and Mr. Hicks was denied the right to have union representation while appearing before a Facility Review Board convened to investigate and identify the causes of the system error of February 23, 1973. The Facility Review Board had no authority to recommend any human corrective action and in its report with respect to the system error of February 23, 1973, the Board made no such recommendation.

10/ (con't)

ruling receiving Respondent's Exhibit 4, is reaffirmed but only for the purpose of showing that, as of February 26, 1973, the union contract proposal in question was the subject of ongoing collective bargaining.

Complainant's Exhibit 1, because it was issued on June 20, 1973, long after the occurrence of the alleged unfair labor practice, was not received, nor will it be considered, as evidence of the occurrence of an unfair labor practice on February 26, 1973. The ruling receiving Complainant's Exhibit 1 is reaffirmed, however, for the reasons that the agency action of June 20, 1973, would appear, as hereinafter discussed, to have rendered moot the instant proceeding. Complainant's Exhibit 1 was not received, and will not be considered, as evidence, as asserted by Complainant, that an unfair labor practice was committed on February 26, 1973.

Respondent's contention that Complainant's Exhibit 1 must be rejected because it was a "settlement agreement" of this and other pending unfair labor practice charges is without merit. As noted, the exhibit was not received, nor will it be considered, as evidence of the commission of an unfair labor practice. Assuming, but without deciding that the change in policy reflected by Complainant's Exhibit 1 was a settlement, receipt of the exhibit was, nevertheless, proper and necessary under the circumstances, to determine whether the action taken has, or has not, rendered further proceedings herein moot.

Sometime after the report of the Facility Review Board was filed, the Chief of the Las Vegas Tower, Mr. Hayter, issued a formal written reprimand to Mr. Hicks and directed that he be placed in remedial training. The decision to impose discipline was solely Mr. Hayter's; however, in making this decision, Mr. Hayter did rely upon the report of the Facility Review Board as well as his own personal investigation including reviewing the voice recordings, the documents involved, and speaking personally with the people involved. The discipline imposed was subject to the Agency's grievance procedure and the right to union representation at all stages of the grievance procedure was conceded by Complainant.

While it is true, as stated by Mr. Hicks, that "Review Boards meet to determine facts which lead to disciplinary action in the case of a person who is found to be negligent or who is found to be lacking in his operational techniques", the function of the Facility Review Board here involved was wholly investigative and it had no authority to recommend, nor did it recommend, any human corrective action. From February 1, 1973, only the facility Chief had the authority to initiate corrective actions, including appropriate disciplinary action. From, and after, February 1, 1973, discipline was entirely separate from the investigative function of the Facility Review Board, although the facility Chief in deciding whether to initiate disciplinary action does, in part, rely upon the report of the Facility Review Board as to its findings as to the causes of the system error, but he also makes his own personal investigation.

Investigation by a Facility Review Board is markedly different from the investigative techniques normally encountered. Facility Review Boards conduct fact finding pursuant to long established guidelines of a published Agency Order; its membership is composed of professional specialists, two of whom must be non-supervisory; its report does not identify individuals by name, but only by key code; since February 1, 1973, such Boards have had no authority to recommend human corrective action; and determinations of the Board are consensus decisions of all members.

Complainant asserts that because the report of the Facility Review Board is relied upon as a "big factor" by the facility Chief in deciding whether he shall initiate discipline, this places the Facility Review Board in the disciplinary procedure; that Section 10(e) of the Executive Order applies; and that denial of union representation to Mr. Hicks while appearing before the Facility Review Board on February 26, 1973, violated Section 19(a)(1) of the Executive Order.

In evaluating affirmative rights under the Executive Order, including those granted by Section 10(e), reserved rights of management must first be considered. Section 12(b) provides, in part, as follows:

"(b) management officials of the agency retain the right, in accordance with applicable laws and regulation -

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions as may be necessary to carry out the mission of the agency in situations of emergency; ..."

The Administrator of the Federal Aviation Program is empowered and charged with the duty to promote safety of flight of civil aircraft in air commerce. See, for example, 49 U.S.C. §§1354, 1421(a)(6); 14 C.F.R. §§65.31, 91.87, 91.90. The identification of all causes of system errors in Air Traffic Controller Operations is a statutory duty imposed by Congress on the Agency in the furtherance of air safety. Pursuant to that duty, the Agency promulgated and has followed for many years prior to Executive Order 11491, or its predecessor Executive Order 10988, an Air Traffic System Error Reporting Program (See, Res. Exh. 1).

Section 12(b) of the Executive Order, reserved to the Agency the absolute and unilateral right, *inter alia*, to maintain the efficiency of the Government operations entrusted to it, including promotion of air safety; to determine the methods, means, and personnel by which such operations are to be conducted; etc., except to the extent that the absolute and unilateral authority of the Agency was specifically restricted or limited by the provisions of Executive Order 11491, as amended.

Section 10(e), in relevant portion 11/, provides as follows:

"(e) When a labor organization has been accorded exclusive recognition...The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (Emphasis supplied).

It seems plain that an investigation of a system error by the Facility Review Board does not involve "personnel policies or practices" or "matters affecting general working conditions" as those terms are used in Section 10(e). However "formal" the procedure, "discussion" in connection therewith, in labor relations parlance, has the definite connotation of proposing changes in working conditions. The function of the Facility Review Board is wholly different. Its function is to identify causes of a system error. Even though the identification of causes of a system error may lead, at some later point, to "formal discussions", the Facility Review Board is not a "formal discussion" process. To the contrary, as noted, the Facility Review Board has no authority to recommend any human corrective action; but performs a pure investigative function. By the same token, even if the Facility Review Board were deemed a "formal discussion", it does not concern grievances, and, there being no discipline, there is no action subject to a grievance. These conclusions are borne out by the decisions construing Section 10(e).

Thus, in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336 (1974), it was contended that denial of union representation at "counselling sessions" was violative of Section 19(a)(1). In finding that there was no violation of Section 19(a)(1) the Assistant Secretary stated:

11/ This case does not involve any issue concerning the bargainability of any demand, including bargainability of a demand by PATCO for participation in "incident" investigation. To the contrary, the record shows that the parties, in fact, bargained about PATCO's demand (Res. Exh. 4). Because no issue of bargainability is involved herein, no opinion is expressed, or intended, concerning the scope of bargaining.

"...the evidence does not establish that the 'counselling sessions' involved...were 'formal discussions' concerning grievances, personnel policies and practices, or working conditions within the meaning of Section 10(e) of the Order. Thus, the sessions involved did not relate to the processing of a grievance. Moreover, the matters discussed at the sessions did not involve general working conditions and work performance. Rather, they were related, respectively, to an individual employee's alleged short-comings with respect to alleged abusive language used to his supervisor, and to the same employee's alleged failure to follow a uniform requirement on the Base. ...Accordingly, as the two incidents did not constitute 'formal discussions' in which the exclusive representative was entitled to be represented by virtue of Section 10(e) of the Order, it follows that the denial of representation at the 'counselling sessions'...did not constitute a violation of Section 19(a)(1) of the Order." (A/SLMR No. 336 at pp. 3-4).

The above case involved specific instances of alleged, and identified, short-comings by an employee. By contrast, the function of the Facility Review Board is one step further removed, i.e., its sole function is to determine the cause of a system error. At the time the Facility Review Board functions no employee "short-coming" has been identified. But more important, the Assistant Secretary, in footnote 8, further stated,

"In my view, an individual employee is not entitled in every instance to have his exclusive representative present because of a concern that a meeting may ultimately lead to a grievance or 'adverse action.'"

U.S. Army Headquarters, U.S. Army Training Center, Infrantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242 (1973), unlike the instant case, involved a collective bargaining agreement and the finding of a Section 19(a)(1) violation is wholly distinguishable; nevertheless, the decision of the Assistant Secretary as to the meaning of the terms used in Section 10(e) is instructive. Thus, the Assistant Secretary stated:

"...the September 23 meeting constituted a 'formal' discussion within the meaning of Section 10(e) of the Order and that such discussion clearly involved matters relating to 'personnel policies and practices, or other matters affecting general working

conditions of employees in the unit'...as the subject of the meeting related to personnel policies and practices in the area of employee sick leave requirements, which had ramifications for all unit employees, I find that the September 23 discussion clearly fell within the scope of Section 10(e) of the Order. ...Peterson, by requesting a meeting with Day...drew the latter's attention to the fact that he, Peterson, was the Complainant's representative for purposes of any meeting concerning the sick leave letter. However, Day took it upon himself to hold the above-noted discussion denying Peterson knowledge of its occurrence or access to it. It is based upon this aspect of Section 10 (e) and Day's conduct in calling such a meeting without giving the Complainant an opportunity to be represented by an individual of its own choice...that I find Respondent to have refused improperly to consult, confer, or negotiate...in violation of the Executive Order." (A/SLMR No. 242 at pp. 4,5).

By contrast, the investigation of a system error does not relate to "personnel policies and practices, or other matters affecting general working conditions of employees in the unit." The purpose of the Facility Review Board is to identify causes of a system error, not to change or to modify, or otherwise affect, in any manner personnel policies, practices or other matters affecting general working conditions. Any corrective action, whether involving personnel policies, practices, or matters affecting general working conditions, must be initiated by the facility Chief in a separate and distinct step.

Charleston Naval Shipyard, Charleston, South Carolina, A/SLMR No. 304 (1973), involved representation at an investigative discussion, but factually is not in point as to the issue decided. One employee operating a portal crane collided with a Reactor Assess Enclosure. There was a preliminary investigation at the scene of the accident on the day that it happened. The following day, the employee was sent a Notice of Investigative Discussion and Reply directing him to appear "for investigative discussion which could result in disciplinary action being taken against you." The employee was advised of his right to be represented in accordance with the provisions of the applicable collective bargaining contract. Another employee operated a crane without a pilot or track walker (flagman) at the foot of the crane while it was in motion. He, like the other employee, was given notice to appear for an investigative discussion. Both were accorded the right to representation at the "investigative discussion" in

accordance with the collective bargaining contract. The issue was whether denial of representation by other than designated union officials or any employee was a violation of the Act. The Assistant Secretary held that it was not. He held, in part, as follows:

"...Section 7(d)(1) of the Order does not establish rights which are enforceable under Section 19 of the Order." (A/SLMR No. 304 at p. 2).

Although this case must be read in conjunction with Texas Air National Guard, supra, and Fort Jackson Laundry Facility, supra, and Fort Wainwright, infra, as recognizing the existence of Section 10(e) rights prior to the inception of a "grievance", 12/ the decision is a further holding that union representation is required by the Order only when the conditions of Section 10(e) granting such right are fully met.

It is interesting that where an investigation of an accident was conducted on the day it occurred no contention was made that representation was required at such investigation, which like the investigations conducted by the Facility Review Board, was, wholly, a matter of determining the cause of the accident, or as in the present case the cause of the system error since, thankfully, no accident resulted therefrom.

U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278 (1973), like Charleston Naval Shipyard, supra, held that Section 7(d)(1) does not create rights enforceable under Section 19 of the Order. Fort Wainwright concerned a meeting held by the agency regarding the implementation of a decision by a U.S. Civil Service Commission Hearing Examiner which meeting was found to constitute a formal discussion within the meaning of Section 10(e). The Assistant Secretary held, in part,

"...agency conduct denying the right of unit employees to be represented by their exclusive representative, violates Section 19(a)(1) of the Order." (A/SLMR No. 278 at p. 3).

12/ "...a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction which is subject to control of agency management." Federal Personnel Management Chapter 771, Inst. 154, May 25, 1971, sub. Ch. 1, par. 1-2(7).

To summarize, the Agency under Section 12(b) of the Executive Order had the right, subject only to the specific limitations imposed thereon by other provisions of the Executive Order, and specifically in this case by Section 10(e), to conduct investigations to determine the cause of system errors in furtherance of its statutory duty to promote safety of air transportation. Section 10(e) of the Executive Order accords labor organizations the right to be represented at formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the Unit. The investigation by the Facility Review Board of the system error of February 23, 1973, was not a "formal discussion" within the meaning of Section 10(e) of the Order; and its investigation did not concern a grievance, personnel policies and practices, or other matters affecting general working conditions of employees in the Unit. Accordingly, Complainant had no inherent right under Section 10(e) of the Executive Order to be represented in proceedings before the Facility Review Board. Therefore, the denial of the request by Harry O. Hicks for union representation while he was appearing before the Facility Review Board and/or the denial of the request of PATCO to represent Harry O. Hicks while appearing before the Facility Review was not a violation of Section 19(a)(1) of the Executive Order.

The Executive Order is not the same as the Labor Management Relations Act (NLRA) and the rights accorded under the Executive Order are not as broad as the rights under NLRA. But even under the NLRA, denial of representation in an investigatory procedure where there is no authority at the investigatory stage to recommend discipline, would not constitute an unfair labor practice. Western Electric Company, 198 NLRB No. 82, 80 LRRM 1705 (1972); LaFayette Radio Electronics Corp., 194 NLRB No. 77, 78 LRRM 1693 (1971); Illinois Bell Telephone Company, 192 NLRB No. 138, 78 LRRM 1109 (1971); Chevron Oil Company, 168 NLRB No. 84, 66 LRRM 1353 (1967).

In Chevron Oil Company, supra, the employer interviewed employees prior to arriving at a decision on whether disciplinary action was warranted. The employer, under established procedures, lacked the authority to discipline employees at these fact-finding meetings. The Board held that exclusion of the union steward from these interviews was lawful. Applying this rationale to the instant case, denial of representation before the Facility Review Board was lawful because, under established procedures, it lacked authority to discipline employees. Like reasoning was applied in Illinois Bell Telephone Company, supra. In LaFayette Radio Electronics, supra, the rationale was that denial of union representation in investigatory interviews is lawful because the interrogations (theft of company property) were part of an investigation and the employer did not thereby deal with employees about tenure and conditions of employment. Finally, in Western Electric Company, supra, the Board held even more broadly that denial of union representation during investigatory interviews

does not violate Section 8(a)(5).

Three decisions of the NLRB have been to the contrary. First, Texaco, Inc., 168 NLRB No. 49, 66 LRRM 1296 (1967), enf't denied, 408 F. 2d 142, 70 LRRM 3045 (5th Cir. 1969), reh'g denied, F. 2d , 71 LRRM 2320 (5th Cir. 1969). Moreover, in Western Electric Company, supra, the Board specifically referred to Texaco, Inc. and stated that such issue "has been considered and rejected by this Board in a number of instances since our earlier decision in the Texaco case." See, also, Jacobe-Pearson Ford, Inc., 172 NLRB No. 84, 68 LRRM 1305 (L968); Texaco, Inc., Las Angeles Sales Terminal, 179 NLRB 976, 72 LRRM 1596 (1969).

Second, Mobile Oil Corporation, 196 NLRB No. 144, 80 LRRM 2823 (7th Cir. 1973). In its decision denying enforcement, the Court stated, in part, as follows:

"...Nor does the text suggest the source of the Board's view that the right of representation depends on whether the employee has any reasonable basis for believing that his job is in jeopardy. The carefully tailored limitations of this procedural right were designed by the Board, not by any statutory mandate.

"A fair interpretation of the broad purpose and language of §7 persuades us that the novel 'right to representation' recognized by the Board in this case is not a 'concerted activity' within the meaning of the Act. This conclusion is supported by precedent, NLRB v. Ross Gear & Tool, Co., 158 F. 2d 607, 19 LRRM 2190 (7th Cir. 1947); Texaco, Inc. v. NLRB, 408 F. 2d 142, 70 LRRM 3045 (5th Cir. 1969); and by history..." (83 LRRM at 2827).

The comment of the Court with respect to fear that an investigation may result in adverse action, emphasizes the correctness of the Assistant Secretary's statement in footnote 8 of his decision in Texas Air National Guard, A/SLMR No. 336 (1974).

Third, Quality Manufacturing Company, 195 NLRB No. 42, 79 LRRM 1269 (1972), enf't denied, in part and grt'd in part, 481 F. 2d 1018 (4th Cir. 1973), cert. granted, U.S. , 42 U.S. Law Week 3610 (1974). Because certorari has been granted in this case, a brief review of the facts and the decision of the Board and of the Court is appropriate since, as will appear from such review, this case is wholly dissimilar from the instant case. On Friday, October 10, 1969, the Union chairlady, Mulford, and two other employees, including employee King, met with the company about the inability to earn a satisfactory wage under the piece rate than in effect. No solution was reached. Later that day, employee King

shut down her machine and was causing a minor disturbance. Two other employees stopped their machines to watch. A supervisor ordered King to resume work. King responded with a flippant remark and the supervisor ordered King to go to the president's office. King complied, but enroute asked Mulford, the Union chairlady, to accompany her. Mulford left her work and went to the anteroom of the president's office where the president told Mulford to return to work. Mulford refused. King refused to go into the president's office without Mulford. The president then directed both Mulford and King to return to their work stations and they did so. On Sunday, Mulford was suspended for two days. The following week similar confrontations occurred with assistant chairlady Cochran seeking to represent King. The ultimate result was suspension of Cochran, discharge of Mulford and King and, when Cochran attempted to file grievances on behalf of Mulford, King and herself, the grievances were rejected and thrown in the trash and Cochran was discharged. The Board held that the Company violated Sections 8(a)(3) and (1) upon a finding that Cochran was discharged because she sought to engage in a protected union activity, i.e., filing grievances; that the Company violated Section 8(a)(1) by discharging King because of her insistence on union representation when summoned to an interview at which she had "reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct," and by suspending and discharging chairlady Mulford and suspending assistant chairlady Cochran because they sought to represent King at such an interview.

The Fourth Circuit granted enforcement of that portion of the Board's order relating to the illegal discharge of Cochran but denied enforcement of the remainder of the Board's order. The Court stated, in part, as follows:

"...Every situation wherein an employee is directed by management to cooperate in an investigatory interview carries the implicit threat of discipline...the Board has many times been confronted with an alleged violation of Section 8(a)(1) in the context of a denial of union representation at employer-employee interviews. By necessary implication, Section 7 rights have been at issue in each of these cases. Yet never has it been thought, as the Board would hold here, that such rights require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions.' ...

"It is clear beyond question, however, that the Board has no power to alter or rearrange employer-employee relations to suit its very whim. Rather, the Board can only determine whether the Act has been violated. And it would appear that in the entire history of the law as developed above, the management prerogative of conducting an investigatory interview, such as Quality attempted here, has not been considered a violation of the Act..." (83 LRRM at 2822-2823).

The interview involved in Quality was not merely investigatory; the president, who sought to conduct the private interview, had the power to discipline in that procedure. Accordingly, Quality is not factually comparable to investigatory proceedings confined to ascertaining facts without authority to discipline. Consequently, it is questionable that the decision of the Supreme Court in Quality, set for argument at term of Court beginning in October 1974, will change the parallel line of decisions represented by Chevron Oil Company, supra, and related cases cited above, dealing with pure fact finding.

The decisions of the NLRB uniformly hold, notwithstanding the new and novel contention of "apprehension" in Mobile and Quality (rejected, however, by both the Seventh and Fourth Circuits), that where the investigation is fact finding and without authority at the investigatory stage to impose discipline, denial of union representation is not an unfair labor practice.

Denial of representation before the Facility Review Board, even if the broader rights of Section 7 of NLRA applied, which, of course, is not the case, would, nevertheless, not constitute an unfair labor practice. A fortiori, denial of representation before the Facility Review Board under the applicable terms of the Executive Order was not a violation of Section 19(a)(1) of the Executive Order.

II. Further Proceedings Herein Have Been Rendered Moot

The single violation alleged in this proceeding is that the Agency violated Section 19(a)(1) by denying representation to a member of the bargaining unit while appearing before a Facility Review Board. The decision of the facility Chief, Mr. Hayter, to impose discipline was separate and apart from the investigation by the Facility Review Board which had no authority to recommend any human corrective action. The discipline imposed on Mr. Hicks was grievable under the Agency's unilateral grievance procedure.

Even if denial of representation constituted a violation of Section 19(a)(1) of the Order, jurisdiction to remedy such violation could reach only that violation - not the merits of the discipline which was subject to challenge and review under an established procedure. Therefore, the maximum remedy permissible in this proceeding would be an order directing the Agency to cease and desist from denying, upon request, such representation. Such order would, necessarily, operate only in the future. See, for example, Fort Jackson Laundry Facility, A/SLMR No. 242 (1973).

On June 20, 1973, the Agency unilaterally issued the following general notice to all ATC facilities:

"...Effective immediately an employee in an alleged system error may if he requests be assisted by an appropriate union representative while listening to the tapes/preparing a statement or appearing before a System Error Review Board. At facilities where no exclusive recognition exists or where there is no recognized union representative the employee involved may be assisted by a fellow employee if he so requests. The role of the employee's representative will be limited to assisting the employee within the context of the established Review Board. The representative will be present only while the employee is appearing." (Comp. Exh. 1).


The Agency has changed its own Facility Review Board procedure to provide the very relief Complainant seeks in this proceeding. Indeed, the Agency has gone well beyond the relief sought herein. The action of the Agency has, thus, rendered moot further proceedings in this matter and the complaint should, for that reason alone, be dismissed.

Neither party has addressed itself to the mootness issue. No issue has been raised, and no decision is made, concerning the effect of possible unilateral withdrawal of the rights unilaterally granted by the general notice of June 20, 1973, except to note that any change in established conditions may invoke the provisions of Section 19(a)(6). To repeat, no such issue is before me for decision and no decision is made, or is to be inferred, as to any such issue.

Recommendation

Having found that denial of representation before the Facility Review Board was not a violation of Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.

Alternatively, as the action of Respondent on June 20, 1973, in changing its policy to permit, *inter alia*, representation before Facility Review Boards, has provided the maximum relief sought herein, said action has rendered further proceeding in this matter moot, whether or not a violation of Section 19(a)(1) occurred on February 26, 1973, and, for this reason alone, I recommend that the complaint herein be dismissed in its entirety.


WILLIAM B. DEVANEY
Administrative Law Judge

Dated July 16, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,
CLEVELAND ARTC CENTER,
OBERLIN, OHIO
A/SLMR No. 430

This proceeding arose upon the filing of an unfair labor practice complaint by the Professional Air Traffic Controllers Organization, Cleveland Center, PATCO-MEBA, AFL-CIO (Complainant), alleging that the Respondent Activity violated Sections 19(a)(1), (5), and (6) of the Order when it refused three of its employees representation during a proceeding before the Respondent's Facility Review Board. The Complainant contends that this proceeding constituted a formal discussion within the meaning of Section 10(e) of the Order, and that denial of representation interfered with the employees rights under the Order, denied recognition to the exclusive representative, and was a failure to negotiate or consult with Complainant regarding the establishment of a procedure which would insure the exclusive representative presence at this type of meeting.

The Administrative Law Judge found no evidence that the Respondent ever refused to negotiate or consult on this or any other subject and, therefore, he recommended dismissing the 19(a)(6) allegation. With regard to the 19(a)(1) and 19(a)(5) allegation, the Administrative Law Judge concluded that the purpose of the Facility Review Board, which investigates system errors, was clearly investigative in nature and that it only had the authority to recommend remedial action, including discipline. Therefore, in the Administrative Law Judge's view, even assuming that the proceedings of the Facility Review Board included formal discussion between management and employees, the discussion did not concern grievances or personnel policies and practices or other matters affecting general working conditions of employees in the unit as prescribed by Section 10(e) of the Order. Accordingly, he recommended that the complaint be dismissed.

Noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's finding that the proceedings before the Facility Review Board did not constitute a formal discussion within the meaning of Section 10(e) of the Order. Under these circumstances, the Assistant Secretary found that the Respondent's denial of union representation to the controllers who appeared before the Board was not violative of Sections 19(a)(1), (5) or (6) of the Order. Accordingly, he ordered that the unfair labor practice complaint be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
CLEVELAND ARTC CENTER,
OBERLIN, OHIO

Respondent

and

Case No. 53-6627

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, CLEVELAND CENTER,
PATCO-MEBA, AFL-CIO

Complainant

DECISION AND ORDER

On July 31, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I find, in agreement with the Administrative Law Judge, that, under the circumstances, the proceedings before the Facility Review Board did not constitute a formal discussion within the meaning of Section 10(e) of the Order and that denial of union representation to the controllers who appeared before the Board was not violative of Sections 19(a)(1), (5) or (6) of the Order. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-6627 be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 30, 1974

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

..... :
In the Matter of :
FEDERAL AVIATION ADMINISTRATION, :
CLEVELAND ARTC CENTER, :
OBERLIN, OHIO :
Respondent :
Case No. 53-6627 :
and :
PROFESSIONAL AIR TRAFFIC CONTROLLERS :
ORGANIZATION, CLEVELAND CENTER :
PATCO-MEBA, AFL-CIO :
Complainant :
..... :

E. L. Embry
Office of Labor Relations
Federal Aviation Administration
800 Independence Avenue, S. W.
Washington, D. C. 20591

For the Respondent

Robert E. Meyer
Vice President-PATCO
3158 Des Plaines Avenue
Des Plaines, Illinois 60018

Before: MILTON KRAMER
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated May 1, 1973 and filed May 7, 1973. The complaint alleged that three employees in the unit requested union representation by the unit's recognized representative at an Incident Review Board hearing

1/ See, in this regard, Department of Transportation, Federal Aviation Administration, Las Vegas Air Traffic Control Tower, Las Vegas, Nevada, A/SLMR No. 429.

and that such request was denied, and that as a result of the hearing and resulting findings one of the three employees was orally admonished by his supervisor. This was alleged to constitute a violation of Section 19(a)(1) of the Executive Order for interfering with the employee's right to representation; a violation of Section 19(a)(5) by denying recognition to an exclusive representative; and a violation of Section 19(a)(6) "by the activity's failing to negotiate or consult on establishing a procedure which would insure that the exclusively recognized representative be present at this type of meeting."

The Area Administrator investigated the complaint and reported to the Assistant Regional Director. On March 4, 1974 the Assistant Regional Director issued a Notice of Hearing on the complaint to be held on March 27, 1974 in Oberlin, Ohio. Hearings were held on March 27 and 28 in Oberlin. The Complainant was represented by its Regional Vice President (Great Lakes Region) and the Respondent by the Chief of Union Management Relations Division, Office of Labor Relations, Federal Aviation Administration. Pursuant to extensions of time requested and granted, briefs were timely filed by the parties June 3, 1974.

Findings of Facts

PATCO-MEBA, AFL-CIO, is the certified exclusive representative of the air traffic controllers of the Federal Aviation Administration including those employed at the Cleveland ARTC Center. Certification of PATCO was on October 20, 1972 but it was not until April 1973 that it entered into a formal contract, including a negotiated grievance procedure, with FAA. Prior to April 1973 there was an agency prescribed grievance procedure.

On January 2, 1973 a system error occurred with respect to an airplane passing from the control of the Cleveland Center to the control of the New York Center. As a result of the error, there was a less than standard separation of airplanes.

An FAA Order in effect at the time contained, among many other provisions, the following:

- "3. AT System Error. An operational error in which a failure of the equipment, human, procedural, and/or other system elements, individually or in combination, results in less than the appropriate separation minima . . . being provided to an aircraft receiving an air traffic service . . .
- "4. Introduction. An important function of effective air traffic control management is the identification and correction of system errors which occur as a result of basic weaknesses inherent in the composite man-machine system. This program is oriented toward the identification of all the causes of system errors so that effective corrective action may be implemented in all areas of the system.

"7. Responsibilities

b. The Facility Chief

- (1) Responsibility. The facility chief shall be responsible for establishing Facility Review Board and shall be accountable for its functions of:
 - (a) Investigation and reporting, in accordance with the System Error Reporting form and its accompanying instructions, all system errors occurring in the facility.
 - (b) Recommending to the facility chief corrective actions based on an objective analysis of the information derived from the investigation. Board findings shall identify whether

the error was primarily "human" or due to other system elements ("machine"). If human error was involved, the full board shall participate in identifying the error and the development of the general nature of corrective action recommended; i.e., discussion, training, disciplinary action, other personnel actions."

Attachment 1 to the Order, provided

"25. Recommendations for Corrective Action. Specific corrective actions commensurate with the basic causes developed in the analysis should be recommended for each occurrence. Recommendations for corrective actions dealing with "machine" elements should include such items as new or revised procedures, equipment changes or modifications, facility layout, environmental conditions, etc. Recommendations for corrective actions dealing with the "human" element may take the form of discussion, training, disciplinary action, or other forms of personnel actions.

On February 1, 1973 the authority of the Facility System Error Review Board to recommend corrective action with respect to the "human" element in a system error was deleted, and the Facility Chief was to take appropriate corrective action, if any, on his own initiative.

In accordance with the FAA Order quoted from above, after the system error of January 2, 1973 the Facility System Error Review Board scheduled a hearing for January 23, 1973 to investigate and report on the error. Among those requested to appear at the hearing and present statements were air traffic controllers Clyde R. Gates, Eugene A. Horvatt, and John M. Paolino. On January 22, they jointly requested of the Facility Chief that the local President of PATCO, Rex Evelsizer, be present at the hearing. They made the request because they were apprehensive that discipline might result from the investigation. The request was denied the same day.

Generally, and in this case, individuals give evidence separately to the Facility System Error Review Board; no other witnesses were present when a witness testified. There is no transcript of the proceedings before the System Error Review Board. The persons appearing submit statements to the Board and the Board may then ask questions or engage in discussion.

The purpose of an inquiry by the System Error Review Board, as testified to by its Chairman and by the Facility Chief and provided in the FAA Order, 1/ is two-fold. First, to investigate and evaluate all factors associated with the cause of the error, such as: the failure, malfunction, or substandard performance of equipment or deficiency in its layout; human cause, such as substandard performance or non-adherence to procedures by Facility personnel; procedural error, such as the absence, inadequacy, or incorrectness of existing instructions; unreasonably high traffic volume, unexpected traffic situations; unusual weather, noise, distractions, erroneous information from outside sources, "untenable" environmental conditions, or any other cause. The second purpose of the inquiry by the Review Board is to make recommendations on steps to be taken to prevent a recurrence of the error.

The Board made its report to the Facility Chief, M.L. Koehler, sometime after January 25 and before February 3, 1973. (The report was not introduced in evidence). It contained five recommendations, one of which was that Horvath's supervisor orally admonish him concerning his failure to effectuate a radar handoff (despite his efforts to do so).

Upon receiving a report and recommendation from the System Review Board, the Facility Chief usually makes his own additional investigation and evaluation, and Mr. Koehler did so in this case. On February 5, he directed Horvath's supervisor to admonish Horvath orally and discuss with him priority of duties. The supervisor did so, privately, with

1/ R. Exh 1, Attachment 1, pp. 1-2

no one else present. The Facility Chief also asked each of the seven Assistant Chiefs to tell each supervisor of the error that had occurred so that the supervisors could tell the other controllers what had happened resulting in two aircraft under the control of the New York Center coming within less than standard separation.

The Facility Chief did not consider the oral admonishment to Horvath to be the imposition of discipline or adverse action of any kind. There is no record made in an employee's personnel file of an oral admonishment. Under the agency (non-negotiated) grievance procedure, discipline such as a letter of warning or a letter of reprimand or more severe action can be the subject of a grievance or an appeal. Before any such action is taken the individual is told it is contemplated and has a right to representation at subsequent proceedings and his representative has access to all pertinent materials. That procedure was not followed in this case.

The complaint alleges that the Respondent violated Section 19(a)(6) of the Executive Order in failing to negotiate or consult on establishing a procedure that would give the exclusive representative a right to be present at meetings of a System Error Review Board. There is no evidence that the Respondent ever refused to negotiate or consult on that or any other subject.

Discussion and Conclusions

An examination of the pertinent FAA Order under which the Facility System Error Review Board functions (R. Exh. 1) makes it plain that its purpose is to investigate and report on what happened when aircraft in flight get closer than standard separation and to recommend remedial action. It has no power to adopt or institute remedial action. When the Facility Chief receives the Board's report he makes his own additional investigation and evaluation and then follows or does not follow the Board's recommendations. At the time of its investigation in this case the Board could include disciplinary action among its recommendations; a week later the authority to include such a recommendation was deleted.

The Complainant predicates its contention that Gates, Horvath, and Paolino had a right to union representation, as they requested, at the Board's investigation on the last sentence of Section 10(e) of the Executive Order. That sentence states:

The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

It may fairly be assumed that the proceedings at the Board's investigation included formal discussions. It may be assumed, although it is somewhat questionable, that in part they included formal discussions between management and employees. But it is not at all such discussions that a recognized representative has the right to an opportunity to be represented. It is only at those that concern "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

The discussions at the Board's investigation did not concern grievances; no grievance was pending. Nor did they involve "personnel policies and practices" as that term is normally understood. I understand such term to include such matters as promotions, the imposition of discipline, the timing of vacations, assignment of overtime work, transfers, assignment to shifts, and the like. I do not understand that term to include such matters as the methods and personnel by which the agency's functions are to be performed. Such matters are expressly removed from the bargaining obligation by Section 12(b)(5) of the Executive Order.

Nor were the proceedings of the Review Board concerned with "other matters affected general working conditions of employees in the unit." At least they were not concerned with such "general working conditions" as the scope of that term is delineated in Department of Defense, Texas Air National Guard, A/SLMR No. 336. In that case the Assistant Secretary held that a discussion was not a discussion involving

general working conditions when it "had no wider ramifications than . . . discussions at a particular time with an individual employee . . . concerning particular incidents as to him." (At page 4.) The discussions in this case with the three controllers were individual discussions concerning individual conduct at a particular time concerning a particular incident.

The fact that each of the three controllers was apprehensive that the Board's investigation might lead to disciplinary action is also irrelevant in the light of the Texas Air National Guard case. In footnote 8 in that case the Assistant Secretary said:

"In my view, an individual employee is not entitled in every instance to have his exclusive representative present because of a concern that a meeting may ultimately lead to a grievance or 'adverse action.'"

I conclude that the Complainant did not have the right to an opportunity to be represented at the investigation here involved and that the employees did not have the right to have their representative given such opportunity.

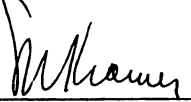
Decisions under the National Labor Relations Act, while not controlling, furnish interesting corroboration of the conclusion reached above. In a number of cases the National Labor Relations Board has held that when an interview or meeting with an employee is held to determine the facts concerning suspected misconduct, and the representatives of the employer at the interview do not have the authority to impose discipline but only to report to a management official who does have disciplinary authority, the employer is within its rights in refusing the employee's request that his union representative be present at the interview or meeting. 2/ In the three cases in which the Board held that the employer committed an unfair labor practice in such situation, because the employee had reasonable grounds for

2/ Chevron Oil Co., 66 LRRM 1353 (1967); Illinois Bell Tel. Co., 78 LRRM 1109 (1971); Lafayette Radio Electronics, 78 LRRM 1693 (1971); Western Electric Co., 80 LRRM 1705 (1972).

believing that discipline might eventuate as a result of the meeting 3/ or for other reasons 4/, the Board was reversed by the Courts of Appeals. 5/ The Supreme Court granted a petition for a writ of certiorari in the Quality Manufacturing Co. case and that case will be heard at the October, 1974 Term, so perhaps we shall soon have more definitive enlightenment on this line of cases.

Recommendation

Since there was no evidence at all to sustain the alleged violation of Section 19(a)(6) of the Executive Order, that claimed violation should be dismissed. And since the evidence adduced does not sustain, by a preponderance of the evidence, the allegations of violations of Sections 19(a)(1) and 19(a)(5), the complaint should be dismissed in its entirety.


MILTON KRAMER
Administrative Law Judge

DATED: July 31, 1974
Washington, D.C.

3/ Quality Mfg. Co., 79 LRRM 1269 (1972); Mobil Oil Corp., 80 LRRM 1188 (1972).

4/ Texaco, Inc., 66 LRRM 1296 (1967).

5/ Texaco Inc. v. Nat'l. Labor Rel. Bd., 408 F. 2d 142 (5th Cir. 1969); N.L.R.B. v. Quality Mfg. Co., 481 F. 2d 1018 (4th Cir. 1973), pending on grant of certiorari; Mobil Oil Corp. v. N.L.R.B., 482 F. 2d 842 (7th Cir. 1973).

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2028
(VETERANS ADMINISTRATION HOSPITAL,
PITTSBURGH, PENNSYLVANIA)
A/SLMR No. 431

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2028
(VETERANS ADMINISTRATION HOSPITAL,
PITTSBURGH, PENNSYLVANIA)

Respondent

and

Case No. 21-3976(CO)

ARTHUR WILLIAMS

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by Arthur Williams (Complainant) against the American Federation of Government Employees, Local 2028, (Respondent). The complaint alleged that the Respondent refused to process a grievance filed by the Complainant beyond the second step of the negotiated grievance procedure contained in the negotiated agreement between the Activity and Respondent because of the Complainant's opposition to the current local union leadership in violation of Section 19(b)(1) of the Executive Order.

On July 11, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

The Administrative Law Judge found that the newly elected Chief Steward did not refuse to process the Complainant's grievance but merely declined to be the latter's representative due to the fact that he was, and had been, representing the other combatant involved in the Complainant's grievance. Further, the Administrative Law Judge noted that there was no evidence to indicate animus on the part of the newly elected slate of the Respondent's officers towards the Complainant or any other former official of the Respondent. Accordingly, he concluded that there was insufficient evidence to support the allegations of the complaint in this matter.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed in its entirety.

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U. S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180

ORDER

U.S. DEPARTMENT OF LABOR

BOARD OF CONTRACT APPEALS

WASHINGTON, D.C. 20210



IT IS HEREBY ORDERED that the complaint in Case No. 21-3976(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 30, 1974

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

.....	:
In the Matter of	:
	:
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,	:
Local 2028, Veterans Administration Hospital,	:
Pittsburgh, Pennsylvania	:
	: Case No. 21-3976 (C0)
Respondent	:
	:
and	:
	:
ARTHUR WILLIAMS	:
	: Complainant
	:
.....	:

John W. Ford, Esquire
821 Hawthorne Drive
Pittsburgh, Pennsylvania 15235
For the Respondent

Mr. Isaac J. Saxon
7718 Alsace Street
Pittsburgh, Pennsylvania 15208
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to an amended complaint first filed on December 19, 1973, under Executive Order 11491, as amended, by Arthur Williams, an individual, against American Federation of Government Employees, Local 2028, hereinafter called the Union, a Notice of Hearing on Complaint was issued by the Regional Director for the Philadelphia, Pennsylvania, Region on March 29, 1974.

The complaint alleges that the Union refused to process a grievance filed by Arthur Williams beyond the second step of the grievance procedure because of his opposition to the current local union leadership in violation of Section 19(b)(1) of the Executive Order.

A hearing was held in the captioned matter on June 4, 1974, in Pittsburgh, Pennsylvania. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following conclusions and recommendations:

Findings of Fact

The Union and the Veterans Administration Hospital, University Drive, Pittsburgh, Pennsylvania, are parties to a collective bargaining agreement which contains a five step grievance procedure. Steps one and two of the grievance procedure provide for discussions among the affected employee, his selected steward and the respective representative of the management agency involved. Failing satisfactory resolution of the grievance in steps one and two, the employee grievant may at his option proceed to step three of the grievance procedure. Step three, which is the provision of the grievance procedure underlying the instant complaint, provides as follows:

Step 3 - If not satisfied with the decision in Step 2, the employee and the steward may refer the complaint to the Chief Steward. The Chief Steward will contact the Division or Service Chief within (5) calendar days from the date of immediate supervisor's reply. At this point, the employee, the Chief Steward, and the Division or Service Chief will meet as soon as possible to attempt resolution of the matter. A decision will be given in writing by the Service or Division Chief within five (5) calendar days following the last of these discussions.

During the period January - July 17, 1973, according to the isolated references in the record on the point, following a rerun election due to some unspecified charges and/or complaints, a new slate of Union officers, committeemen and stewards was finally elected. Thus, on July 17, 1973, James K. Tyler and Walter Tarwacki, succeeded Isaac J. Saxon and Edward Jamison, as President and Chief Steward of Local 2028, respectively. Arthur Williams, the complainant herein, was not reelected to his former position of Sergeant-at-Arms.

On May 6, 1973, Complainant Williams and employee Bernyce Hamlin, both of whom worked in Dietetic Service, were engaged in some sort of physical contact which resulted, according to an

"Admonishment" subsequently issued by Food Service Supervisor Lowe on June 25, 1973, in each of the participants" requiring medical treatment, filing reports of injury, absence from duty due to the confrontation,...."

Following receipt of the above-mentioned "Admonishment" dated June 25, 1973, Bernyce Hamlin approached and secured Walter Tarwacki and Marcellus Luck as her personal representatives for purposes of filing a grievance over the "Admonishment." Tarwacki, who at the time held no official position in the Union, along with Luck subsequently processed a grievance on behalf of Bernyce Hamlin through the first and second steps of the grievance procedure. Upon receiving a negative response from supervisor Lowe in the first and second steps of the grievance procedure, the grievance for some unexplained reason was dropped and never pursued to the third step of the grievance procedure, i.e. referral to the Chief Steward.

Complainant Williams received his June 25, 1973, "Admonishment" by certified mail on June 28, 1973, while at home on sick leave. Upon receiving the "Admonishment", Williams held several telephone conversations with Saxon and Jamison, the then President and Chief Steward, respectively, of the Union, wherein he was advised that the time limits in Section 1 of the grievance procedure would not begin to run until such time as he returned to work and initiated the grievance procedure by filing a grievance. Following his return to work on or about July 15, 1973, Williams contacted shop steward Sisco relative to his grievance. Thereafter, on August 2, 1973, Sisco and Williams met with Supervisor Lowe and entered into the first step of the grievance procedure, i.e., informal discussion of the subject matter underlying the grievance. Following a negative response from Lowe to their request that the "Admonishment" be removed from Williams' personnel file, the grievance was reduced to writing and submitted on August 12, 1973, pursuant to Step 2 of the grievance procedure, to Lowe for a written reply within five days. By memorandum dated August 15, 1973, Supervisor Lowe refused to remove the "Admonishment" from Williams' personnel file, thus completing Step 2 of the grievance procedure.

Following the rejection of his grievance in Step 2, Williams sought out and eventually met Chief Steward Tarwacki and informed him that he wished to process his grievance through the third step of the grievance procedure. Tarwacki, who apparently was about to go on annual leave, informed Williams that he was and had been representing Bernyce Hamlin, the other party involved in the grievance, and that he thought that it would be a con-

conflict of interest to also represent Williams. Tarwacki then suggested that Williams contact Shop steward Talbert, who he thought had been processing Williams' grievance in the early stages, and tell him that Tarwacki had authorized him (Talbert) to act in Tarwacki's behalf in processing the grievance of Williams through the third step of the grievance procedure. 1/ Thereafter, Williams made no attempt to contact Talbert or any other named shop steward with respect to processing his grievance through the third step. Williams did, however, on or about August 16, 1973, informally submit a short note to Local 2028 President Tyler wherein he noted that the Chief Steward and his assistant were on vacation and urged him to keep his grievance moving through the 3rd step of the grievance procedure. The note was unaccompanied by any data bearing on the grievance or any explanation thereof.

Although complainant Williams contends that the alleged refusal was predicated on his support for an opposing slate of candidates, no evidence was entered into the record indicating animus on the part of the newly elected slate of Local 2028 officers, stewards and/or committeemen towards Williams or any other former official of Local 2028.

DISCUSSION AND CONCLUSIONS

Section 1(a) of Executive Order 11491, as amended, guarantees each employee of the executive branch of the Federal Government the right to freely and without penalty or reprisal, to form, join, and assist a labor organization or to refrain from such activity. The "right to Assist a labor organization extends to participation in the management of the organization." Union abridgement of such rights constitutes a violation of Section 19(b)(1) of the Order.


In view of the foregoing cited provisions of the Order, it is clear that if Chief Steward Tarwacki's alleged refusal to process Williams' grievance was in any way connected with Williams' activities in support of an opposing slate of Local 2028 officers, such refusal would be violative of Section 19(b)(1) of the Order. However, I find that such was not the case.

1/ While Williams acknowledges such a conversation with Tarwacki, he places it as occurring after Tarwacki had returned from annual leave and at a date well passed the time limits set forth in Step 3 for further processing a rejected Step 2 grievance. Williams further testified that the conversation he had with Tarwacki prior to Tarwacki taking annual leave concerned itself solely with the time limits involved in processing a grievance from Step 2 to Step 3 and that Tarwacki assured him that he could take up to 30 days to process same. (Footnote con't next page)

Tarwacki in his capacity as Chief Steward and a responsible union representative did not refuse to process Williams' grievance but merely declined to be his representative thereon due to the fact that he was, and had been, representing the other combatant involved in Williams' grievance. Whether, as he concluded, representation of both grievants would have resulted in a conflict of interest, the fact remains that he suggested and authorized another union representative to act in his stead. Accordingly, in the absence of any evidence that such authorized alternate representative, who Williams admittedly did not contact, had either refused to process Williams' grievance, was unacceptable to management, or acted in a dilatory manner to Williams detriment, I find insufficient evidence to support the allegations of the complaint.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(b)(1) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.


 BURTON S. STERNBURG
 Administrative Law Judge

Dated: July 11, 1974
 Washington, D.C.

(Footnote 1/ Con't) Tarwacki denied ever discussing time limits with Williams or having more than one discussion with him relative to his grievance. Having observed both witnesses, I am inclined to view Tarwacki's recollection of the events as the more reliable and accordingly credit his testimony in this respect. Williams, on the other hand, while appearing to be a most sincere witness had extreme difficulty in recollecting the sequence of events underlying the processing of his grievance.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVAL AIR STATION,
FALLON, NEVADA
A/SLMR No. 432

This case involved unfair labor practice complaints filed by the American Federation of Government Employees, Local 1841 (Complainant) against Department of the Navy, Naval Air Station, Fallon, Nevada (Respondent), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order. Specifically, the complaint alleged that Respondent refused to bargain in good faith: by its conduct and certain statements made by its representatives during negotiations held in June 1972; by its posting a letter dated January 16, 1973, from the Activity Commander to the Complainant's President on bulletin boards throughout the Station with instructions that it be read and initialed by employees; and by virtue of certain statements it made at a labor-management meeting held on April 26, 1973, and its posting on bulletin boards of the minutes of that meeting.

The Assistant Secretary adopted the Administrative Law Judge's conclusion that, among other things, the posting of minutes of the April 26, 1973, labor-management meeting did not violate Section 19(a)(1) and (6) of the Order, although not adopting the rationale for his finding. The Administrative Law Judge found that the April 26 minutes accurately reflected what had occurred at the parties' labor-management meeting and that it contained no threats or promise of benefit. Under the circumstances, he found that the posting of the minutes constituted an exercise of the Respondent's right to communicate with its employees which, standing alone, did not interfere with any protected employee rights. The Assistant Secretary found that, absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to communicate directly with unit employees over matters relating to the collective bargaining relationship, direct communications, such as here involved, necessarily tended to undermine the status of an exclusive bargaining representative. In the Assistant Secretary's view, by directly reporting to unit employees matters which have arisen in the context of the collective bargaining relationship, an agency or activity necessarily undermines an exclusive representatives' right to be dealt with exclusively in matters affecting the terms and conditions of employment of the unit employees it represents. Any lesser standard in his opinion, clearly

would be in derogation of the collective bargaining relationship. However, noting the Administrative Law Judge's finding that the parties, through mutual agreement and past practice, had established a procedure for the posting of minutes of such labor-management meetings, the Assistant Secretary concluded that the Complainant was estopped from contending that the April 26, 1973, posting was in violation of the Order.

The Assistant Secretary rejected the Administrative Law Judge's finding that the posting of a January 16, 1973, letter from the Respondent's Commanding Officer to the Complainant's President did not violate the Order. Although noting that the letter contained statements which might be offensive to the Complainant, the Administrative Law Judge found that it was not so outrageous or capricious as to interfere with protected rights. He reasoned that an activity can communicate with employees and report its version of any meetings as its position in labor-management matters so long as the communications do not involve unlawful threats and promise of benefit and do not constitute an attempt to bypass the exclusive representative. The evidence established that the posting in this instance did not involve "minutes" of a monthly labor-management meeting, but rather, as noted above, involved a letter from the Respondent's Base Commander reflecting events which occurred at a special meeting between Complainant's President and the Respondent's Executive Officer held to solve a negotiating problem and an unfair labor charge. The Assistant Secretary found, consistent with the above rationale, that, absent agreement by an exclusive representative, it is improper for agencies or activities to communicate directly with unit employees with respect to matters relating to the collective bargaining relationship. He noted that the need for such policy is clearly demonstrated in the instant case where the Respondent's communication to unit employees created an unfavorable impression with respect to Complainant's President and, in his view, necessarily tended to derogate the Complainant's exclusive bargaining status. Accordingly, he found that such action was inconsistent with the Respondent's obligation to deal exclusively with the exclusive representative in violation of 19(a)(6) of the Order. Moreover, he found that such conduct necessarily interfered with the rights of unit employees in violation of Section 19(a)(1).

Based on the above rationale, the Assistant Secretary also found, in agreement with the Administrative Law Judge, that the requirement that employees read and initial the posted January 16 letter was violative of Section 19(a)(1) and (6) of the Order.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions to remedy such conduct.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AIR STATION,
FALLON, NEVADA

Respondent

and

Case Nos. 70-2477,
70-2496 and
70-4076

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1841

Complainant

DECISION AND ORDER

On July 10, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in an unfair labor practice alleged in the complaint in Case No. 70-2496 and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. The Administrative Law Judge also found other alleged improper conduct of the Respondent not to be violative of the Order. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject cases, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, except as modified below.

The complaints herein alleged essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by the following conduct: (1) by its conduct and certain statements made by its

representatives during contract negotiations held on June 5, 7, 9, 14, 16, and 19, 1972; (2) by its posting of a letter dated January 16, 1973, from the Respondent to the Complainant's President on bulletin boards throughout the Naval Air Station with instructions that it be read and initialed by employees, without first showing the letter to the Complainant; and (3) by virtue of certain statements it made at a labor-management meeting held on April 26, 1973, and its posting on bulletin boards of the minutes of that meeting.

The essential facts of the case are set forth in detail in the Administrative Law Judge's Report and Recommendations and I shall repeat them only to the extent necessary.

The Administrative Law Judge found, among other things, that the Respondent's posting of the minutes of the April 26, 1973, labor-management meeting did not violate Section 19(a)(1) and (6) of the Order. In this connection, he noted that the parties' expired negotiated agreement had contained a provision for the posting of such minutes and that the Complainant did not provide for any change in the procedure for posting in its new contract proposals. 1/ Furthermore, he noted that there existed a past practice for the posting of minutes irrespective of whether or not the Complainant agreed to their accuracy. In finding that the Respondent's posting of the April 26 minutes was not violative of the Order, the Administrative Law Judge concluded that the minutes accurately reflected what occurred at the labor-management meeting involved and contained no threats or promise of benefit to the employee. Under all of these circumstances, he found that the posting of these minutes constituted an exercise of the Activity's right to communicate with its employees which, standing alone, did not interfere with any protected employee rights.

While I adopt the ultimate disposition of the Administrative Law Judge in this regard, I do not adopt his rationale. Thus, contrary to the Administrative Law Judge, I find that, absent mutual agreement between an exclusive bargaining representative and an agency or activity concerning the latter's right to communicate directly with unit employees over matters relating to the collective bargaining relationship, direct communications such as that involved in this situation necessarily tend to undermine the status of the exclusive bargaining representative. Section 10(e) of the Order provides, in part, that "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit . . . is entitled to act for . . . all employees in the unit . . . and is responsible for representing the interests of all employees in the unit" In my view, by directly reporting to unit employees

1/ Article V, Section 3 of the expired agreement stated, in pertinent part: "Minutes of these meetings/monthly labor-management meetings/ will be posted on Civilian Bulletin Boards by the EMPLOYER and three (3) copies furnished to the UNION."

matters which have arisen in the context of the collective bargaining relationship, an agency or activity necessarily undermines an exclusive representative's rights set forth in Section 10(e) to be dealt with exclusively in matters affecting the terms and conditions of employment of the unit employees it represents. Any lesser standard clearly would be in derogation of the collective bargaining relationship.

As noted above, however, the Administrative Law Judge found that the parties herein, through mutual agreement and past practice, had established a procedure for the posting on bulletin boards the minutes of the parties' monthly labor-management meetings. Under these circumstances, I find that the Complainant is estopped from contending that Respondent's posting of the minutes of the April 26, 1973, labor-management meeting was violative of the Order. Accordingly, in agreement with the Administrative Law Judge, I find that the Respondent's conduct in this regard did not violate Section 19(a)(1) and (6) of the Order.

The Administrative Law Judge also found that the posting by the Respondent of the January 16, 1973, letter from Captain Muncie to Ms. Sanders did not constitute either an attempt to bypass the Complainant or to interfere with any other rights protected under the Order. Under the circumstances, I disagree with this finding of the Administrative Law Judge. Thus, the evidence established that the posting in this instance did not involve the posting of "minutes" of a monthly labor-management meeting in accordance with Article V, Section 3 of the parties' expired negotiated agreement, but, rather, involved the posting of the contents of a letter to the Complainant's President reflecting the events which occurred at a special meeting between the Respondent's Executive Officer and the Complainant's President held to solve a negotiating problem and an unfair labor charge. In considering the posting of this letter, the Administrative Law Judge reasoned that an activity can communicate with employees and report its version of any meetings as its position in labor-management matters so long as the communications do not involve unlawful threats and promise of benefit and do not constitute an attempt to bypass the exclusive representative. Although noting that the letter contained statements which might be offensive to the Complainant, he found that the letter was not so outrageous or capricious as to interfere with protected rights.

As discussed above, absent agreement by an exclusive representative, I find that it is improper for agencies or activities to communicate directly with unit employees with respect to matters relating to the collective bargaining relationship. The need for such a policy is clearly demonstrated in this instance where the Respondent's communication to unit employees created an unfavorable impression with respect to the actions of the Complainant's President and, in my view, necessarily tended to undermine the Complainant's exclusive bargaining status. Under these circumstances, therefore, I find that the Respondent's posting of Captain Muncie's letter of January 16, 1973, to the

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Complainant's President was inconsistent with its obligation under the Order to deal exclusively with the exclusive representative of its employees in violation of Section 19(a)(6). Moreover, I find that such conduct necessarily interfered with the rights of unit employees in violation of Section 19(a)(1).

Further, consistent with the above rationale, I find, in agreement with the Administrative Law Judge, that the requirement that employees read and initial the posted January 16 letter was violative of Section 19(a)(1) of the Order. And based on the rationale outlined above, such conduct also was considered to be violative of Section 19(a)(6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Naval Air Station, Fallon, Nevada shall:

1. Cease and desist from:

(a) Posting letters on bulletin boards relating to meetings pertaining to the collective bargaining relationship between Fallon Naval Air Station and American Federation of Government Employees, Local 1841, the employees' exclusive representative unless there exists a mutual agreement to permit such posting;

(b) Requiring employees to read and initial communications posted on bulletin boards pertaining to the collective bargaining relationship between Fallon Naval Air Station and American Federation of Government Employees, Local 1841, the employees' exclusive representative, unless there exists a mutual agreement to permit such action;

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Naval Air Station, Fallon, Nevada, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the

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Commanding Officer, Department of the Navy, Naval Air Station, Fallon, Nevada, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaints in Case Nos. 70-2477 and 70-4076 be, and they hereby are, dismissed.

Dated, Washington, D. C.
September 30, 1974



Paul J. Fauser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT post letters on bulletin boards relating to meetings pertaining to the collective bargaining relationship between Fallon Naval Air Station and American Federation of Government Employees, Local 1841, our employees' exclusive representative, unless there exists a mutual agreement to permit such posting.

WE WILL NOT require our employees to read and initial communications posted on bulletin boards pertaining to the collective bargaining relationship between the Fallon Naval Air Station and American Federation of Government Employees, Local 1841, our employees' exclusive representative, unless there exists a mutual agreement to permit such action.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



In the Matter of

DEPARTMENT OF THE NAVY
NAVAL AIR STATION
FALLON, NEVADA,

Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1841,

Complainant

Case No. 70-2477
70-2496
70-4076

A.S. Calcagno
Navy Regional Office of
Civilian Manpower Management
Phelan Building
760 Market Street
San Francisco, California 94102

Richard Taylor
National Representative
American Federation of Government
Employees (AFL-CIO)
3501 Arden Creek Road
Sacramento, California 95825

BEFORE: Samuel A. Chaitovitz
Administrative Law Judge

Pursuant to a complaint filed on January 3, 1973, and an amended complaint filed on January 16, 1973, in Case No. 70-2477; a complaint filed on May 8, 1973, in Case No. 70-2496; and a complaint filed on September 19, 1973, in Case No. 70-4076; all under Executive Order 11491, as amended, (hereinafter called the Order) by AFGE Local 1 (hereinafter called the Complainant or Union) against Department of the Navy, Naval Air Station, Fallon, Nevada (hereinafter called the Respondent or Activity) an Order Consolidating Cases and Notice of Hearing on Complaint was issued by the Regional Administrator for the San Francisco Region on November 27, 1973.

A hearing was held in this matter before the undersigned on December 11 and 12, 1973, in Reno, Nevada. All parties were represented and afforded a full opportunity to be heard and to present witnesses and to introduce other relevant evidence on the issues involved. Upon the conclusion of the taking of testimony both parties were given an opportunity to make oral argument. On or about February 11, 1974, both parties filed briefs with the undersigned. Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, 1/ I make the following findings, conclusions, and recommendations.

Contentions of the Parties

The Union contends that the Activity violated the Order in following three areas:

A. Case No. 70-2477. The Complainant alleges that the Activity refused to bargain in good faith in violation of Sections 19(a)(6) and (1) of the Order by its conduct and certain statements made by its representatives during contract negotiations held on June 5, 7, 9, 14, 16, and 19, 1972.

B. Case No. 70-2496. The Complainant alleges that the Activity violated Section 19(a)(1) and (6) of the Order by posting a letter dated January 16, 1973, from the Activity Commander to the Union President on bulletin boards throughout the station with instructions that it be read and initialed by employees. This letter was posted without first being shown to and approved by the Union and it allegedly contains threats and allegedly demonstrates that the Activity holds the Union in disdain.

1/ The transcript of the hearing herein is corrected so that on page 42, line 17, the word "including" is deleted and the word "excluding" is substituted for it.

C. Case No. 70-4096. The Complainant alleges that the Activity violated Sections 19(a)(1) and (6) of the Order by posting on bulletin boards minutes of a Labor-Management meeting held on April 26, 1973, and by its discussion of personnel details at this meeting.

The Activity denies that it engaged in conduct which violated the Executive Order. The Activity argues further that neither the charge letter nor the original complaint filed in Case No. 70-2477 complied with the requirements of the Rules and Regulations.

Statement of Facts

I. Background

At all times material herein the Union was the collective bargaining representative for all civilian employees of the Fallon Naval Air Station excluding supervisory, management, and professional employees, and employees of the nonappropriated funds, and of any other military unit. At the time of the alleged violations there were between 180 and 200 employees in the unit represented by the Union. The Union and the Activity had a collective bargaining agreement which became effective on May 12, 1970, and was due to expire on May 11, 1972. 2/

II. Negotiations:

a. Commencement.

On or about November 30, 1971, Base Commander, Captain W.B. Muncie, advised the Union to get its proposals for a new contract ready. On February 16, 1972, the Activity forwarded its contract proposals to the Union. Soon thereafter the Activity sent the Union two additional proposed contract articles. The Union did not at that time submit any of its proposals but rather insisted upon reaching agreement as to ground rules for negotiations before it submitted its proposals. The Activity tried to convince the Union to try to reach an agreement on a contract through informal means.

2/ This agreement followed another two-year agreement which had become effective April 23, 1968.

The Union wanted formal ground rules first. The parties met and ground rules for negotiations were agreed upon and signed June 2, 1972. 3/ These ground rules provided that a maximum of four union negotiators would be on official time during negotiations until a total of 160 hours had been consumed by all employees.

The Union finally submitted its contract proposals during late May 1972. It contained about 32 articles. The Activity allegedly took about 17 of the Union's proposed articles, rewrote and shortened them and added them to the Activity's existing contract proposal and submitted it to the Union on or about June 2.

(b) June 5 Meeting

The first negotiation meeting was held on June 5, 1972. The chief Union negotiator was Dana Greenleaf, who remained the Union's chief negotiator until the meeting of June 14 at which time Phyllis Sanders became the Union's chief negotiator. The Activity's chief negotiator was Commander S.W. Dunton, who the record established had full and complete authority to bargain, negotiate and reach agreement on behalf of the Activity. Ms. Sanders kept notes of these meetings; which notes were soon afterwards written into the form of minutes and typed. 4/

Captain Muncie opened the meeting and addressed the negotiators. He urged those present to agree upon a contract as quickly as possible. The Union alleges and it is found

3/ The Union contends that generally management stalled in reaching an agreement as to these ground rules. The Activity denies this, while admitting it encouraged the Union to submit its contract proposals early and to attempt to reach agreement on a contract through informal negotiations, and alleges that after it agreed to meet concerning ground rules, the Union did not promptly submit its proposed ground rules. No specific evidence, other than the general allegation of stalling was produced by the Union. No finding need be made, however, since there was no allegation that there was any violation of the Order concerning the negotiation of the ground rules.
4/ The record establishes that these minutes were not a complete and verbatim record of what occurred and took statements of context and were incomplete; the record further establishes, however, that insofar as they went, although they tended to foreshorten and abbreviate what was said, they reasonably accurately quoted or reported particular statements.

that Captain Muncie stated that the Activity submitted well written counter-proposals "without all that garbage," and that Mr. Greenleaf had said he could negotiate a contract in two days. Captain Muncie stated further that "...I will not accept any contract that has any unnecessary and ridiculous requests. We have had good contracts in the past and I want this one to be the same. No garbage." Captain Muncie did not deny that he might have used the above language but stated it was in the context of urging the negotiators to try to reach a contract as quickly as possible and that such contract reached should be written in clear and concise language and should not contain a lot of unclear or irrelevant matters.

Commander Dunton is alleged to have said that the Union should just sign Management's counter-proposals; the negotiations could be concluded in 10 minutes. Commander Dunton is alleged to have repeated, a number of times during the negotiations that the Union should sign the Activity's counter-proposals. 9/ The parties then got down to negotiations 6/ and commenced discussing first the preamble and then certain articles. There was a dispute as to which numbering system, the Union's or Management's, should be used, each side insisting on their own. Although it was not clear whether one or the other was used throughout negotiations, the minutes indicated that at least at this meeting, to some degree, the Union's numbering system was used. The parties discussed the preamble and a number of articles and reached agreement on a preamble 7/ and some articles. The parties gave their reasons for their demands and for the specific language differences. In some cases they modified various language as proposed by each side before agreeing to particular articles. 8/ With respect to articles not agreed to, each side expressed its demands and the reasons and justification in support thereof. There was some discussion and disagreement

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- 5/ It is found that as the various individual articles were raised, Commander Dunton urged the Union to sign the Activity's proposals.
 - 6/ Ms. Sanders seemed to indicate that the Union's negotiators were intimidated by the Activity's representative sitting there in a "big uniform", with all the medals."
 - 7/ There seemed to be some conflict between Union chief negotiator Greenleaf and Ms. Sanders, a Union representative on the negotiating team, as to whether the Union should have agreed to the preamble as modified.
 - 8/ For example, the Union agreed to change certain language in Equal Employment Opportunity Article from "prohibiting" discrimination to "combatting" it. Similarly language changes and modifications were made and agreed to by both parties with respect to other articles.

as to precise language to be used in certain other articles. 9/ The record establishes that these language differences were substantial and not merely frivolous. The parties in addition to agreeing to certain articles set others aside. The record establishes that often as articles were raised Commander Dunton urged the Union to sign the Activity's counter-proposal. The minutes indicate that with respect to Article I the Activity's negotiating committee, during a break, met with Captain Muncie and then advised the Union that the Activity wished to continue to urge its counter-proposal.

The minutes indicate that Captain Muncie returned to the meeting and stated that he had "bad news" for the Union. He stated that some fire-fighters had been in contact with the National Fire Fighters Association and wished to withdraw from the Union. Captain Muncie advised the Union to be careful "some other Union may take over and then we would have two unions. So I suggest that you get the contract signed quickly." Captain Muncie did not recall returning to that meeting but did recall informing the Union that some disgruntled fire-fighters had advised him that they wished to withdraw from the Union and that the Union might before long be in a position to be challenged. 10/ At the close of the meeting the parties agreed to alternate drawing up the agenda for succeeding meetings. The Union submitted and the Activity agreed to an agenda for the June 7 meeting. This first meeting lasted, with breaks, from 8:00 a.m. until 3:30 p.m.

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- 9/ For example, with respect to Article I the Union wanted the contract coverage to refer only to the employees in the "unit" whereas the Activity wanted it to be more specific, to avoid confusion, and wanted it to refer to employees of Naval Air Station, Fallon.
 - 10/ Despite the confusion as to at which meeting these statements were made, the versions are not substantially different. Because of the minutes and the other testimony, I find these statements were made at the June 5 meeting.

(c) June 7 Meeting

At the June 7 negotiating meeting, at the Activity's request and with the Union's agreement, the parties discussed those articles that had been brought up and discussed at the June 5 meeting but had not been agreed upon. A dispute arose as to a counter-proposal by the Activity with respect to Section C of Article V, Management Rights and Responsibilities. The Activity's proposal indicated at the bottom that it had been "taken right from the E.O.". The Union alleged that it was not exactly taken from the Executive Order. The Activity asked to merely cross out the language "taken from E.O." The Union insisted they be given a copy of the counter-proposal with that language included. The Activity refused. This entire article was then set aside to allow the Union an opportunity to study certain counter-proposals.

There was also some confusion when the Union requested a copy of the May 12, 1972 edition of "the Federal Labor Consultant." The Activity's representatives at first did not seem to know what the Union was referring to and after a discussion of about 30 minutes furnished the Union a copy of the publication.

The Union's proposed Article VII, Employer-Union Cooperation, which provided, inter alia, that "notification of employees, their employment, retirement or death, will be made to the Union monthly...." The preceding sentence in the proposal provided that management will give the Union a list of "all employees in the unit" (emphasis added). During the discussion of this article the Activity's representative is alleged in the minutes to have stated that in order to supply such a list it must have a list of Union members. The minutes quoted the Activity representative as stating: "How else would Management know who to include on the list...?" The Activity contends that it requested the list of Union members because the Union wanted to know when the Union members were transferred. It is concluded, noting particularly the similarity between the words "unit" and "union" and what was actually said at the negotiations, that there was substantial confusion between the parties as to whether the Union wished to be notified of transfers of members of the unit or members of the Union. It should be

noted that the minutes indicate that the parties then did substantially agree to Article VII which consisted of Sections A through H, some of which sections were in the language proposed by the Union and some were proposed by the Activity, except that in one section the Activity wished to add the word "legal" before the word "activities" to that section which provided that there shall be no restraint of Union representatives because of his "involvement in union activities." The minutes indicate that this was so as not to protect employees who may "get involved in illegal union activities." While making the statement Commander Dunton asked if the Union members present were proud of their involvement in the Union. The Union representatives replied "yes". During this meeting the parties reached agreement as to some articles and not as to others. During these discussions of proposed articles both sides apparently explained their positions and listened to the other sides position. Again there was some discussion as to the precise words to be used in certain articles. When discussing Article XIX, Training and Employee Development, Commander Dunton is alleged to have said that employees should not go to a training program; that employees should remain on the job and earn their pay checks. Commander Dunton denied making such a statement. In fact this article was then rather quickly agreed to by the two parties. This entire discussion and agreement with respect to Article XIX, as reflected in minute took less than 45 minutes.

The Activity submitted and the Union accepted an agenda for the June 9 meeting.

(d) June 9 Meeting

This meeting was quite short. The parties discussed their respective position of Article XXVIII, Employee Debts. There was substantial disagreement as to this article; it had been discussed at the prior meeting. After about an hour of discussion it was agreed to set it aside. The parties then discussed Article IX, Use of Official Facilities. There was a discussion as to whether the Activity would provide the Union with a permanent office, as the Union desired or with an office on a "space available" basis, as the Activity offered. Both sides explained their positions but no agreement was reached on this point. There was, however, substantial agreement on the other sections of this article. The Base Commander was going on leave for about two

weeks and Commander Dunton, who would be acting commander, requested that the meeting adjourn so that he could confer with Captain Muncie about matters concerning the running of the post. This was agreed to by the Union and the next meeting was scheduled for June 14.

(e) June 14 Meeting.

This is the meeting at which Ms. Sanders replaced Mr. Greenleaf as the Chief Union Negotiator. This meeting apparently convened at 8:00 a.m. The Union at first stated that it wished to continue discussing Article IX, Use of Official Facilities, because such discussion had not been completed. Before the discussion started, however, the Union representative gave a talk concerning the aims of the Union negotiators, referring to the National Labor Relations Act and the Federal Labor-Management Consultant.

Neither the Union or the Activity changed their position with respect to Article IX and apparently rather than discuss it further, the Union decided to set it aside. The parties then discussed the other articles on the agenda. No agreements were made--both sides insisted upon their proposals. In a few situations the Activity insisted on its proposal or, in the alternative stated that the Activity's regulations would be sufficient and no article in the contract was necessary. At 10:10 a.m. all the articles on the agenda had been brought up, although the discussions were apparently quite brief, and the Union left the meeting. The Activity's representatives protested, stating they were prepared to stay for the entire day to discuss the articles.

(f) June 16 Meeting.

The meeting convened at about 8:00 a.m. At the outset of this meeting the Union and Management disagreed as to whether there was any unfinished business and whether there were too many new articles slated for discussion. The parties agreed to first take up unfinished business or set aside articles and then to discuss the first eight articles on the Union's agenda. The parties again discussed whether Article I should set forth that it applied to employees of the Naval Air Station, Fallon, as the employer urged, or either merely refer to the "unit" or to employees "serviced by the Personnel Office" at Naval Air Station, Fallon. Management stated the reference to "unit" was too vague and the reference to the "Personnel Office" was unacceptable because some employees not in the unit were serviced by the personnel office. This article was then set aside.

Management Rights and Responsibilities, Article V, was then discussed and agreement was tentatively reached on some sections. The parties agreed to certain changes, additions and deletions in the various sections. While discussing one section of this article the Activity asked precisely whether the words "their rights" referred to employee or employer rights. The Union advised it meant "Management's rights". At first Management suggested changing the language from "their rights" to "its rights" and then suggested changing "its rights" to "Management's rights", the Union then proposed setting the entire Article V aside. The parties then again discussed Article VII wherein the Activity renewed its proposal to insert the word "legal" before those Union activities which were protected. The Union refused to agree and the Activity suggested that in lieu of the word "legal", adding the word "authorized" before union activities.

The parties continued to discuss proposed articles that had been brought up at previous meetings. The parties then discussed the new business. The first new article brought up was Article 24, Security, to which the Activity immediately agreed. The parties then discussed the additional articles on the agenda but no new agreements were reached. Management wanted to continue discussions but the Union terminated the meeting at 2:10 p.m. because it felt no more meaningful discussions could take place. Management submitted its proposed agenda for the next meeting. The Union refused to agree to the proposed agenda even though it was the Activity's turn to propose the agenda, because the numbering system of the articles apparently referred to Management's proposed numbering system and not the numbering system of the basic agreement. The Union said Management must follow the numbering system of the basic agreement, otherwise it would create confusion. The Union then left.

(g) June 19 Meeting.

This meeting started at 8:03 a.m. with the Union again refusing to accept the Activity's proposed agenda, insisting that the agenda must follow the articles in the basic agreement. The Union and the Activity could not agree on an agenda and the Union, despite Activity's statements that it wished to stay and negotiate, left the meeting at 8:10 a.m. At this stage, when negotiations broke off, the parties had signed off or tentatively agreed to a "preamble" and eight articles of the new contract.

III. Labor-Management Meeting of April 26, 1973

The Activity and the Union had monthly labor-management meetings and on April 26, 1973, such a meeting was held. Present at this meeting were, inter alia, Commander Glade, the Activity's Executive Officer, and Ms. Sanders, who was at that time the Union President. The minutes of the meeting, as recorded by the Activity, consisted of six pages and eleven numbered items. All parties agreed that these minutes accurately reflect what occurred at the meeting.

Item 7 of the minutes states:

"The Executive Officer made a personal observation as to what he thinks has transpired between Management and the Union since he arrived at NAS Fallon, about eight months ago. He said he felt that labor relations along with management relations have been strained, and that personalities are entering into negotiations to the point that nothing is being accomplished. It's Management's view that Management is here to serve all the employees of the station, and that the Union should feel that they are also representing not only the members of the Union but all the employees of the station. He said he thought it important to the Union that they have a contract and that a contract would be a motivating factor. It protects the rights of the employees and gets relationships much more on an even keel for all concerned. He said there have been two unfair labor practices against Management this past year. The command received a call from Mr. Black, who is in charge of OCMM, Washington. His lawyers have reviewed the unfair labor practices and in his opinion there is no substance to the charges that have been submitted. The Executive Officer pointed out that a vast amount of expense of taxpayers money and time goes into unfair labor practice, but that it is certainly the right of the employees and the members of the Union to submit such charges, when in order. However, when the charges do not have substance they are not conducive to good working relationship. He said Captain Muncie has been given an extension here at NAS Fallon for an additional year as Commanding Officer. The Executive Officer said he

personally felt that not much headway has been made in Union/Management affairs and that perhaps a change in attitude and change in personality might be in order. He said from his personal standpoint, he would like to suggest the Union look very seriously to a change in their leadership, whereby persons in head offices such as Union Chief Negotiator and Management's Negotiator could work more harmoniously with one another. He said if the Union so desires, he would be willing to submit his resignation as Management's Chief Negotiator if they felt that his personality was not conducive to good relationship. He said he would like the Union to take this matter to their membership and go over their achievements during the past year and see what they have achieved, and to see if his suggestions might not be in order. He extended an offer to meet privately or in open session with any of the Union to suggest alternatives to get the negotiations back to the table and to attempt to get a contract settled. He said the Union has already exhausted approximately one-half of their clock time for negotiations and very little has been settled thus far. He said there will not be an extension of on the the clock time and when negotiations do resume every effort must be made to utilize the remaining time in responsible fashion."

Item 9 of the minutes states, in part:

"...Ms. Sanders said from the conversation, it appears the station instruction 12300.1 is not being followed when details are made. When asked if she had any specifics, she replied that the Union will not bring up any specific examples because the detailing procedures are of interest to all employees, and the Union does not want to jeopardize any employee. She said any employee who is detailed for 30 days or less must be advised of the reason, the duties of the job and probable duration. If over 30 days the detail must be documented and IRO and the employee are to have a copy. Mr. Moon explained that the supervisors should request documentation of a detail. This is done on Standard Form 52. He said the

only purpose of documenting a detail is to document experience which is not in the man's normal position. Just because a man is moved from one place to another is not an indication that he is being detailed, providing he is doing the work of his position."

A copy of these minutes was sent to the Union. The Union submitted no evidence that it in any way objected to the accuracy of these minutes and Commander Glade did not recall receiving any such objections. Subsequently the minutes were posted on bulletin boards where employees could read them.

The record establishes that the contract that had expired provided, and the past practices had been, for such minutes to be posted. The Activity, because the Union so requested, would forward the minutes to the Union for its comments and objections as to the accuracy of the minutes. If the Activity agreed with the comments and objections the minutes would be changed and posted; 11/ if the Activity disagreed and felt that its minutes were accurate, it would post them despite the Union's objections. The Union, in the monthly meetings, protested this procedure of posting such minutes when the Union had objections to the accuracy of the minutes. 12/ The contract proposed by the Union did not provide for any change in the language concerning the procedure for posting minutes.

IV. January 16 Letter

Ms. Sanders, President of the Union, states that at the monthly labor-management meeting which was held on January 11, 1973, she was handed a letter from Captain Muncie which discussed negotiations, etc., and stated that if she was interested in solving the "negotiating problem or the unfair labor charge..." she could contact Commander Glade. The next morning she called Commander Glade and made an appointment to meet him later that morning.

11/ Ms. Sanders testified that no changes were ever made at the request of the Union. She had been Union President since November 1972.

1. These protests were apparently first raised by the Union at the January 1973 labor-management meeting.

Ms. Sanders testified that they discussed the labor-management meeting of the day before; Commander Glade's trip to Washington where he was advised that the parts of the contract were unacceptable; and the field of labor-management relations generally. She denied that there was any discussion of the pending unfair labor practice charge or that she offered to withdraw the charge.

Commander Glade testified that during the meeting in question Ms. Sanders stated that Captain Muncie was in deep trouble and that the Union had enough evidence to get him relieved of command. She asked if Captain Muncie would agree to extending the 40 hours for negotiating the contract, noting that 20 hours had already been used. She also stated that Captain Muncie should sign the union contract proposals and some new updated proposals that had not yet been submitted or else she would have him relieved of duty as commanding officer. She stated that if the Activity complied she would withdraw the unfair labor practice charge.

With respect to this meeting, I credit Commander Glade's version rather than Ms. Sanders'. She denied that she even mentioned the unfair labor practice charge yet she also testified that one of the purposes she called and set up the meeting with Commander Glade was to discuss resolving the unfair labor practice complaint. Further her version of the meeting almost totally omitted any mention of the contract negotiations whereas resolving the problems involving negotiations was one of the main reasons for the meeting. Commander Glade's version is much more probable and consistent with surrounding circumstances and is therefore credited.

On that day or the next, Commander Glade briefed Captain Muncie on the meeting and as a result a letter was drafted and sent to Ms. Sanders concerning this meeting. I find this letter accurately reflects what occurred at the meeting. This letter is attached hereto and made a part hereof as "Appendix A".

When this letter was sent to Ms. Sanders it was also simultaneously posted on the Activity's bulletin boards. Although it was not Activity policy, one supervisor, Mr. W.D. Delaney, posted the letter with the notation on the top,

"Civil Service Personnel-Read and Initial", followed by a series of initials. Mr. Delaney testified that he followed this procedure whenever he posted notices because he had men who worked on a number of shifts and some of whom he often didn't see. This permitted him to be sure that everyone had read the posted notice before he took it down. He noted that one employee refused to initial the letter in question and advised Mr. Delaney he didn't wish to initial it. Mr. Delaney replied, "Well, fine. At least you saw it anyway."

Conclusions of Law

I. Preliminary Matters

The Activity contends that the unfair labor practice charge and complaint in Case No. 70-2477 was not sufficiently precise to meet the requirements of the Order and Rules and Regulations §203.2. Both the letter of October 24, 1972 (the charge) and the original complaint dated January 3, 1973, advised the Respondent that the Activity was alleged to have failed to bargain in good faith during the negotiations of June 1972 and to have thereby violated Section 19(a)(6) of the Order. An amended complaint was filed January 16, 1973, which was much more specific than the prior two documents. Nevertheless, it is concluded that the original charge and complaint were sufficiently specific to advise Respondent, in compliance with the Order and Regulations, that its conduct during the negotiation meetings constituted violations of Section 19(a)(6) of the Order.

II. The Negotiations

(a) The Meetings

The record establishes that on June 5, 7, 9, 14, and 16, 1972, the parties had fairly lengthy negotiation meetings. 13/ During these meetings the Activity's representatives presented the Activity's proposal, explained the reasons for them and listened to and considered the Union's proposals and the reasons given in their support. The parties made reasonable progress, made compromises and reached agreements

13/ The June 9 meeting was the shortest and lasted about two hours. The meeting held on June 19 lasted less than 10 minutes.

during the first two or three negotiation meetings. The record does not establish that the Activity was either stalling negotiations or was bargaining with a closed mind. Quite the contrary it seemed eager to keep negotiations moving and although it may have been engaging in "hard bargaining" and may have been strongly urging and insisting upon many of its proposals, the Activity was quite ready to consider union proposals and to explain its positions. The Activity's positions with respect to the various proposals and the specific language differences it had with the Union were quite reasonable and were not frivolous. Similarly it was not unreasonable in desiring that its proposed numbering system be followed or in its wishing to further discussing proposed articles that had not been agreed upon during earlier meetings. 14/

In this regard the Union representatives, at least commencing with the June 14 meeting, seemed to have a mis-ception of the Activity's bargaining obligations. 15/

14/ The Activity's position that proposed articles that had been discussed but not agreed to was "unfinished business" under the ground rules, and therefore the first item that should be discussed during meetings was not unreasonable or clearly erroneous.

15/ Ms. Sanders testified:

"for instance, Management oftens refers to their station instructions. They have a right to write their station instructions as they see best for Management.

"They can submit those station instructions to the Union and discuss them and the Union can point out that they do not follow certain rules and regulations, or if they are in violations of, say, the Executive Order or anything else, then, if Management was negotiating them Management would change or delete or re-write those critical passages.

"They submit a contract to the Management and its Management duty, then, to accept what is good in the contract and only to fault what is against the rules and the regulations, and the Executive Order, and such as this.

"...It would have to be violating something to be worthy of an objection."

Ms. Sanders further testified that the Union representatives were intimidated by the fact that the Activity representatives were officers in uniforms with medals.

The Activity is not required to agree on the Union's proposals 16/ or to make concession, c.f. Department of the Army Directorate, United States Dependant Schools, European Area, A/SLMR No. 138. Rather it need only attend the sessions and enter negotiations with the intent to reach an agreement with the Union and to consider the Union's proposals. Neither "hard bargaining" nor a failure to make concessions constitutes a failure to fulfill its bargaining obligation. The Union's obligation is the same.

The record establishes that the Activity wanted to meet and discuss and explore the various Union and Activity proposals and to try to reach agreement, whereas commencing at the June 14 meeting the Union seemed intent upon ascertaining, as quickly as possible if the parties agreed to each particular article, and if not to set those articles aside, apparently in order to use as little of the Union Negotiator's "on the clock" time as possible. The record, as a whole, establishes that commencing with the June 14 meeting the Union representatives seemed very reluctant to engage in any extended discussions of the contract proposals. The meetings, because of the Union's conduct, became quite brief and the discussions abbreviated. The meetings was not sufficient to demonstrate that the Activity was stalling, refusing to consider the Union's proposals, bargaining with a closed mind, or in any other way failing to fulfill its bargaining obligation. Similarly although it may be desirable for negotiations to be concluded during the Union's representative's on the clock time, the Activity is not required by the Order to reach agreement during this period. The record does not establish any intentional stalling by the Activity.

(b) Commander Dunton's Statement

In its complaint the Union attributes to Commander Dunton a number of statements during negotiations to the effect that all Union had to do was sign the Activity's proposals, and that, during discussions, certain articles were not necessary because the Activity's regulations adequately covered the areas in question. Similarly he is alleged to have asked the Union representatives on occassion if they were proud of what the Union had done.

16/ Neither need it consent to the Union's numbering system.

In the context of the meetings, it is concluded that the statements attributed to Commander Dunton were on some occasions merely part of the "hard bargaining" engaged in by the Activity and on others, merely an attempt to keep some conversation going. The comment with respect to whether the Union representatives were proud of what the Union had done was in the context of discussing the reasonableness of the Activity's position with respect to whether the words "legal" or "authorized" should modify "union conduct" which was to be protected by the contract. In these circumstances it was relevant to the discussion and the point the Activity was trying to make. Similarly the Activity's request that the Union provide it with a list of Union members was made during a rather confused discussion of the Union's desire to be notified of unit employees who retire, die, etc. In this context noting especially the Activity's explanation to the Union that it needed the list to know who the Union wished to be advised about, the Union either realized or should have recognized the confusion and could have easily clarified its underlying request. It is clear the Activity's request in this context did not violate the order.

The process of negotiations must allow the parties sufficient leeway in the use of language to permit them to express and explain their proposals and positions. Negotiations are designed to encourage a true exchange of ideas so that the parties can understand each other and thereby agree upon a mutually acceptable contract. This sometimes may involve blunt talk and may irritate sensibilities. On the otherhand so long as the language and statements do not indicate any stalling or other refusal or reluctance to negotiate or bargaining in good faith and do not contain any unlawful threats, coercion, or promises of benefits, such language and statements must be permitted for negotiations to be meaningful.

(c) Captain Muncie's Statements

The record establishes that at the outset of the negotiations Captain Muncie made some brief opening remarks during which he urged the parties to agree upon a contract as quickly as possible. He stated that such a contract should be written in clear and concise language and should not contain a lot of unclear or irrelevant matter. In this context he stated that the Activity's counter-proposals were written "without all that garbage", and he urged the Union to accept these counter-proposals. He stated further: "I will not accept any contract that has any unnecessary and ridiculous requests. We have had good contracts in the past and I want this one to be the same. No garbage."

These opening remarks, taken as a whole, hardly constituted either a failure of the Activity to live up to its bargaining obligation nor did it interfere with, restrain or coerce employees from engaging in conduct protected by the Order. Rather it was a frank and honest statement of the Activity's aims and hopes for the bargaining sessions. They did not either indicate a closed mind or an unwillingness to negotiate and consider all proposals. It was a plea to keep negotiations on the track and to keep irrelevant matters out of any contract and to keep the contract clear and concise. Perhaps the use of the word "garbage" was somewhat indelicate, but Union negotiators and representatives at negotiations cannot be so thin-skinned that such a word would interfere with or restrain them from adequately and completely representing the Union and presenting its positions.

At this first meeting, sometime later, Captain Muncie returned and advised the Union that he had been advised by some disgruntled fire-fighters that they wished to withdraw from the Union and have been in contract with another labor organization. He further stated that "some other Union may take over and then we would have two Unions. So I suggest that you get the contract signed quickly." The Union produced no evidence that these statements were not true or were, in any way, inaccurate. Nor was there any evidence that the Activity encouraged the fire-fighters' alleged displeasure or threatened the Union with any improper conduct on the part of the Activity. It is concluded that the foregoing statements concerning the fire-fighters, which advised the Union of certain facts, and then encouraged the Union to agree upon a contract as quickly as possible in order to avoid challenge by an outside Union, do not violate the Order. They are neither a threat by the Activity to engage in any improper conduct nor an attempt by the Activity to avoid its bargaining obligations.

Further these statements by Captain Muncie did not include threats or promises of benefit nor did it hold the Union up to ridicule so as to constitute a violation of the Order. The Order insures that the rights and obligations set forth therein will be protected; it does not prohibit the Activity from saying something merely because the Union might not wish to hear it.

In light of the foregoing, it is concluded, with respect to the negotiations during June of 1972, that the record fails to establish that the Activity engaged in conduct which violates Sections 19(a)(1) and (6) of the Order.

III. Labor-Management Meeting of April 26

The Union and the Activity held regular monthly meetings during which they discussed various labor relations matters. At the regular labor-management meeting held on April 26, 1973, Commander Glade stated that since he had arrived at the base eight months before, labor-management relations had been strained. He discussed the desirability for all concerned to have a contract. He also discussed the Activity's position that the pending unfair labor practice complaint was without merit. He went on and stated that he felt not much headway was made in "union/management affairs and that perhaps a change in attitude and change in personality might not be in order." According to the minutes of the meeting, Commander Glade stated, "from his personal standpoint, he would like to suggest that Union look very seriously to a change in their leadership, whereby persons in head offices such as Union Chief Negotiators and Management Negotiators could work more harmoniously with one another. He said if the Union so desires, he would be willing to submit his resignation as Management's Chief Negotiator if they felt that his personality was not conducive to good relationship. He said he would like the Union to take this matter to their membership and go over their achievements during the past year and see what they have achieved, and to see if his suggestion might not be in order. He extended an offer to meet privately or in open session with any of the Union to suggest alternatives to get negotiations back to the table and to attempt to get a contract settled. He said the Union had already exhausted approximately one-half of their clock time for negotiations and very little had been settled thus far. He said there will not be any extension of their clock time and when negotiations do resume every effort must be made to utilize the remaining time in a responsible fashion".

The statements of Commander Glade attempted to propose to the Union various suggestions for getting the bargaining sessions started again. He suggested that perhaps there was a personality clash. Therefore, he suggested that the Union consider changing its Chief Negotiator. 17/ Commander

17/ Although he might have referred to changing the Union's "leadership", it is quite clear from the context of the discussion and the subsequent language used, that the Commander Glade was referring to the Union's bargaining representatives.

Glade, himself, offered to resign as the Activity's Chief Negotiator, if the Union felt it would help negotiations. Commander Glade did not demand such a change of the Union's negotiators, rather he suggested it as a possible way to start negotiations moving again. Similarly his offer to meet publicly or privately with the Union 18/ to suggest alternatives for getting negotiations started again was a proposed method for examining other possible solutions.

It is concluded that these statements and suggestions made during a labor-management meeting, in order to explore ways to get negotiations started again did not interfere with or restrain employees from exercising protected rights and did not constitute a failure to bargain in good faith. Similarly the discussion of details of employees did not constitute a failure to bargain in good faith.

The next question that must be examined is whether the posting of these minutes of the meeting, admittedly accurate minutes, constituted a violation of the Order. The Union contends that the posting of such minutes without its consent constitutes a violation of Section 19(a)(1) and (6) of the Order.

The Order does not forbid the Activity from communicating with its employees concerning labor-management relations. Rather it protects the employees rights to engage in or refrain from engaging in Union activity and further it protects a collective bargaining representative's right to represent the members of the collective bargaining unit. So long as the Activity's exercising its right of communication with employees does not interfere with the protected rights, the Activity's communication does not violate the Order. Absent an agreement to the contrary, the Activity need not secure the Union's permission or approval to communicate with its employees. 19/

18/ Here again in the context of the discussions and as testified to by Commander Glade this was an offer to meet with any Union representative, not Union member, to discuss the alternatives. The statement to meet "publicly" or "privately" referred to either public meetings, in a conference room and with minutes, or to private meetings in his office with no minutes.

19/ This is especially so where such posting of minutes had been a past practice which the Union had approved.

In the instant situation the communication accurately reflects what occurred at a labor-management meeting and does not contain any threats or promises of benefit. It does not constitute an attempt by the Activity to bypass the Union and bargain directly with the employees or to improperly urge the employees to put pressure on the Union to pursue certain courses of conduct. Rather, although the drawing of a line may in some instances may be quite difficult, the Activity was merely reporting to the employees its version of what had occurred. 20/ Further there was no evidence submitted from which any inference could be drawn that the statements were made at the meeting for the purpose of reporting them in the minutes and thereby possibly undercutting the Union.

It is concluded therefore that the posting of the instant minutes did not violate Sections 19(a)(1) and (6) of the Order.

IV. January 16 Letter

During the meeting of January 12, 1973, between Commander Glade and Ms. Sanders, Ms. Sanders stated that Captain Muncie "was in deep trouble as a result of the unfair labor practice", and indicated that she could get the Captain out of this serious trouble by withdrawing the "unfair labor charge" if the Activity signed the Union's contract proposals and agreed to extend the on the clock time for negotiations for new Union proposals. Commander Glade characterized this proposal as "blackmail", stated the unfair labor practice charge filed by the Union was only a method to force the Activity to accept the Union's proposals and stated that such tactics had no place in labor management relations.

The statements made by Commander Glade did not constitute any violation of the Order, but merely expressed the Activity's interpretation and view of Ms. Sanders offer and statements. The statements of Captain Glade did not include any improper threats nor were they so outrageous or capricious as to interfere with rights protected by the Order.

20/ It is unnecessary to decide whether the Order would be violated if the minutes had been inaccurate or whether the Union's ability to communicate with employees would neutralize any such violation.

It is further concluded that the posting on bulletin boards by the Activity of the January 16 letter from Captain Muncie to Ms. Sanders did not constitute either an attempt to unlawfully bypass the Union or interfere with any other protected rights. This letter accurately reflects what occurred at the meeting in question. As discussed above the Activity can communicate with employees and report its version of any meetings as its position in labor-management matters so long as there are no unlawful threats and promises of benefit, and it is not an attempt to bypass the collective bargaining representatives and bargain directly with the employees, urging them to put pressure in the Union to take certain actions. The posting of this letter does not appear to constitute such an attempt to bypass the Union. The statement in the letter that the Activity considers the Union's conduct as violating the Order and the threat by the Activity to file unfair labor practice charges are not considered the type of threat that would violate Section 19(a) (1) of the Order. Rather it is an expression of a legal position which may result in following a procedure specifically provided by the Order, i.e, filing an unfair labor practice charge. It was not a threat to withhold benefits or to take any other direct action related to employment or collective bargaining rights other than to pursue certain legal avenues. Such a statement involving possible recourse to the procedures provided in the Order could not possibly be found to violate the Order.

Although the use of the word "blackmail" may offend the Union, it is not such a characterization as to per se constitute interference within the meaning of the Order. If the Union disagrees with the Activity's characterization it is free to communicate with the employees and to present its positions. This would appear to be the more acceptable route rather than to unduly limit the Activity's opportunity to communicate with employees. Therefore it is concluded that the statements made during the meeting and the posting of the January 16 letter do constitute violations of Sections 19(a) (1) and (6) of the Order.

Finally, however, although the Activity may have a right to communicate with employees, these employees have a right to join and support the Union or to refrain from such conduct. The requirement and posted notation by one

supervisor, on his own, but for whom the Activity is responsible, 21/ that employees must read and initial the posted letter constituted an undue interference with those employees' rights to support or refrain from supporting the Union. It was making them do something which they had a right to refrain from doing and therefore this notation and requirement, constituted a violation of Section 19(a) (1) of the Order.

Recommendations

Having found that Respondent Activity, by requiring employees to read and initial the January 16 letter, had engaged in conduct which is in violation of Section 19(a) (1) of the Order, I recommend that the Assistant Secretary adopt the following order. With respect to all alleged violations of Sections 19(a) (1) and all alleged violations of Section 19(a) (6) of the Order it is recommended that the complaints be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Naval Air Station, Fallon, Nevada, shall:

(1) Cease and desist from:

(a) Requiring employees to read and initial communications between the Fallon Naval Air Station and Local 1841, American Federation of Government Employees, which are posted by the Activity on bulletin boards;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

(2) Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Naval Air Station, Fallon, Nevada, copies of the attached notice marked "Appendix B" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin

21/ It is noted that this was not an official policy of the Activity.

boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this Order as to what steps have been taken to comply herein.

Samuel A. Chaitovitz
Samuel A. Chaitovitz
Administrative Law Judge

Dated: July 10, 1974
Washington, D.C.

Civil Service Personnel - READ & INITIAL
1. 201
2- [unclear]
3- WPA-10
4- [unclear]
5- [unclear]
6- [unclear]
7- [unclear]
8- [unclear]

NAVAL AIR STATION
VAN VOORHIS FIELD
FALLON, NEVADA 89408

A:WBM:ly
12000
16 January 1973

From: Commanding Officer, Naval Air Station, Fallon, Nevada
To: President, AFGE # 1841 (Mrs. Phyllis Sanders, Special Services Division)

Subj: Conduct of Business between Management, NAS Fallon and AFGE Union No. 1841

1. It has been brought to my attention that you have recently involved yourself in highly irregular tactics and procedures which, if management so chose, could result in a valid complaint to the Under Secretary of Labor for Labor and Management Relations. Specifically, it has been related to me that you called the Executive Officer on 12 January 1973 and requested a private conference to discuss labor and management business. At this meeting you were quoted as making highly suspicious statements, concerning management, which prompts me to question certain loyalties and integrities manifested by you in exercising the calling of your office. During this session you reportedly made statement to the fact that "...the Captain (referring to the Commanding Officer, NAS Fallon) was in deep deep trouble as a result of the Unfair Labor Practice which has been submitted by Local AFGE 1841". Further, you indicated that as President of the Union it was within your power to get the Captain out of serious trouble by withdrawing the unfair labor charge. You agreed to take this step if and when the command met certain demands on the part of the Union. These demands included:

a. Management to sign in toto the Union's contract proposals as submitted by Union in June of 1972; without reservation; without collective bargaining; without further negotiations!!

b. In addition, Management to agree to extending the allotted on-the-clock time for further negotiations regarding provisions of the above proposals which the Union felt were outmoded since first submitted in June 1972.

2. In responding to the above, the Executive Officer stated that the command would not be intimidated by any "blackmail" tactics on the part of the Union. Further, that in Management's view the unfair labor charge, as submitted by Union, was unfounded and was a deliberate move to pressure management into signing the Union's proposals. It was explained to you at this time that collective bargaining is a process of bi-lateral negotiations and that tactics such as intimidation, threats and "blackmail" had no place in labor-management relations. It was also made clear to you that as Commanding Officer I had allowed the maximum possible on-the-clock time for negotiation sessions. This maximum was established by Executive Order 11191, as amended, and in no way can additional time be allowed for this purpose. Furthermore, 40 hours is more than adequate had you chosen to negotiate in good faith.

Docket No. _____ OFFICIAL EXHIBIT NO. _____

NOTICE TO ALL EMPLOYEES

3. As a result of the above, you are advised that any further tactics on your part to convey threats, intimidations or otherwise seek to hamper the collective bargaining process will result in a charge of failing to negotiate in good faith. Your actions are clearly recognizable as violations under the Executive Order 11491, as amended, and if continued will result in formal charges.


W. B. MUNCIE

Copy to:
Bulletin boards

Pursuant to
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT require our employees to read and initial communications between the Fallon Naval Air Station and Local 1841, American Federation of Government Employees which are posted by the Activity on bulletin boards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION CENTER,
 BATH, NEW YORK
 A/SLMR No. 433

VETERANS ADMINISTRATION CENTER,
 BATH, NEW YORK

Respondent

and

Case No. 35-2875(CA)

LOCAL 491,
 NATIONAL FEDERATION OF
 FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

This proceeding arose upon the filing of an unfair labor practice complaint by Local 491, National Federation of Federal Employees (Complainant). The complaint alleged, in substance, that the Respondent Activity attempted to dissuade one of its employees from seeking union representation by indicating to her that her return to duty following an absence on Leave Without Pay (LWOP) necessitated by medical problems would only be complicated should she seek such assistance. It was alleged that this act of dissuasion was part of a pattern of conduct by the Respondent which resulted in the employee's termination, based in part on the employee's having sought union assistance in resolving her difficulties, and, therefore, was in violation of Section 19(a)(1) and (2) of the Order.

On July 9, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent, Veterans Administration Center, Bath, New York, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations. The Administrative Law Judge found other alleged conduct of the Respondent not to be violative of the Order.

With respect to the first allegation, the Assistant Secretary adopted the Administrative Law Judge's finding that the Respondent's conduct violated Section 19(a)(1) of the Order. In this regard, the Administrative Law Judge concluded, based on the credited testimony of the aggrieved employee, that the Assistant Chief of Personnel stated to her, in effect, that should she involve the Complainant in the matter of her reinstatement following the period of her LWOP, everything would go into her records and that this might hurt her. The Administrative Law Judge concluded that this constituted an attempt by the Respondent to encourage the employee to by-pass her exclusive representative and deal directly with the Respondent with regard to the resolution of her difficulties, in violation of Section 19(a)(1) of the Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions 1/ and recommendations of the Administrative Law Judge.

As to the allegation that the Respondent's actions violated Section 19(a)(2) of the Order, the Assistant Secretary adopted the Administrative Law Judge's conclusion that there was insufficient evidence to establish that the Respondent's refusal to allow the employee to return to work and her subsequent termination were based on anti-union considerations or for engaging in conduct protected under the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration Center, Bath, New York, shall:

1/ In view of the disposition herein on the merits, it was considered unnecessary to decide whether Section 19(d) had any applicability in this matter. Cf. California National Guard, State Military Forces, Sacramento, California, A/SLMR No. 348.

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees by urging or admonishing them to refrain from seeking representation or assistance from Local 491, National Federation of Federal Employees, concerning grievances, personnel policies and practices, or other matters affecting working conditions.

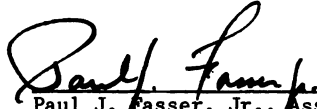
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Veterans Administration Center, Bath, New York, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Veterans Administration Center, Bath, New York and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
September 30, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT urge or admonish our employees to refrain from seeking representation or assistance from Local 491, National Federation of Federal Employees concerning grievances, personnel policies and practices, or other matters affecting working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 3515, 1515 Broadway, New York, New York 10036.



Report and Recommendations

This proceeding, heard in Bath, New York on November 15 and 16, 1973, arises under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereafter called the Assistant Secretary) a Notice of Hearing on Complaint issued on October 10, 1973, with reference to alleged violations of Sections 19(a)(1) and (2) of the Order. ^{1/} The complaint filed on May 23, 1973, by Local 491, National Federation of Federal Employees (hereafter called Complainant or the Union) alleged that the Veterans Administration Center, Bath, New York (hereafter called Respondent or the Activity) violated the Order as follows:

"(1) Specifically that on August 29, 1972 attempts were made to dissuade one Karen Karwoski, Bath V.A.C. from relating to the Union in her own best interests and that attempts were otherwise made to so condition Union officials, specifically the President and Vice-President, in violation of the Executive Order 11491 Section 19(a)(1). (See attachments)

(2) That these attempts, together with clandestine activity designed to obscure improper actions and procedures taken by management over a period of several months, reflected contempt of recognized labor Union and V.A. regulations and basic civil rights, resulting in defacto discouragement of membership, refusal to consult in meaningful way as evidenced in transcripts attached of meetings, and refusal to divulge the background facts (management's actions) or honestly reveal management's intentions. (See attachments)

(3) That the Union's involvement precipitated adverse action by management against Miss Karwoski which, management personnel admitting, would not have occurred otherwise, claiming they were forced to take such action. That this action inflicted harm upon the employee because she sought to protect herself in a legally constituted way, but one which would reveal management's failures, misjudgments and violations of the law and/or regulations. (See attachments)"

^{1/} The complaint also alleged violations of Sections 19(a)(5) and (6) of the Order. The Regional Administrator found no merit to these allegations and that portion of the complaint was dismissed. No appeal was taken from the dismissal.

.....
In the Matter of :
VETERANS ADMINISTRATION CENTER, :
BATH, NEW YORK :
Respondent : Case No. 35-2875 (CA)
and :
LOCAL 491, NATIONAL FEDERATION :
OF FEDERAL EMPLOYEES :
Complainant :
.....

Stephan L. Shochet, Esq.
Office of the General Counsel
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C. 20420
On Behalf of Respondent

George Tilton, Esq.
Associate General Counsel
National Federation of Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006
On Behalf of Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

The relevant "attachments" carry the caption "Collaborating and Supportive Sequences" and state:

"Steward's record of employee-management sequences #2. This agency has denied the right to employment for which an employee had been hired: 8/10/72, 8/27/72, 8/29/72 Bath V.A.C.

This agency has threatened the employee and demeaning acts and gestures have been imposed on her as well as belaboring the employee with unreasonable demands and denials:

i.e. 8/10/72, 8/23/72, 8/24/72, 8/29/72 Bath V.A.C. 9/4/72, 9/8/72, 9/11/72, 9/15/72 Prattsburg, N.Y. 10/18/72, 10/24/72, Bath V.A.C.

The agency has arbitrarily proposed and effected an employee's status change and removal: 9/14/72, 9/15/72, 10/27/72, 11/10/72 Bath V.A.C.

The agency has denied proper hearing and the employee was denied regulatory requirements. She was improperly used, transported, ridiculed and degraded both on and off federal reservation as directly precipitated by adverse and improper actions of management, No effort has been made by management to develop impartial and reasonable reconciliation of facts. Management has denied the employee and the Union the right to review any evidence file they have, if such exists. 8/72 - 9/21/72 and 10/5/72 - Unfair Labor Charge - Bath V.A.C."

In its response to the complaint, the Activity contended that the Union's unfair labor practice charge dated October 5, 1972, did not comply with Section 203.2(a)(3) of the Regulations and the complaint did not comply with Section 203.3(a)(3) of the Regulations. Accordingly it moved that the

2/ The relevant portion of the unfair labor practice charge provides:

- "I. That you are in violation of Section 19(a)(1) which requires that Agency Management shall not interfere with, restrain, or coerce an employee in the exercise of the rights assured by Executive Order 11491.
 - 1. That the Assistant Chief of Personnel did in fact advise employee Karen Karwoski not to consult with the Union in pursuit of correcting the current injustice imposed on her by Management. (cont'd)

complaint be dismissed. Respondent's motion to dismiss states, in relevant part:

"In the letter of charges, the so-called facts set forth in support of the alleged violations of Subsections 19(a)(2), (5) and (6) are so vague that Respondent is unable to understand the nature of the unfair labor practices with which it is charged. The so-called facts set forth in support of the alleged violation of Subsection 19(a)(1) fail to disclose when or where the event took place, or what was the nature of the alleged injustice being imposed on the employee.

With respect to the complaint filed herein, the allegations in paragraphs (2) and (3), in item 2 of the complaint, are so vague that Respondent is unable to formulate a specific answer. Paragraph (1), in item 2 of the complaint, apparently refers to the same incident mentioned in the letter of charges in support of the alleged violation of Subsection 19(a)(1). However, this paragraph refers to other incidents concerning union officials which were not even alluded to in the letter of charges. Thus, the Complainant has also failed to comply with Section 203.2(a)(1) of the regulations, since Respondent was never charged with the attempts to "condition Union officials" (sic) (R A/S No. 16)."

The motion to dismiss was not specifically ruled upon administratively. Respondent renewed the motion at the outset of the hearing at which time I reserved ruling on the matter.

It is my recommendation that the motion should be granted in part and denied in part. In my view the unfair labor

Footnote 2 continued

"II. That you are in violation of Section 19(a)(2) which requires that Agency Management shall not encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

The facts tending to establish this charge are:

- 1. Despite numerous letters to the contrary advising of employee Karen Karwoski's availability for work, you have discriminated against her request to return to work by arbitrarily establishing subjective rules without specific statements of actual duties this employee has been unable to perform. This type of discrimination relative to conditions of employment has persisted despite advisement from Union officials and physicians to the contrary."

practice charge describes with sufficient particularity that the matters alleged to have constituted violations of Sections 19(a)(1) and (2) of the Order 3/ were a specific remark to employee Karen Karwoski made by the Activity's Assistant Chief of Personnel and the Activity's denying her request that she be allowed to return to work (which eventually included termination). Given the details which preceded employee Karwoski's separation from employment, as will hereinafter be set forth, it cannot be gainsaid that the Activity was abundantly clear as to the facts and circumstances of the Section 19(a)(2) allegation. While the unfair labor practice charge does not specifically set forth the date or place that the alleged 19(a)(1) statement was made, that defect was cured when Miss Karwoski and the Assistant Chief of Personnel met on October 24, 1972, under the auspices of the Union and the Activity. At the meeting precise details of the alleged statement, including the time and place of the occurrence, were conveyed to the Activity thereby placing the parties in a position to resolve the matter informally.4/

However, with regard to the Union's reference in the Complaint to "attempts...made to so condition Union officials" and "clandestine activity designed to obscure improper actions...", I do not find that such allegations meet the requisite specificity required by the Regulations. Thus the unfair labor practice charge is totally silent on such alleged conduct and the complaint does not recite what "attempts" or "actions" of the Activity otherwise allegedly violated the Order or indicate the time and place of such acts. Moreover, at the hearing the Union acknowledged that the only specific act it was alleging to be violative of Section 19(a)(1) of the Order was the Activity's alleged attempt to interfere with Miss Karwoski's rights to obtain union assistance and that other matters on which testimony was adduced at the hearing was only intended to show that such conduct was part of the same common scheme to deprive Miss Karwoski of her rights. Therefore, based on the foregoing I shall address only the question of whether the Activity violated the Order with regard to the alleged statement made to Miss Karwoski on August 29, 1972, and the adverse action taken against her.3/

3/ These are the only issues before me since the Section 19(a) (5) and (6) allegations were dismissed.

4/ See Report on a Decision of the Assistant Secretary, Report Number 33.

5/ Respondent acknowledges in its brief that these matters are proper for consideration by the Assistant Secretary and the Administrative Law Judge.

At the hearing the parties were represented by counsel and were afforded full opportunity to adduce evidence, call, examine, and cross-examine witnesses and argue orally. Briefs were filed by both parties.

Upon the entire record in this matter, from my reading of the briefs and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

In July 1972, Karen Karwoski, a Nursing Assistant employed in the Activity's Nursing Home Care Unit and a member of the collective bargaining unit, 6/ experienced some emotional problems. On July 17 she related her problems and need for assistance to a personal friend, Dr. Howard Symmons, a clinical psychologist employed at the Activity. On that same day Dr. Symmons contacted Dr. Winston Hainsworth, Chief of Staff and Dr. Harold Ginsburg, Chief of Psychology, and informed them of the situation. Dr. Ginsburg examined Miss Karwoski and he concurred with Dr. Symmons opinion that Miss Karwoski needed medical assistance. Thereupon Dr. Symmons took Miss Karwoski to a psychiatrist at a nearby hospital where she remained as a patient for a short time. She was released from care at the hospital in the last week of July 1972.

After being released from the hospital Miss Karwoski returned to work at the Activity. Shortly after her return, on August 8, 1972, Miss Karwoski inserted a hypodermic syringe containing orange juice and gin into her arm but did not inject the substance into her vein. On the following day Miss Karwoski informed Dr. Symmons and Mr. Paul Cratick, a social service employee, of the episode. They concluded that Miss Karwoski needed emergency psychiatric care. Dr. Symmons turned the syringe over to Dr. Hainsworth and they arranged for immediate psychiatric care at another hospital. Mr. Cratick then drove Miss Karwoski to the other hospital where she received some attention and was put on out-patient status.

6/ At all times material hereto the Union has been the exclusive collective bargaining representative of all the Activity's professional and non-professional employees excluding supervising and managerial employees. The Union and the Activity are parties to a negotiated agreement which was effective for a two-year period commencing April 1972.

On August 10, 1972, Dr. Symmons met with Miss Karwoski and told her that he thought she should go on leave and would talk to her supervisor about the matter. Later that same day Miss Karwoski met with her supervisor, Mary Alvermann and Donald Howe, the Activity's Assistant Chief of Personnel in his office. Mrs. Alvermann had informed Mr. Howe that she had been advised by Dr. Hainsworth that Miss Karwoski would be gone for an indefinite period of time and would require a complete medical clearance before she would be allowed to return to work. Mrs. Alvermann also told Mr. Howe that Miss Karwoski had very little sick or annual leave left to her credit. Mr. Howe arranged the meeting so that Miss Karwoski could sign a leave without pay request.

At the meeting, 7/ which was of short duration, Mr. Howe explained to Miss Karwoski that she was being asked to sign a leave without pay slip and if after 30 days she needed more time she could come back and make another request to the Director for more leave without pay. She was also informed that prior to her return to work she would be required to furnish a complete medical clearance. Miss Karwoski asked if she could return in two weeks if she received her clearance and was told that she did not have to wait the full 30 days if she obtained her clearance before that time. Miss Karwoski signed the leave without pay request without protest and Mrs. Alvermann left the meeting. Very shortly thereafter she observed Miss Karwoski leave the room.

Later that same day Miss Karwoski and her mother met with Dr. Hainsworth, Dr. Symmons, and another doctor. At this meeting it was recommended that Miss Karwoski seek treatment which could involve a rehabilitation program and might include an assignment to a work area where there would be less "risk" than in a semi-independent nursing area. Miss Karwoski

7/ This version of the meeting of August 10 is a synthesis of the testimony of Miss Karwoski, Mrs. Alvermann and those portions of Mr. Howe's testimony on this meeting which I credit. I have relied primarily on Mrs. Alvermann's testimony which is substantially corroborated by Miss Karwoski. It is reasonable that Mrs. Alvermann's testimony was more vivid and complete than that of Miss Karwoski considering the events which occurred involving Miss Karwoski on the preceding day and her obviously disturbed condition at this time. I shall subsequently further discuss Mr. Howe's testimony regarding this meeting.

was also advised that before she would be allowed to return to work she would have to have a certificate from a qualified psychiatrist. 8/

On August 24, 1972, Miss Karwoski met with Mrs. Alvermann and Mary Pierce, Chief of Nursing Services. While there is a conflict in the testimony as to what transpired at that meeting, in any event on August 25 Miss Karwoski filed a grievance with the Union alleging that in the August 24 meeting she was told that if she didn't resign, she would be terminated. 9/

After having filed the grievance with the Union on August 25, 1972, Miss Karwoski and Charles Lesperance, the Union's Executive Officer and a steward, met with Mr. Howe in his office on that same day. The gathering lasted approximately 25 minutes. Mr. Lesperance testimony regarding the meeting consisted only of reading from notes he took and retained on the subject. Those notes contained the following: "Grievance filed. Consult with Personnel. Nothing in file. Personnel ignorant of what was going on. No evidence of leave without pay in record. Personnel chart of employee-clear." Mr. Howe testified that, as required by regulations, he remained with Mr. Lesperance and Miss Karwoski while they reviewed her personnel file but did not discuss with them the nature or reason for the inquiry. 10/ Miss Karwoski testified that Mr. Howe told her at this time that there was no adverse action against her and alluded to the 30-day leave without pay period.

Sometime that same day (August 25) Dr. Symmons telephoned Miss Karwoski. During the conversation Miss Karwoski told Dr. Symmons that she would not talk to him or see him without a Union representative present. She refused to explain the reason for her attitude. Accordingly, Dr. Symmons had no further contact with Miss Karwoski relative to this matter.

8/ This account is primarily based upon the testimony of Dr. Symmons. Dr. Hainsworth's testimony regarding this meeting was sketchy and somewhat confusing. Miss Karwoski offered no testimony relative to the meeting but in a grievance she filed with the Union on August 28, 1972, she related that Dr. Hainsworth, in the presence of her mother, told her on August 17, exactly one week after August 10, that a "document" from a psychiatrist was required before she would be allowed to return to work.

9/ Mrs. Alvermann and Miss Pierce deny having made such a statement. A credibility resolution on this discussion is not necessary to a disposition of the complaint herein and accordingly, none will be made.

10/ Under the circumstances of this meeting, I find that the Activity was put on notice at this time that Miss Karwoski had sought and obtained the Union's assistance in dealing with her difficulties.

On Sunday, August 27, 1972, Miss Karwoski reported for work at the facility. She had not previously obtained a psychiatric certificate of readiness for work and therefore was refused permission to work. As a result thereof, on August 28 she filed another grievance with the Union. Mr. Lesperance's notes for that day revealed "upon reception of the grievance, Personnel consulted." At this time, according to Miss Karwoski, Mr. Howe asked her if she was permitted to work on the previous Sunday and she responded "no." Mr. Howe replied that the matter was out of his hands.

Miss Karwoski went to the facility again on August 29 in an effort to return to work. According to her testimony she was sitting in a chair outside the Personnel Office when Mr. Howe walked by and motioned her to the area outside of his office. He then told Miss Karwoski that she could be sitting there all day before anyone would see her. She replied that she would sit there all day and the next and the next if need be. Mr. Howe then replied with words to the effect that if the Union pressed this issue, everything would have to go into Miss Karwoski's records and that might hurt her.

Mr. Howe testified to a different version of this conversation, denying that he ever mentioned the Union's involvement on Miss Karwoski's behalf. According to Mr. Howe, on August 28 or 29 upon entering his office he noticed Miss Karwoski sitting on a chair in the hallway outside the Personnel Office. Mr. Howe's immediate supervisor asked him to find out what Miss Karwoski was doing in the hallway and Mr. Howe returned to the hallway and asked Miss Karwoski if he could help her. Miss Karwoski replied she was ready to go back to work. Mr. Howe asked if she had a medical statement from a psychiatrist and Miss Karwoski replied "no" and mentioned that she had reported for work on the previous Sunday. This, according to Mr. Howe, was the extent of his conversation with Miss Karwoski on that occasion.

According to Mr. Howe, the only other pre-unfair labor practice charge 11/ conversation he had with Miss Karwoski relative to this matter occurred on August 10, 1972. In this regard Mr. Howe testified in direct examination as follows:

"Q. ..., you heard her testify that you said to her, I think the words she used was, off the books or something like that, that you said to her that if the Union got involved this would have to go into her personnel record or "it" would have to go into her personnel record, do you remember that?

A. Yes.

11/ As stated previously, the unfair labor practice charge in this case (Respondent Exhibit No. 2) was dated October 5, 1972.

"Q. Do you remember any of those words?

A. Yes.

Q. Did you ever remember saying anything like that to her?

A. I don't recall it.

Q. Would you recall it?

A. It seems as though I would.

Q. It seems as though you would or you would?

A. Yes, I would.

Q. Did you ever discuss the Union with her?

A. (No response.)

Q. Did you ever tell her that she had a right to go to the Union?

A. I always discuss Union with employees. If they asked -- if there is any action being taken we always tell them that they may have their Union representative present if they desire. This is the requirement.

Q. Did you tell Karen about that on the 28th or the day she was sitting out there?

A. Not on that day, no.

Q. Did you tell her that on the 10th when she signed the leave without pay slip?

A. That, I cannot say. I explained a lot of things and regulations on that date.

Q. You might have mentioned the Union to her?

A. I might have mentioned it to her, yes.

Q. And, might have you mentioned to her, at that time, that no adverse action would be taken and there would be no need for her to go to the Union at that time?

"A. Might I have mentioned this?

Q. Well, did you?

A. No.

Q. Was there any mention at all that leave without pay was not in any adverse action?

A. That, I might have said, yes. Leave without pay is a request from an employee and is not an adverse action."

On cross-examination on this subject Mr. Howe testified follows:

"Q. Mr. Howe, did you in any way discourage her from going to the Union?

A. I did not.

Q. Did you suggest perhaps there was a less or no point of her going to the Union?

A. None whatsoever.

Q. Are you certain of that?

A. Yes.

Q. I'm going to ask you one more time. You're under oath.

A. Yes.

Q. You're certain of that?

A. Yes."

Further cross-examination of Mr. Howe revealed that he participated in a meeting with Miss Karwoski and two Union representatives on October 24, 1972. The meeting was called for the purpose of attempting to resolve the credibility conflict which arose from the disparate versions of the August 29 meeting. The transcript of the October 24 meeting 12/ reveals that when questioned about the alleged reference to the Union acting in Miss Karwoski's behalf, Mr. Howe admitted mentioning

12/ Complainant Exhibit No. 4.

the Union to Miss Karwoski but insisted that the conversation occurred on August 10. Mr. Howe stated at the October 24 meeting:

"I am telling you that we - she asked me about going to the Union the first time we were in there. I always advise the employees they have the right to go to the Union and this is what I was doing. The first time we were in the office I was advising her of her rights. I said I see no reason to go to the Union at this point - no adverse action had been taken against her. She signed a voluntary Leave Without Pay statement in my presence. That's all that happened that day.

Well we're getting off the subject. The point is that she says that I told her not to go to the Union. I say I did not tell her not to go to the Union. I only told her there was no action involved adversely at that time and I see no need to go to the Union at that point."

Upon further cross-examination at the hearing Mr. Howe testified:

"A. This transcript is not in error. No place in here did I tell her not to go to the Union or that she shouldn't go to the Union.

Q. That there was no need for her to go to the Union?

A. On the day that she came in on August 10 I explained to her the regulations, she was signing a leave without pay and I told her her rights to go to the Union if she had a grievance but at that time all she was doing was signing a voluntary request for leave without pay. Now, on that day this is what I told her.

Q. Did you tell her there was no point in her going to the Union?

A. Not in so many words. I told her that she did not have a grievance when you sign for a voluntary leave without pay that she was requesting."

Mr. Howe further testified:

"Q. When you talked to her on August 10 as you say at that time, did you tell her that you were not taking adverse action against her?

"A. I explained to her the leave without pay; what leave without pay was and so forth and that it was not an adverse action, yes, that was requested by the employer.

Q. You told her that this was not an adverse action and therefore there was no need for her to go to the Union?

A. I did not tell her there was no need for her to go to the Union.

Q. On August 10 you didn't tell her that?

A. I did not tell her that.

Q. Ever?

A. Ever."

From my evaluation of the testimony 13/ and from my observation of the witnesses and their demeanor I credit Miss Karwoski's version of the August 29, 1972 conversation.

Sometime in September 1972, Dr. Hainsworth telephoned Mr. Irving Morrow a retired Activity employer who was the Union's President at the time. Dr. Hainsworth announced that he was calling with regard to Miss Karwoski and suggested that with regard to the Activity helping Miss Karwoski receive proper medical care, it would be much more difficult if the Union was included in the matter. Mr. Hainsworth strongly urged that the Union refrain from getting involved in the situation. Mr. Morrow responded that the Union felt it could offer some assistance to Miss Karwoski in addition to that which was being provided by the Activity.

By letter dated September 14, 1972, the Activity notified Miss Karwoski that they were proposing her termination. The letter stated, inter alia:

"I. This is to notify you that it is proposed to remove you based on the following reasons:

13/ On cross-examination, Miss Karwoski denied the essence of Mr. Howe's version of the August 10 meeting. Moreover, Mrs. Alvermann, a witness called by Respondent who was present virtually throughout the August 10 meeting, did not give any testimony which would corroborate Mr. Howe's testimony as described above.

"1. On August 29, 1972 at 10:30 A.M. you were scheduled for medical examination in the Personnel Physician's Office to determine your mental and physical fitness to return to duty. The Personnel Physician and a Psychiatry Consultant stood by for your appointment. Even after being paged on the PA System you failed to keep the appointment nor have we been advised of what you plan to do as regards your return to duty.

2. Your LWOP ended on September 7, 1972 and from that date on we have to carry you on an AWOL status since we are unable to determine your plans.

4. The final decision to effect the action proposed has not been made. The Center Director who will make the final decision, will give full and impartial consideration to your reply, if a reply is submitted.

7. As indicated in paragraph 1 above, you are being carried in an AWOL status. This will continue during this notice period unless you contact us immediately. We hope that you will do so and we can make adjustments to your leave record if medical clearance is obtained."

On September 29, 1972, Chaplin Ronald A. Gunton, an employee of the Activity and the First Vice-President of the Union, met Dr. Symmons 14/ who attempted to discuss the Karwoski situation with him. When Reverend Gunton refused to discuss the matter, Dr. Symmons turned to another physician and informed him that Miss Karwoski was sick and needed help. Dr. Symmons also stated that "(Miss Karwoski) had gone to the Union and we're terribly afraid now we won't be able to help her...there is nothing we can do for her because she had gone to the Union" or words of that effect.

14/ I find that Dr. Symmons during the period relevant hereto, was a supervisor within the meaning of the Order. The evidence reveals that Dr. Symmons in the normal course of his employment was assigned a technician as an assistant. With regard to this employee Dr. Symmons was fully responsible to assign tasks to be performed at the hospital and direct the technician in the manner of carrying out his duties. Further, Dr. Symmons evaluated the performance of the technician and the Chief of Psychiatry generally relied upon Dr. Symmons written and oral evaluation of the employee when signing an employee's yearly appraisal as to whether that employee was performing in a satisfactory manner.

Sometime thereafter Miss Karwoski's employment was terminated. According to the Activity, it had no alternative to taking such action since Miss Karwoski did not obtain psychiatric clearance relative to returning to work nor did she request further leave without pay. The record is silent as to what subsequently transpired except that Miss Karwoski thereafter appealed her separation and, as a result of the appeal, was reinstated to employment in March of 1973 after taking various "examinations."

Discussion and Conclusions

I conclude that Mr. Howe's statement to Miss Karwoski in August 29, 1972, to the effect that if the Union pressed the issue, everything would go into her records and that might hurt her, violated Section 19(a)(1) of the Order. Thus, the statement, in my view, urged Miss Karwoski to by-pass the Union and deal directly with the Activity with regard to the resolution of her difficulties. The suggestion that Union representation in the matter might result in some form of adverse consequence to Miss Karwoski constitutes coercion and "runs counter to very practice and philosophy of exclusive recognition." ^{15/} However well-intentioned the Activity might have been in its desire to assist Miss Karwoski with a minimum of administrative complication, it could not, under the Order, impede Miss Karwoski's free and full access to Union representation and assistance.

With regard to the Section 19(a)(2) allegation, I do not find that Complainant has met its burden of proving, by a preponderance of evidence, that Respondent violated the Order by refusing to permit Miss Karwoski to return to work and subsequently terminating her. Thus, Miss Karwoski was consistently advised, from virtually the onset of her separation from duty, that a psychiatrists' certification would be required before she could return to work. She was also made aware that her leave without pay status was good for only 30 days and renewal of such status required a request to the facility Director and his approval thereof. Both of these requirements for return to work were placed on Miss Karwoski prior to her seeking Union assistance and the Activity did not at any time material hereto, by word or deed, withdraw these requirements. Neither did Miss Karwoski at any time material hereto meet these requirements. Accordingly, it has not been established that the Activity's refusal to permit Miss Karwoski's return to work and her subsequent

^{15/} Cf. United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42.

termination was, in any way, the result of her seeking Union help.

Further, while the Activity was obviously desirous of handling Miss Karwoski's problems without intervention of the Union, this alone does not establish that the Activity engaged in any action adverse to Miss Karwoski because of the Union's involvement. I construe Dr. Hainsworth's statement to Mr. Morrow in September 1972, and Dr. Symmons' statement made in the presence of Reverend Gunton on September 29, 1972, to be expressions of the sentiment that Miss Karwoski's reinstated was made administratively more difficult since the Union was challenging the Activity's requirement that Miss Karwoski obtain psychiatric clearance. ^{16/} The Activity saw this as a matter which could be resolved expeditiously if Miss Karwoski simply obtained psychiatric clearance while on leave without pay but after Miss Karwoski sought Union assistance, the resolution appeared to be not readily forthcoming thus complicating the situation in the Activity's judgement. However, the Activity's conclusion in this regard does not establish that it took any action adverse to Miss Karwoski because of her seeking union representation. ^{17/}

Respondent contends that since Miss Karwoski pursued her termination of employment through the Activity's appeals procedure, indeed successfully, Section 19(d) of the Order ^{18/} is controlling and accordingly, the allegation of violation of Section 19(a)(2) of the Order should be dismissed. However, the record is not clear whether the appeals procedure utilized

^{16/} The transcript of a meeting between the Activity and the Union held on October 19, 1972 (Complainant Exhibit No. 3) indicates that the Union strongly contested to the Activity's position in this regard.

^{17/} I also reject the Union's contention that any Section 19(a) ⁽¹⁾ violation of the Order also violates Section 19(a)(2). While a Section 19(a)(1) violation may well discourage membership in a labor organization, by the express provisions of Section 19(a)(2) the discouragement must be the result of "discrimination in regard to hiring, tenure, promotion, or other conditions of employment." As set forth above, no such discrimination has been established herein.

^{18/} Section 19(d) of the Order provides, in pertinent part, that, "Issues which can properly be raised under an appeals procedure may not be raised under this section..."

herein permitted Miss Karwoski to raise the issue whether the termination was discriminatorily motivated and in violation of rights protected by the Order. ^{19/} Moreover, the subject matter of the 19(a)(2) allegation litigated herein concerned not only Miss Karwoski's termination but the Activity's refusal to permit her to return to work without a psychiatric clearance. It is not clear from the record that this latter issue was or could have been considered in the appeal. Accordingly, in all the circumstances, I reject Respondent's contention with regard to the applicability of Section 19(d) to the case herein.

Recommendation

Having found that Respondent has engaged in conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order. I also recommend that the Section 19(a)(2) allegation be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Veterans Administration Center, Bath, New York, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees by urging or admonishing them to refrain from seeking representation or assistance from Local 491, National Federation of Federal Employees, concerning grievances, personnel policies and practices, or other matters affecting working conditions.


(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

^{19/} See Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336.

(a) Post at its facility at Veterans Administration Center, Bath, New York, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: July 9, 1974
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT urge or admonish our employees to refrain from seeking representation or assistance from Local 491, National Federation of Federal Employees concerning grievances, personnel policies and practices, or other matters affecting working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, Room 3515, Federal Office Building, 1515 Broadway, New York, New York 10036.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
AVIATION SUPPLY OFFICE,
PHILADELPHIA, PENNSYLVANIA
A/SLMR No. 434

This unfair labor practice proceeding involved Section 19(a)(1) and (2) allegations filed by Anthony L. Gomez, (Complainant), a former employee of the Department of the Navy, Aviation Supply Office, Philadelphia, Pennsylvania, (Respondent). The Complainant alleged essentially that the Respondent followed a pattern of harrassment against him because of his union activities which caused him to transfer to a position with another agency. Such conduct, in the Complainant's view, constituted a constructive discharge in violation of the Order. The Respondent contended, among other things, that the Assistant Secretary had no jurisdiction in this matter because the alleged constructive discharge would constitute an adverse action and that such adverse action might properly be raised under an appeals procedure available to the Complainant. Accordingly, under Section 19(d) of the Order, the issue could not be raised before the Assistant Secretary in an unfair labor practice proceeding.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In this connection, he noted that the issue of the alleged constructive discharge involved an allegation which was subject to an adverse action procedure. He concluded, therefore, that as an appeals procedure was available to the Complainant, the Assistant Secretary was without authority under Section 19(d) to proceed on a Section 19 complaint.

Noting particularly that no exceptions were filed, the Assistant Secretary adopted the conclusion of the Administrative Law Judge that as the issue in this matter properly could have been raised under an appeals procedure, it could not be raised under Section 19. Accordingly, he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
AVIATION SUPPLY OFFICE,
PHILADELPHIA, PENNSYLVANIA

Respondent

and

Case No. 20-4033(CA)

ANTHONY L. GOMEZ

Complainant

DECISION AND ORDER

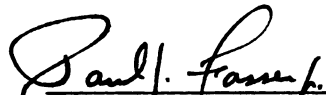
On July 11, 1974, Administrative Law Judge Thomas W. Kennedy issued his Report and Recommendation in the above-entitled proceeding, finding that dismissal of the instant complaint was warranted on the basis that under Section 19(d) of the Order the Assistant Secretary was without authority to proceed. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I find, in agreement with the Administrative Law Judge, that, under the circumstances, further proceedings on the complaint herein were unwarranted. Thus, as the issue in this matter properly could have been raised under an appeals procedure, in accordance with Section 19(d) of the Order it may not be raised under Section 19.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 20-4033(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 30, 1974


Paul J. Passer, Jr., Assistant Secretary of
Labor for Labor-Management Relations



In the Matter of:

DEPARTMENT OF THE NAVY,
AVIATION SUPPLY OFFICE,
PHILADELPHIA, PENNSYLVANIA

Respondent

Case No. 20-4033(CA)

and

ANTHONY L. GOMEZ, an Individual

Complainant

John J. Connerton, Esquire
Office of Civilian Manpower Management
Department of the Navy
Washington, D. C. 20390

Joseph J. Dallas, Esquire
Regional Office of Civilian
Manpower Management
Department of the Navy
Philadelphia Naval Base
Philadelphia, Pennsylvania 19112
For the Respondent

Herbert G. Keene, Jr., Esquire
1330 Two Girard Plaza
Philadelphia, Pennsylvania 19102
For the Complainant

Before: THOMAS W. KENNEDY
Administrative Law Judge

REPORT AND RECOMMENDATION

I. Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on October 31, 1973, by the Regional Administrator for Labor-Management Services Administration, Philadelphia Region, based on a complaint filed by Anthony L. Gomez 1/ (herein called Gomez or Complainant) against the Department of the Navy, Naval Publications and Forms Center, 2/ Philadelphia, Pennsylvania (herein called Respondent). The complaint alleges that Respondent violated Section 19(a), subsections (1),(2) and (6) of the Order. 3/ Specifically, the Complainant alleges that Respondent followed a pattern of harrassment against Complainant because of his union activities, thus forcing him to transfer to another employer. It is alleged, therefor, that this transfer constituted a constructive discharge in violation of the Order.

A hearing was held before the undersigned duly designated Administrative Law Judge on February 5,6,20,21, and 22, 1974, in Philadelphia, Pennsylvania. All parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Opportunity to file briefs was granted, but only Respondent availed itself of this opportunity.

1/ Although the complaint was originally filed by both Complainant Gomez and Lodge 81, Fraternal Order of Police, the Regional Administrator on October 1, 1973, dismissed Lodge 81 as a party for failing to comply with Section 203.2 of the Rules and Regulations.

2/ The charge and the subsequent complaint name the Naval Publications and Forms Center as the Respondent. However, on July 1, 1973, due to an administrative change, the name of the Respondent was changed from the Naval Publications and Forms Center to the Aviation Supply Office. At the hearing herein the pleadings were amended to reflect this change in name.

3/ On September 25, 1973, Complainant, through Counsel, withdrew the §19(a)(6) allegation.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

II. Findings

A. Background

Anthony L. Gomez was first employed by Respondent around August of 1970 as a security guard in Respondent's Security Division. Initially at Level GS-3 and later at GS-4, he was, at all times material herein, "...a career Navy employee in a competitive status and was entitled to all of the rights set forth in the pertinent Civil Service Statute and Regulations with respect to adverse actions." 4/ He was a member of Lodge 81, Fraternal Order of Police, which was the exclusive representative for a unit of all non-supervisory guards and detectives of the Police Branch in Respondent's Security Division, and during his employment was elected to the position of Watch Director on the day shift, a union title which parallels the more commonly used "shop steward." Following this election, Complainant alleges that there emerged a pattern of harassment, which involved disciplinary measures taken by Respondent against Complainant in response to his zealous execution of his union duties. Complainant further alleges that but for this illegal harassment he would not have transferred, as he did on September 18, 1972, to another government agency. And a transfer induced in this manner, claims Complainant, is a constructive discharge in violation of Section 19(a)(1) and (2) of the Order.

B. The Alleged Pattern of Harassment

The alleged pattern of harassment was couched chiefly in disciplinary measures: three letters of reprimand, 5/ a warning of a letter of reprimand, a recommendation for a suspension, and a post-transfer attempt by Respondent to discredit Complainant in his new employment. In addition, Complainant describes constant verbal abuse by immediate supervisors and unequal, "singling out" treatment in general work directives.

4/ Stipulated by Counsel (T.515).

5/ A letter of reprimand is a formal disciplinary procedure and is placed in the involved employee's personnel file for the reckoning period - generally one year.

The initial letter of reprimand was issued to Gomez on December 1, 1971, on the ground of "Leaving Job to Which Assigned During Working Hours Without Proper Permission." Four specific instances of unauthorized absences were cited therein, on September 22, October 11 and 13, and November 2, 1971. Another incident cited was unauthorized use of a telephone on October 6, 1971.

Gomez grieved the matter of the letter of reprimand to Lt. Bryant, Director of the Security Division and the next-level supervisor. After an investigation, Bryant affirmed the letter based on the four absences, although he did not credit the telephone incident because of possible equipment difficulties.

Continuing his appeal, Complainant next went to the Administrative Department Director, Commander Swayne. On February 1, 1972, Commander Swayne issued her decision, which reduced the disciplinary measure to a letter of caution, 6/ stating that she felt this would serve to correct the problem. Complainant had never before been disciplined.

The second letter of reprimand was issued on June 18, 1972 - this time for "Failure to Carry Out Instructions of Your Supervisor." One incident, occurring on June 8, 1972, produced this letter of reprimand. Apparently, Complainant was directed to remain at the site of a possible fire until the fireman arrived, but instead ran across the street to the Police Office to suggest that they also call an electrician, since the smell of the smoke indicated to him an electrical fire, then returned to his post to await the firemen.

Gomez grieved this second reprimand through the administrative procedures, and this time Commander Swayne upheld the letter of reprimand. Upon further appeal, a two day hearing was held before a Navy Department Administrative Hearing Examiner, in August, 1972. A decision was never rendered, however, the issue becoming moot by regulation upon Complainant's transfer. 7/

6/ A letter of caution is an informal disciplinary action which is not placed in the employee's file but is retained by the issuing officer.

7/ F.P.M. Supplement 990-1, Book III, Section 771.305(b).

On August 22, 1972, Complainant received the third letter of reprimand, which was again based on a single incident of "Failure to Carry Out a Work Assignment." The incident, which occurred on August 8, 1972, involved the failure to open a busy base gate at the appropriate time in the morning. Again Complainant grieved and again Bryant denied his appeal.

On June 5, 1972, Lt. Bryant issued to Gomez a "Memorandum of Understanding." This, in essence, after citing five specific occasions when Gomez exceeded the normal chain of command to discuss problems within the Security Division, was a clear warning that the next such occasion would result in disciplinary action. At the end of August, Lt. Bryant recommended that Gomez be suspended for five days for having: 1) violated the June 5 Memorandum by contacting an official outside the chain of command; and 2) acquired two letters of reprimand subsequent to that Memorandum. Such suspension was never implemented, however, due to Gomez' transfer.

Gomez transferred to Frankford Arsenal on or about September 18, 1972, and has been continuously so employed up to the date of the hearing in the instant case. Shortly after the transfer, Sgt. Roda, who had been Gomez' immediate supervisor, personally delivered Gomez' personnel evaluation voucher to Frankford Arsenal. Such vouchers are generally mailed, but Roda forgot to mail it. Bryant then asked Roda, who was on sick leave, to take it there himself to expedite delivery. At the arsenal, a conversation developed between Roda and Police Chief Coleman, Gomez' new supervisor, about Gomez' employee qualities. Gomez contends that Roda's remarks were discriminatory, derogatory and a continuation of Respondent's harassment. Respondent contends these remarks were bona fide answers to Coleman's questions.

Finally, highlighting these specific actions by Respondent, which Complainant contends constitute a pattern of harassment against him for vigorously pursuing his union activities, are a number of alleged practices by Respondent which tended to discriminate against Complainant. Some of these alleged practices are: 1) verbal abuse by certain supervisors which would tend to discredit Complainant before other union members; 2) strict break time monitoring by Respondent limited to Complainant; 3) disparaging remarks made by supervisors against the union, and 4) a general practice of strictly and unreasonably enforcing regulations against Complainant but not against other guards not active in union affairs.

C. Positions of the Parties

1. Position of Complainant

The position of the Complainant is that the alleged pattern of harassment, as described above, culminated in his transfer to another employer, thereby constituting a constructive discharge in violation of Sections 19(a)(1) and (2) of the Order.

2. Position of Respondent

Respondent reveals three major jurisdictional defenses and four arguments on the merits: 1) the alleged incidents which occurred prior to July 7, 1972, are untimely under Section 203.2(b)(3) of the regulations; 2) the allegations involved herein constituted grievances, and since Complainant grieved these matters, under Section 19(d) he cannot raise them in this forum; 3) the complaint contains issues that can properly be raised under an appeals procedure and thus may not be raised under Section 19 of the Order; and 4) On the merits, the facts do not support a finding that Respondent violated the Order.

III. Conclusions

Respondent's first argument asserts a "statute of limitations" bar to any "incidents" which occurred prior to July 17, 1972, citing Section 203.2(b)(3) of the regulations. This section reads:

(3) A complaint must be filed with nine (9) months of the occurrence of the alleged unfair labor practice or within sixty (60) days of the service of a respondent's written final decision on the charging party, whichever is the shorter period of time. (Emphasis supplied.)

A distinction must be drawn between any "incidents" which may contribute to an unfair labor practice and the "unfair labor practice" itself. Section 203.2(a)(3) refers to the "facts constituting the unfair labor practice" and later to the "particular acts" involved. Clearly, the "facts", "acts", and "incidents" which lead up to and cause the alleged unfair labor practice, here a constructive discharge, cannot be barred from consideration if the resulting alleged unfair labor practice complaint is timely.

Here the alleged unfair labor practice occurred with Complainant's transfer in September, 1972, and the complaint was filed on April 19, 1973 - well within the nine month period. Accordingly, I find the complaint timely and would consider any facts or incidents leading up to the alleged unfair labor practice.

Respondent's second argument involves the second sentence of Section 19(d) of the Order, as amended. This reads:

Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. (Emphasis added.)

Respondent argues, then, that since the "issues", here meaning the letters of reprimand, were already grieved, Complainant has elected his avenue of recourse and is precluded from further pursuit under Section 19. But here again the alleged unfair labor practice must be distinguished from the various disciplinary actions. If the alleged unfair labor practice merely involved one letter of reprimand for which a complaint was filed after it had already been grieved, then this language of the Order would probably bar jurisdiction. But here, whether the individual disciplinary actions constitute a pattern of harassment which resulted in a constructive discharge is the "issue" for the purposes of the above quoted language, and not whether the letters of reprimand were, indeed, warranted. Accordingly, I find Respondent's contention of precluded jurisdiction due to prior grievance proceedings to be without merit.

Respondent's third and most convincing argument is that the complaint contains issues that can properly be raised under an appeals procedure and thus may not be raised under Section 19 of the Order. 8/ The first sentence of Section 19(d), as amended, reads:

8/ Respondent has raised this argument earlier in the case and twice during the hearing by way of motion to dismiss. The motion was, on each occasion, denied.

Issues which can properly be raised under an appeals procedure may not be raised under this section. (Emphasis added.)

In deciding whether this language actually bars jurisdiction, we must consider whether, given the issues involved, an "appeals procedure" where these issues could be raised was available to Complainant.

Here, the issue is characterized as a "constructive discharge," which, in the Federal Service, constitutes an adverse action. Furthermore, in Title 5 of the United States Code, an adverse action is defined as "a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay." 9/ But a transfer is not tantamount to a removal unless the transfer was involuntary. In this regard, the Federal Personnel Manual Supplement 752-1, reads in pertinent part:

S1-2. VOLUNTARY AND INVOLUNTARY SEPARATIONS AND REDUCTIONS

a. General. (1) Separations and reductions in rank or pay voluntarily initiated by an employee are by their very nature actions which do not require the use of adverse action procedures. On the other hand, a normally voluntary action - i.e., a resignation, optional retirement, or reduction in rank or pay at the employee's request - is an adverse action if it is obtained by duress, time pressure, intimidation, or deception. Whether an action is voluntary or involuntary is determined not by the form of the action, but by the circumstances that produced it. (Emphasis supplied.)

Therefore, the transfer by Complainant, to be a constructive discharge, would have to be considered an involuntarily initiated action, obtained under duress and intimidation - which, given the above, clearly constitutes an adverse action.

The question then becomes, if Complainant were the subject of an adverse action, was there an "appeals procedure" available to him for the purpose of §19(d)? Administrative Law Judge Dowd, in a similar case, has suggested certain criteria which an

9/ 5 U.S.C. 7511(2).

appeals procedure should meet in order to satisfy Section 19(d) of the Order:

Based upon my review of the matter, I conclude that in order for an appeals procedure to come within the meaning of 19(d) it must meet the following criteria: (1) it must be an appeals procedure in which the unfair labor practice issue "can be raised;" and (2) it must be an appeals procedure providing for third-party review of the unfair labor practice issue so raised. (at page 15) 10/

In the instant case, since Complainant was in the competitive service he was subject to 5 C.F.R Parts 752 and 771 and the corresponding F.P.M. sections. Subpart B of Part 752 sets out the mechanics whereby one in Complainant's position can contest an adverse action taken by an agency. 11/ Moreover, the procedures for appealing an agency decision, as guaranteed by statute 12/, are set forth in Subpart B of Part 771. If we were now to apply Judge Dowd's test for adequacy of the "appeals procedure" under 19(d), we would see: 1) that the regulations specifically direct that any unfair labor practice charge be raised; 13/ and 2) that third party appellate review

10/ Veterans Administration, Veterans Benefits Office and Flonoiral Merritt, Case No. 22-3533(CA) (ALJ Report and Recommendations, May 24, 1973), aff'd, A/SLMR No. 296.

11/ I find that Complainant is covered by both these parts 5 C.F.R. 752.201 and 771.103.

12/ 5 U.S.C. 7701

13/ 5 U.S.C. 771.106(a) reads:

Section 771.106 Allegations of unfair labor practices. (a) An allegation of an unfair labor practice made in connection with an appeal or grievance under this part shall be incorporated in the appeal or grievance and processed under this part; however, the decision on the appeal or grievance may not be construed as an unfair labor practice decision under Executive Order 11491, as amended.

is available where the unfair labor practice charge could be considered, to the extent that further appeal to the Civil Service Commission is available after the agency appellate decision is issued. 14/ Further evidence of "third party review" is illustrated by regulations which require as arbiters disinterested examiners and authorized officials of a higher administrative level than the original decision maker. 15/ Therefore, even applying these demanding criteria, it is apparent that Complainant had, indeed, an appeals procedure available to him. (See Texas Air National Guard, A/SLMR #336.)

The Assistant Secretary has already treated the issue of the Section 19(d) bar to jurisdiction in United States Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272. There, the Assistant Secretary stated in summary:

It is my view that, having found that the agency appeals procedure herein was available to the Complainant and that under Section 19(d) I am without authority to review the application of such procedure as to the Complainant, further proceedings on the instant complaint are unwarranted. (page 5) 16/

Since I have found that the agency appeals procedures were available to Complainant, I am constrained to find the Assistant Secretary without authority under Section 19(d) to proceed on a Section 19 complaint.

14/ 5 C.F.R. 771.22 reads in Part:

Section 771.22 Further appeal after agency appellate decision.

(a) If the agency has only one appellate level, the employee is entitled to appeal to the Commission on receipt of the agency appellate decision.


(b) If the agency has more than one appellate level, the employee is entitled to appeal either to the agency second level or to the Commission on receipt of the agency first-level appellate decision. If the employee appeals to the agency second level, he forfeits his right to appeal to the Commission. If the employee appeals to the Commission, he forfeits his right to appeal to the agency second level.

15/ 5 C.F.R 771.209 and 771.218

16/ Even though this case was brought under the unamended Order, the effect is the same, since the existence of an appeals procedure, per se, barred jurisdiction before and after the amendment. Where grievance procedures were present, the amendment

IV. Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against Respondent be dismissed in its entirety.


 THOMAS W. KENNEDY
 Administrative Law Judge

Dated: July 11, 1974
 Washington, D. C.

(Footnote 16/ con't) gave a complainant an election of recourse under either the grievance procedures or the Order.

September 30, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VANDENBERG AFB, 4392d AEROSPACE
SUPPORT GROUP,
VANDENBERG AFB, CALIFORNIA
A/SLMR No. 435

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1001, Vandenberg AFB, California (Complainant) against the Respondent Activity alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by its conduct at a March 12, 1973, negotiation session.

The incident which gave rise to the unfair labor practices in this case occurred on March 12, 1973, at a regularly scheduled negotiation session between the parties herein. Prior to this session, the parties had met on approximately seven or eight occasions beginning in December 1972. The purpose of the meetings was to arrive at a negotiated agreement for the professional unit at the Base. The Complainant represented both the professionals and nonprofessionals in two separately certified units. Prior to the March 12 meeting, at the suggestion of the Complainant, the parties attempted unsuccessfully to engage in joint negotiations leading to a single agreement covering both units. However, the Respondent received permission from the Complainant to place on the parties' agenda at the meeting to take place on March 12, 1973 -- which meeting pertained only to the professional unit, -- the concept of dual simultaneous negotiations leading to two separate agreements in the two units.

The Administrative Law Judge found that at the March 12 meeting the Complainant's representative discussed matters extraneous to the agenda for approximately two hours, even though it was the practice of the parties to follow strictly the items that had been set forth in the agenda for discussion. However, after two hours during which no agreement was reached upon the items discussed, the Respondent attempted to move to the joint negotiations question which was on the regularly scheduled agenda. The Complainant refused to discuss the matter stating that its proposals for joint negotiations had been discussed too long without agreement. At this point, the Respondent felt that the Complainant had breached the agreement expressed in the parties' ground rules and it announced the negotiations to be at an impasse and that it would request the intervention of the Federal Mediation and Conciliation Service. The Complainant's representative sought to discuss another agenda item and the Respondent refused, stating that negotiations should be suspended pending mediation of the impasse. The Respondent then stated that it was not obligated to negotiate the same subject matter twice with the same union and would not negotiate further unless the ground rules were amended. When the parties could not arrive at an agreement as to how to proceed, the Respondent's bargaining team left the conference room and the bargaining session ended. The following day, the Respondent called the Complainant

and offered to continue negotiations without discussion of the item in question and was informed that the offer would be considered but that an unfair labor practice charge might be filed. Also, on that day, another member of the Respondent's negotiating team informally contacted the Complainant requesting that the parties continue negotiations stating that the Respondent was ready to omit the matter over which the disagreement had arisen. Thereafter, the Complainant charged the Respondent with an unfair labor practice based on the March 12 incident. The Respondent took the position that its negotiating team would be present for the next bargaining session and that it would then be prepared "to negotiate seriously on any appropriate matter." Despite some informal meetings between the parties in June 1973, arranged by a Commissioner of the Federal Mediation and Conciliation Service, no formal meeting between the parties has taken place concerning an agreement covering the professional employee unit despite repeated requests by the Respondent.

The Administrative Law Judge found that, although the Respondent was greatly disappointed and surprised by the Complainant's refusal to discuss the joint negotiation question, it was not a subject over which management could insist to impasse because the Complainant was not required to bargain away its legal right to separate bargaining for separate agreements for the separately certified units. The Administrative Law Judge concluded, therefore, that the Respondent had committed a "technical violation" of Section 19(a)(6) when it walked out of the meeting in that it did not have a right to insist to the point of impasse that the Complainant discuss its proposal for dual simultaneous negotiations. However, he further found that the violation was rendered "moot" the following day when the Complainant was advised twice that the Respondent had receded from its position and was willing to return to the bargaining table and, therefore, no remedial order was required. Accordingly, he recommended that the complaint in this matter be dismissed in its entirety.

The Assistant Secretary concluded that under the circumstances of this case the Respondent violated Section 19(a)(6) of the Order by unilaterally terminating the March 12, 1973, meeting based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining. Further, the Assistant Secretary found that such conduct also violated Section 19(a)(1) of the Executive Order. The Assistant Secretary, however, disagreed with the Administrative Law Judge that under the circumstances herein the Respondent's improper conduct was merely a "technical violation" which did not require a remedial order.

Having found that the Respondent violated Section 19(a)(1) and (6) of the Order, and that such conduct required the issuance of a remedial order, the Assistant Secretary issued such an order.

-2-

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VANDENBERG AFB 4392d AEROSPACE
SUPPORT GROUP,
VANDENBERG AFB, CALIFORNIA

Respondent

and

Case No. 72-4109

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1001,
VANDENBERG AFB, CALIFORNIA

Complainant

DECISION AND ORDER

On June 10, 1974, Administrative Law Judge Francis E. Dowd issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent's conduct in unilaterally declaring a negotiation impasse concerning its proposal for dual simultaneous bargaining, walking out of the bargaining session, and refusing to discuss other subjects, was "unlawful." However, he found such conduct to constitute merely a "technical violation" which was rendered "moot" by subsequent actions on the part of the Respondent. The Administrative Law Judge recommended, therefore, that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

The instant complaint, as amended, alleges that the Respondent refused to negotiate in violation of Section 19(a)(1) and (6) of the Order by its conduct at a March 12, 1973, negotiation session by refusing to bargain with the Complainant and by walking out of the meeting. It is asserted that such actions, as well as the Respondent's statement at the meeting that it was not obligated to negotiate the same subject twice, constituted an improper refusal to negotiate.

I agree with the Administrative Law Judge that, in the particular circumstances of this case, the Respondent violated Section 19(a)(6) of the Order by unilaterally terminating the parties' March 12, 1973, negotiation session based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining. In addition, I find that such conduct also constituted an improper interference with employee rights in violation of Section 19(a)(1) of the Order. However, I disagree with the Administrative Law Judge's conclusion that, under the circumstances of this case, the Respondent's improper conduct constituted merely a "technical violation" of the Order which did not require a remedial order. Accordingly, I shall order that the Respondent remedy its violation of Section 19(a)(1) and (6) of the Order.

The Remedy

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order the Respondent to cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations the Assistant Secretary of Labor for Labor-Management Relations, hereby orders that the Vandenberg AFB 4392d Aerospace Support Group, Vandenberg AFB, California, shall:

1. Cease and desist from:

(a) Refusing to meet and confer in good faith with the National Federation of Federal Employees, Local 1001, Vandenberg AFB, California, by unilaterally terminating scheduled negotiation sessions based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining.

(b) Interfering with, restraining, or coercing employees represented exclusively by the National Federation of Federal Employees, Local 1001, Vandenberg AFB, California, by refusing to meet and confer in good faith with such exclusive representative by unilaterally terminating scheduled negotiation sessions based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.


2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify the National Federation of Federal Employees, Local 1001, Vandenberg AFB, California, that it will meet and confer in good faith and will not unilaterally terminate scheduled negotiation sessions based on an alleged impasse with respect to one subject of bargaining.

(b) Post at the Vandenberg AFB 4392d Aerospace Support Group, Vandenberg AFB, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the 4392d Aerospace Support Group, Vandenberg AFB, California, and shall be posted and maintained by the Commanding Officer of that Group for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith with the National Federation of Federal Employees, Local 1001, Vandenberg AFB, California, by unilaterally terminating scheduled negotiation sessions based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining.

WE WILL NOT interfere with, restrain, or coerce employees represented exclusively by the National Federation of Federal Employees, Local 1001, Vandenberg AFB, California, by refusing to meet and confer in good faith with such exclusive representative by unilaterally terminating scheduled negotiation sessions based on an alleged impasse with respect to one subject of bargaining and refusing to meet and confer on other subjects of bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 WASHINGTON, D.C. 20210



Hearing on Complaint issued on September 18, 1973, by the Regional Administrator of the United States Department of Labor, Labor-Management Services Administration, San Francisco Region. Involved herein is the Amended Complaint of Local 1001 of the National Federation of Federal Employees (NFFE) (hereafter referred to as the Union) against Vandenberg Air Force Base, California (hereafter referred to as the Activity). The Amended Complaint alleges that the Activity violated Section 19, subsections (a)(1) and (6) of the Order by refusing to bargain with the Union and by walking out of a March 12, 1973, negotiation session. 1/

Both parties were represented by counsel at the hearing and were afforded full opportunity to examine and cross-examine witnesses and to adduce relevant evidence. The Activity has filed a post hearing brief which has been duly considered.

On the basis of the entire record herein and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations to the Assistant Secretary.

Findings of Fact

1. Complainant is the certified exclusive representative of two units of employees at the Activity: one comprised of all professional employees and the other a base-wide unit including all nonprofessional, nonsupervisory, nonguard employees. At the time of the incident complained of there was a collective bargaining agreement in effect between the Activity and the Union for the base-wide unit. The agreement was to expire in May of 1973.

2. Preparatory to negotiations for a collective bargaining agreement between the Activity and the unit of professional

1/ The original Complaint filed on March 20, 1973, made substantially the same allegations as the Amended Complaint. It charged, however, that Section 19(a)(2) had also been violated by the Activity's actions.

.....
 In the Matter of :
 :
 VANDENBERG AFB 4392d AEROSPACE :
 Support Group, Vandenberg AFB :
 California :
 Respondent :
 and : Case No. 72-4109
 :
 NATIONAL FEDERATION OF FEDERAL :
 EMPLOYEES, LOCAL 1001 :
 VANDENBERG AFB, CALIFORNIA :
 Complainant :

Charles L. Wiest, Jr., Captain USAF
 Headquarters, 15th Air Force
 Judge Advocate Office
 March Air Force Base, California 92508

For the Respondent

Homer H. Housington
 National Federation of Employees
 Post Office Box 870
 Riata, California 92376

For the Complainant

Before: FRANCIS E. DOWD
 Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

This proceeding under Executive Order 11491, as amended (hereafter referred to as the Order) was heard before the undersigned on November 1, 1973, pursuant to a Notice of

employees, the parties negotiated and agreed upon a Memorandum of Agreement, 2/ signed November 15, 1972, which was to govern the conduct of contract talks.

3. Shortly thereafter the Union submitted to the Activity proposals for the substantive terms of an agreement. Consistent with the ground rules established in the Memorandum of Agreement the Activity filed counterproposals 3/ with the Union on December 21, 1972. Negotiations began with a meeting between the parties on January 8, 1973. 4/ At subsequent meetings on the 15th and 22nd of January the parties discussed proposals for terms to be included in the professional unit contract. These discussions centered on a Union proposal to include an Article governing the basic workweek and hours of work for professionals. When the Activity refused to agree to its inclusion the matter was tabled.

4. At the January 29 negotiating session Mr. Francis D. O'Neil, chief Union spokesman, announced that it was his personal preference, 5/ in the interests of economy of time and energy, that the ongoing negotiation for a contract for professionals be combined with upcoming negotiations for a new contract for the base-wide unit. This idea was well received by the Activity, which promptly proposed, by letter dated February 2, that the current negotiations be expanded to include both units. 4/

2/ Complainant's Exhibit No. 1.

3/ Complainant's Exhibit No. 2.

4/ Unless otherwise indicated all dates hereinafter mentioned are in 1973.

5/ I assume O'Neil was speaking in his representative capacity. Certainly, the Activity was warranted in so concluding.

6/ Complainant's Exhibit No. 3.

5. At the regular February 5 negotiating session the Union representatives expressed approval of the concept of joint negotiations. The Activity spokesman indicated that proposed amendments to the Memorandum of Agreement to allow for the change in negotiations would be submitted. Talks on the professional unit contract were to be suspended pending decision on the joint negotiations proposal. To insure against having negotiations on the professional contract stalled interminably, the parties agreed to placing a deadline of March 19 on discussions concerning joint negotiations.

6. On February 9 the Activity submitted proposed amendments to the Memorandum of Agreement to provide for joint negotiations. 7/ The Union membership approved of the concept of combined bargaining at a meeting held February 13th.

7. Discussion of the Activity's February 9 proposals was initiated at a meeting of the parties held March 5. Negotiations hit a snag on two items raised with regard to the proposed contract for both units. The parties could not reach agreement on the duration or term of the proposed joint contract or on provisions for a mid-term reopener. With negotiations deadlocked on these items both parties abandoned the concept of joint negotiations leading to a single contract for both units and agreed that at the next bargaining session scheduled for March 12, discussion would return to a separate contract for the professional unit.

8. As required by the November 15, 1972 Memorandum of Agreement the Union submitted a proposed agenda for the March 12 meeting pertaining only to the professional unit. On March 9 the Activity requested and received permission from the Union to add to the agenda, 8/ as item number 1 for discussion, the following item: "Management letter of 9 March 1973 transmitting an amendment to the ground rules." The Activity's letter 9/ suggested the amendment of the Memorandum of Agreement to allow, in the Activity's words, for dual-simultaneous negotiations leading to separate agreements with each of the units represented by the Union. Under the proposed amendment there would

7/ Complainant's Exhibit No. 4.

8/ Complainant's Exhibit No. 5.

9/ Complainant's Exhibit No. 6.

be negotiations with the Union over contract items selected by the Union with the concurrence of the Activity applicable solely to the professional unit. Items selected by the Union and agreed to by the Activity as applicable both to the professional and base-wide units would be jointly negotiated and made part of each contract.

9. At the opening of the March 12 meeting Mr. O'Neil brought up for discussion the topics which had been tabled on March 5, that is, contract duration and mid-term reopener. Although ground rules for negotiations provided that only items on the agenda were to be discussed, Mr. Richard K. Jacoby, chief Activity spokesman, permitted 10/ this variation from the rules and the parties spent approximately two hours of the scheduled four-hour meeting discussing the items tabled on March 5.

From the testimony of the Union witnesses it would appear that they regarded the discussion of contract duration and mid-term reopener as also being part of a discussion of agenda item 1--management's proposal for dual-simultaneous negotiations. This is because O'Neil, in his own mind, had decided that consideration of these issues should be a precondition to agreeing with any proposal for joint or dual-simultaneous negotiations. However, it seems quite clear to me that, in this regard, the record supports the Activity's contention that the discussions of contract duration and mid-term reopener were not intended to be part of agenda item number 1; indeed, these items were not even on the agenda and it was a courtesy to the Union that they were even discussed at all. While I can understand why the Union may have reasoned as it did, the fact remains that these topics were not on the agenda and their discussion was not equivalent to discussing the Activity's proposal which was the real agenda item number 1.

10. When no agreement could be reached on these non-agenda topics Mr. Jacoby turned to item number 1 on the agenda, the Activity's March 9 proposals. Mr. Jacoby attempted to explain the meaning and effect of the proposed amendments to

10/ Actually, O'Neil cleared this with Jacoby by telephone the preceding Tuesday, March 9, after receiving and reading the Activity's March 9 letter.

the negotiating ground rules but could not elicit much comment from Mr. O'Neil who stated that proposals for joint negotiations had been discussed too long without agreement.

Mr. Jacoby testified that at this juncture in the meeting, tensions were high and nerves frayed. Jacoby had come to the March 12 meeting with the hope that if it was not possible to have joint negotiations leading to one contract for both units, at least the parties could agree to joint negotiations on certain subjects leading to agreement on contract terms to be included in the separate agreements with each unit. Jacoby testified that he was upset because he felt the Union had breached its agreement expressed in the ground rules to at least negotiate each item that appeared on the agenda.

I am satisfied, based upon my review of the entire record, including the credited testimony of Jacoby on this point, that the Union representatives were refusing to discuss agenda item number 1. I am satisfied that the complete details and ramifications of management's March 9 proposal never were fully explained and developed because of the Union's unwillingness to spend any time on the subject. The point I am making is not that the Union was required to agree on this agenda item but, rather, that the Union first acquiesced in putting this item on the agenda and then acted unreasonably and perhaps even discourteously in refusing to let the Activity explain its position. It seems quite clear that the Activity's proposal had not previously been considered at any negotiation session. Accordingly, it was a new topic to be put on the table for discussion before being accepted, rejected or tabled. In this regard, I note that there is no evidence contradicting Jacoby's testimony that the ground rules were accompanied by an understanding to at least negotiate each item on the agenda.

11. After the Union refused to discuss the Activity's March 9 proposals (agenda item number 1), Mr. Jacoby announced that he considered the negotiations to be at an impasse and that he would request the intervention of the Federal Mediation and Conciliation Service. Mr. O'Neil, speaking for the Union, then sought to move along to the second item on the agenda. Mr. Jacoby refused, stating that negotiations should be suspended pending mediation of the impasse. According to O'Neil, Jacoby then stated that management was not obligated to negotiate the same subject matter twice with the same Union and would not negotiate

further unless the ground rules were amended. Jacoby testified that he did not recall his exact words but did not believe he made that statement. Instead, he testified that he had "used the term difficult, 'if not impossible' to reach agreement on matters that were common to both contracts." To the extent that there is any conflict in these two versions, I resolve it in favor of the Union, not based upon a credibility resolution but, rather, my evaluation of all the testimony of these witnesses, and the corroborative testimony of Ms. Brogan. I also find that the import of Jacoby's testimony tends to support O'Neil's recollection.

As tempers on both sides of the bargaining table flared, O'Neil announced that the Union might file an unfair labor practice charge against the Activity if Jacoby would not proceed with discussion of item number two on the agenda. When the parties could not arrive at agreement as to how to proceed, the Activity bargaining team left the conference room and the session ended.

12. On the day following the incident, March 13, Jacoby met with his team and determined that even though they felt they would be upheld on any evaluation of the impasse, it would be more practical in terms of getting an agreement and showing good faith to resume negotiations. Accordingly, Jacoby telephoned O'Neil and told him that the Activity was prepared to return to the bargaining table to continue negotiations on the professional unit contract. According to Jacoby, O'Neil indicated that the offer would be considered, but that an unfair labor practice charge might be filed on the incident.

Also on the 13th of March James A Hunt, a member of the Activity bargaining team, had an informal discussion with O'Neil on a parking lot located on the Activity. Hunt testified that he informed O'Neil that the Activity bargaining representatives had decided not to stand at impasse, that the Federal Mediation and Conciliation Service was not going to be contacted and that the Activity was ready to resume negotiations on the items of March 12 agenda, skipping over item number 1 from which the furor had arisen.

13. By letter dated March 15 Mr. O'Neil, writing for the Union, filed official charges against the Activity for the actions of the Activity negotiating team in the March 12 meeting. The Activity responded to the Union charge on March 16 with a

letter by Colonel W.A. Lenz, Chief of the Personnel Division. 11/ The letter announced that the management negotiating team would be present for the next scheduled bargaining session on March 19 and would then be prepared "to negotiate seriously on any appropriate matter." The letter stated that this "constitutes management's decision on your charge." By letter of the same date Mr. O'Neil informed Mr. Jacoby that a formal complaint would soon be filed with the Department of Labor, and that pending resolution by the Assistant Secretary the Union wished to suspend negotiations. 12/

14. At some time in June of 1973, while negotiations were still stalled, Commissioner Swiegart of the Federal Mediation and Conciliation Service on his own initiative called the two sides together in an attempt to settle their differences. 13/ From the date of that meeting to the date of the hearing several informal conferences had been held between the parties with regard to a contract for the unit of professional employees. The Activity has made repeated overtures to the Union to resume formal talks but the Union has refused, pending resolution of the instant Complaint.

Conclusions

The Complaint alleges that the Activity refused to negotiate in violation of section 19(a) (6), (1) and (2), by its conduct at the March 12 negotiation meeting. Specifically, it is alleged that the Activity's refusal to discuss agenda item number 2, coupled with its walking out of the meeting and its statement that it was not obligated to negotiate the same subject twice, all adds up to a refusal to negotiate.

11/ Complainant's Exhibit No. 9.

12/ Complainant's Exhibit No. 8.

13/ Commissioner Swiegart had been called in by the parties to mediate an earlier dispute which had arisen during discussions on the ground rules for the professional unit negotiations. His second involvement with the parties came after he inquired informally about the status of the negotiations.

As noted in paragraph 10 herein, Jacoby was looking forward at this meeting to discussing management's proposal for dual-simultaneous negotiations leading to separate contracts. Jacoby's high hopes were based on the telephone call from O'Neil on March 9, as discussed in paragraph 8 herein. It was, therefore, with great surprise and disappointment that Jacoby learned--after spending 2 hours discussing nonagenda topics--that the Union was unwilling to even discuss what appeared on the agreed upon agenda as item number 1; i.e., the proposal for dual-simultaneous negotiations. The problem, however, is the manner in which the Activity reacted to the Union's unwillingness to discuss this topic.

While I can understand the Activity's disappointment in not being able to at least discuss, no less reach agreement, its proposal for dual-simultaneous bargaining, nevertheless, it was childish and, indeed, unlawful to unilaterally declare the negotiations at impasse and walk out of the meeting. In the first place, the mere fact that one party believes an impasse exists over a particular subject does not give that party a right to unilaterally declare an impasse and then refuse to discuss other subjects. The whole process of collective bargaining includes "give and take," compromise, and concessions about a number of contract items. In the second place, agenda item number 1--dual-simultaneous bargaining--is not the type of bargaining subject over which management can insist to impasse because a Union may not be required to bargain away its legal right to separate bargaining for separate contracts for separately certified units. 14/

Accordingly, I conclude that as of March 12, when the Activity walked out of the meeting, it had committed a technical violation of section 19(a) (6) of the Executive Order in that it did not have a right to insist, to the point of impasse, that the Union discuss its proposal for dual-simultaneous negotiations. However, I further find that this violation was

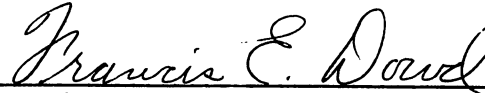
14/ It is well established case law, under the National Labor Relations Act, that a Union may give up this legal right, if it wishes to do so, with or without receiving a bargaining concession in return. But once the Union decides that it does not wish to engage in joint bargaining for a single contract, or joint bargaining for separate contracts, or dual-simultaneous bargaining for separate contracts, then that should be the end of the matter.

rendered moot the following day when the Union was advised twice, by Hunt and also by Jacoby, that the Activity had receded from its position and was willing to return to the bargaining table. In these circumstances, I cannot understand why the Union refused to accept this offer by the Activity. Even if the Union had some doubt about the Activity's good faith, it could quickly test this good faith by returning to the bargaining table. Instead, the Union insisted upon filing an unfair labor practice charge to which the Activity promptly responded, by letter from Colonel Lenz, that the Activity's decision with respect to the charge was to "negotiate seriously on any appropriate matter." There is no evidence in the record to suggest that the Activity had in mind anything but to do precisely what an Assistant Secretary's order would accomplish if a violation were found, i.e., to order the Activity back to the bargaining table. I conclude that as of the date that the unfair labor practice charge was filed, the Activity was not insisting to impasse upon multi-unit bargaining as a condition precedent to bargaining. Therefore, I recommend that no violation of section 19(a) (6), (1) and (2) of the Executive Order be found.

In the light of the foregoing, I further conclude that the Union's conduct in this entire matter, both at the March 12 meeting and thereafter, raises a serious question as to its own genuine willingness to bargain in good faith. It is noted, however, that apparently the Activity did not file an unfair labor practice charge against the Union. Instead, the Activity has attempted to bargain with the Union, despite the Union's apparent unwillingness to do so, at the same time that it is bargaining in good faith with the same Union for a contract governing a different unit at the same location.

Recommendation

On the basis of the foregoing findings and conclusions, I recommend that the Complaint in this matter be dismissed in its entirety.


 Francis E. Dowd
 Administrative Law Judge

Dated: June 10, 1974
 Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARIZONA NATIONAL GUARD,
AIR NATIONAL GUARD,
SKY HARBOR AIRPORT
A/SLMR No. 436

ARIZONA NATIONAL GUARD,
AIR NATIONAL GUARD,
SKY HARBOR AIRPORT

Activity-Petitioner

and

Case No. 72-4725(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3046

Labor Organization

This case involved a petition for clarification of unit (CU) filed by the Activity seeking clarification of the status of one employee, an Aircraft Instrument and Control Systems Mechanic (Leader), WG-12, (Mechanic, Leader) in the Instrument Subfunction of the Activity. The Activity took the position that the incumbent in that position was a supervisor and should be excluded from the unit.

The Assistant Secretary, noting that the Mechanic (Leader) did not hire, fire, or transfer employees; that the direction given the only other employee in the Instrument Subfunction was routine in nature, did not require the exercise of independent judgment, and was dictated by established procedures; and that the evidence did not establish that the Mechanic (Leader) promoted or effectively evaluated the other employee in the Instrument Subfunction, concluded that the incumbent in the position in question was not a supervisor within the meaning of Section 2(c) of the Order.

Accordingly, the Assistant Secretary clarified the exclusively recognized unit by including within the unit the position of Aircraft Instrument and Control Systems Mechanic (Leader), WG-12.

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Henry C. Lee, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner filed a petition for clarification of an existing unit of all Air National Guard Technicians employed at the Sky Harbor Airport, Phoenix, Arizona, for which the American Federation of Government Employees, AFL-CIO, Local 3046, herein called AFGE, is the exclusively recognized representative. Specifically, the Petitioner seeks to clarify the status of an employee in the job classification of Aircraft Instrument and Control Systems Mechanic (Leader), WG-12, referred to hereinafter as the Mechanic (Leader). It contends that this employee is a supervisor within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

The record reveals that the position in question is one of two full-time positions in the Petitioner's Automatic Flight Control Systems - Instrument Subfunction: 1/ The Instrument Subfunction performs maintenance

1/ The record indicates that one to four military reservists are assigned to the Instrument Subfunction for two to three weeks each year. The evidence does not establish that the incumbent exercises supervisory authority within the meaning of Section 2(c) of the Order over these reservists during their brief period of military service.

work on aircraft instrument equipment and is under the general direction of the Electronics Mechanic Foreman, WS-10. It is asserted that the Mechanic (Leader), who has been in this position since September 1, 1973, supervises the other employee in the Instrument Subfunction, an Aircraft Instrument and Control Systems Mechanic, WG-10.

The evidence establishes that work is assigned to the Instrument Subfunction by Maintenance Control, which establishes work priorities for the Instrument Subfunction. The Electronics Mechanic Foreman, WS-10, who, as noted above, is the overall supervisor of the Instrument Subfunction, is located approximately 150 feet away from the Instrument Subfunction in the same hangar and visits it 2 or 3 times daily to see that the work is properly performed.

While the Petitioner alleges that the Mechanic (Leader) exercises certain supervisory functions with respect to the other employee in the Instrument Subfunction, the record indicates that such functions either are not engaged in or are in the nature of a more experienced employee assisting a less experienced employee as distinguished from supervision. ^{2/} Thus, the evidence establishes that the Mechanic (Leader) spends 95 percent of his time working with the other employee in the Instrument Subfunction performing work on aircraft instruments, and that such assignments as are made to the other employee are routine in nature and are within well established procedures. Further, he does not approve leave or sign time and attendance cards, does not approve overtime, does not attend supervisors' meetings, has no authority to hire, transfer, reassign, or discharge, and does not have the authority to recommend, initiate or approve promotions.

While the record reveals that in one instance the Mechanic (Leader) expressed verbal approval of a pay increase with respect to the other employee in the Instrument Subfunction, there is no evidence that his recommendation was required before approval of the raise or that the recommendation effectively led to the pay increase. Moreover, although the incumbent was one of three individuals comprising a board which rated the qualifications of applicants for the position of Aircraft Instrument and Control Systems Mechanic, WG-10, there is no evidence that any recommendation the incumbent may have made led to the selection of an individual to fill the position. The incumbent testified that while he has never evaluated the performance of the other employee in the Instrument Subfunction, he would be expected to prepare a written performance appraisal with respect to that employee if the occasion arose. The evidence fails to establish, however, that any such appraisal would effectively lead to a promotion or be effective for any other purpose. ^{3/}

^{2/} Cf. Department of the Navy, United States Naval Station, Adak, Alaska, A/SLMR No. 321.

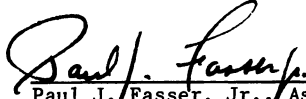
^{3/} Cf. Federal Aviation Administration, National Capital Airports, A/SLMR No. 405.

Under all of these circumstances, I find that the evidence is insufficient to establish that supervisory authority has been vested in the Aircraft Instrument and Control Systems Mechanic (Leader), WG-12 as he does not hire, fire, or transfer employees and such direction as he gives to the other employee in the Instrument Subfunction is routine in nature, does not require the exercise of independent judgment, and is dictated by established procedures. Nor does the evidence establish that he promotes or effectively evaluates the other employee in the Instrument Subfunction. Accordingly, I find that the Aircraft Instrument and Control Systems Mechanic (Leader), WG-12, is not a supervisor within the meaning of Section 2(c) of the Order, and that the employee in this classification should be included in the unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, AFL-CIO, Local 3046, on September 29, 1969, at the Sky Harbor Airport, Phoenix, Arizona, be, and it hereby is, clarified by including in said unit the position of Aircraft Instrument and Control Systems Mechanic (Leader), WG-12.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ARMY AND AIR FORCE EXCHANGE SERVICE,
 VANDENBERG AIR FORCE BASE, CALIFORNIA
 A/SLMR No. 437

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1001 (Complainant), alleging that the Army and Air Force Exchange Service, Vandenberg Air Force Base, California (Respondent) violated Section 19(a)(1) and (2) of the Order by its treatment of a unit employee who also was a Union representative. The Complainant contended that the alleged discriminatee was "berated," assigned "menial" duties, and her schedule was changed by her supervisor because of her activities as a Union representative. In addition, the Complainant alleged that the Respondent violated Section 19(a)(6) of the Order by its unresponsiveness in resolving the dispute herein. The Respondent denied that it "berated" the employee involved, or that it assigned her duties other than those in her job description. The Respondent also claimed that the schedule change was not discriminatory in that it involved other employees, was in response to business demands, and that there was no merit to the 19(a)(6) allegation.

The Administrative Law Judge recommended that the Section 19(a)(6) allegation be dismissed; however, he concluded that the Respondent's conduct constituted a violation of Section 19(a)(1) and (2) of the Order.

The Assistant Secretary rejected the Administrative Law Judge's finding of a 19(a)(2) violation with regard to the schedule change. Thus, he found that the evidence did not establish that the schedule change was discriminatory in nature or that it was intended to discourage the employee involved in the exercise of her union activities. The Assistant Secretary also rejected the Administrative Law Judge's finding that there was a 19(a)(2) violation regarding the threatened assignment of additional duties because there was no evidence that the alleged discriminatee actually was assigned any of these duties.

However, the Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent violated Section 19(a)(1) of the Order with respect to the threatened assignment of additional duties and the announcement of a schedule change, as such conduct was in retaliation for the employee involved having engaged in union activities. As to the announcement of the schedule change by her immediate supervisor, he noted that such action was intended to be perceived as being the immediate supervisor's retaliation for the employee's engaging in union activities.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and he further ordered that the complaint be dismissed insofar as it alleged violations of Section 19(a)(2) and (6).

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
 VANDENBERG AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-4190

NATIONAL FEDERATION OF FEDERAL
 EMPLOYEES, LOCAL 1001

Complainant

DECISION AND ORDER

On May 21, 1974, Administrative Law Judge Francis E. Dowd issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent, Army and Air Force Exchange Service, Vandenberg Air Force Base, California, had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. The Administrative Law Judge found other alleged conduct of the Respondent not to be violative of the Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the findings 2/, conclusions and recommendation of the Administrative Law Judge, only to the extent consistent herewith.

1/ Although the Complainant was granted additional time under Section 203.24(b) of the Assistant Secretary's Regulations, in which to file an answering brief to the exceptions filed by the Respondent, it failed to do so.

2/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

The complaint in the instant case alleged essentially that the Respondent violated Section 19(a)(1) and (2) of the Order by its treatment of a unit employee, Mrs. Shirley Beard, who also was a Union representative. In this regard, the Complainant charged that Mrs. Beard was "berated," assigned "menial" duties, and her schedule was changed by her supervisor, Mr. Robert Dupuis, based on her activities as a Union representative. In addition, it is alleged that the Respondent violated Section 19(a)(6) of the Order by its unresponsiveness in resolving the dispute herein.

The Administrative Law Judge recommended that the Section 19(a)(6) allegation be dismissed; however, he concluded that the Respondent's conduct in this matter constituted a violation of Section 19(a)(1) and (2) of the Order.

The evidence established that on February 15, 1973, Mrs. Beard, as an appointed representative of the Complainant, attended a meeting between the Complainant, the recently certified exclusive representative of the Respondent's employees, and the Respondent. Prior to that meeting on February 9, Beard had been told by her supervisor that she would not be affected by a planned revision of work schedules so that as a Union steward she could have contact with other people. At the conclusion of the meeting on February 15, Beard raised, on behalf of herself and other employees of the "discount self-service island," a problem regarding the scheduling of break time. She was advised by the General Manager of the Base Exchange that he would call her supervisor, Dupuis, and that she should return and speak to Dupuis about the problem herself. Dupuis admits having been called and reprimanded regarding the break problem by the General Manager. According to Beard's testimony, which was credited by the Administrative Law Judge, Dupuis became very angry with Beard after he had received the reprimand from the General Manager. Along with threatening the assignment of more "make work" in addition to her regular duties, Dupuis stated to Beard, "Well, you won the first god damn round, but I won round two." In addition, the credited testimony established that Dupuis then turned to his assistant and told him that Beard's schedule would be changed.

Contrary to the finding of the Administrative Law Judge, in my view the evidence does not support a finding of a violation of Section 19(a)(2) with regard to the schedule change. Thus, the evidence establishes that sometime prior to the above-noted incidents of February 15, 1973, Mr. Zielinski, the Service Operations Manager of the Base Exchange, who is Dupuis' immediate supervisor, actually made and forwarded to Dupuis a schedule change involving Beard and other employees. Although the Administrative Law Judge concluded that this schedule was not final and irrevocable, the evidence does not establish that Dupuis had the authority to make final changes in the schedule, or that he did, in fact, recommend or propose any changes to Zielinski. Furthermore, whether or not the schedule prepared by Zielinski was considered as final or merely as a proposal, the record does not reflect that the schedule sent to Dupuis by Zielinski ever was actually modified on or after February 15. Under these circumstances, I find no basis for the conclusion that the schedule change

was discriminatory in nature and was intended to discourage Beard in the exercise of her union activities as the record evidence is insufficient to support a conclusion that the schedule, prepared by Zielinski before February 15, was changed subsequent to the earlier meeting with Respondent that Beard had attended on that date. Accordingly, I shall dismiss the allegation that the Respondent violated Section 19(a)(2) of the Order based on the effectuation of a change in Beard's schedule. 3/

However, in agreement with the Administrative Law Judge, I find that Dupuis' conduct in threatening the addition of "make work" to Beard's regular duties and his announcing of her schedule change were in retaliation for her engaging in union activities and, thus, were violative of Section 19(a)(1) of the Order. In this regard, the credited evidence, set forth above, reveals that although Beard's schedule change was made by Zielinski prior to February 15, 1973, Dupuis intended that Beard perceive it as his change and, therefore, his retaliation for the reprimand Dupuis had received because of Beard's activity as a Union representative at the meeting of February 15, 1973, between the Complainant and the Respondent.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Army and Air Force Exchange Service, Vandenberg Air Force Base, California, shall:

1. Cease and desist from:

Interfering with, restraining, or coercing Mrs. Shirley Beard, or any other employee, in the exercise of their rights assured by Executive Order 11491, as amended, by threatening the assignment of additional duties to regular duties in retaliation for engaging in union activity or by announcing a schedule change with the intent that it be perceived as being in retaliation for engaging in union activity.

2. Take the following affirmative actions to effectuate the purposes and provisions of the Order:

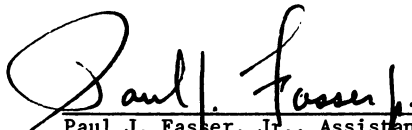
(a) Post at its facilities at Vandenberg Air Force Base, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the General Manager of the Base Exchange and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The General Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

3/ As there was no evidence adduced that Mrs. Beard actually was assigned any of the threatened additional duties, contrary to the Administrative Law Judge, I find no basis for concluding that the Respondent violated Section 19(a)(2) of the Order in this regard.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations of Section 19(a)(2) and (6) of the Order be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 30, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of
EXECUTIVE ORDER 11491, AS AMENDED
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Mrs. Shirley Beard or any other employee in the exercise of their rights assured by Executive Order 11491, as amended, by threatening the assignment of additional duties to regular duties in retaliation for engaging in union activity, or by announcing a schedule change with the intent that it be perceived as being in retaliation for engaging in union activity.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



Army and Air Force Exchange Service at Vandenberg Air Force Base, California (hereinafter referred to as the Activity) on May 8, 1973. The Complaint charges that the Activity violated Sections 19(a) (1), (2), and (6) of the Order by its treatment of Mrs. Shirley Beard, Activity employee and Union representative.

A hearing on the Complaint was held before me on October 31, 1973. Both parties were present and represented and were afforded full opportunity to call and examine witnesses and to adduce relevant evidence. Briefs filed by both parties have been carefully considered.

Upon the entire record in this case and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

Position of the Parties

The Union complains that Supervisor Dupuis "berated" Mrs. Beard, assigned her to "menial" duties and later changed her work schedule, all because she was appointed as steward and acted as employee representative in a meeting which took place on 15 February 1973. Further, the Union claims that management was so unresponsive to its demands to discuss the Beard incident that it should be held in violation of Section 19(a) (6) of the Order. As a result, the Union contends that the Activity should be found guilty of an unfair labor practice and be ordered to formally notify the employees of Mrs. Beard's appointment and that in the future she would represent unit employees in the service station.

The Activity generally denies all charges and specifically denies that any of its supervisors engaged in any behavior that could be characterized as "berating" or that any tasks, other than those contained in her job description, were assigned to Mrs. Beard. According to the Activity, the new schedule, which altered the schedule of several employees other than Mrs. Beard, was prepared in response to the business demands of the service station operation; was based on legitimate management needs; and was prepared far in advance of the 15 February meeting when Mrs. Beard was appointed as a steward. The Activity further contends that the Union's charge that it failed to meet and discuss the Beard case as required by section 19(a) (6) is totally lacking in merit.

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In the Matter of :
:
ARMY AND AIR FORCE EXCHANGE SERVICE, :
VANDENBERG AIR FORCE BASE, :
CALIFORNIA :
Respondent :
and : Case No. 72-4190
:
NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL 1001 :
Complainant:
.....

Robert E. Edwards, Assistant General
Counsel, Labor Relations Law Branch,
Army and Air Force Exchange Service
Dallas, Texas 75222
For the Respondent

Homer R. Hoisington, Regional Business
Agent, National Federation of
Federal Employees, P. O. Box 870
Rialto, California 92376
For the Complainant

Before: FRANCIS E. DOWD
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This proceeding under Executive Order 11491, as amended, was initiated by the filing of a Complaint by the National Federation of Federal Employees, Local 1001 (hereinafter referred to as the Complainant or the Union) against the

Findings of Fact

1. The parties stipulated that the Activity is a component of a nonappropriated fund instrumentality of the United States Government performing basically as a retail organization at the Vandenberg Air Force Base, California. As part of its operations the Activity operates two service stations on the facility.

2. On January 26, 1972, the Union petitioned the Labor-Management Services Administration of the U.S. Department of Labor to be allowed to represent the hourly employees of the Activity.

3. On January 19, 1973, after an election was conducted among unit employees, the Union was duly certified as the exclusive representative.

4. Mrs. Shirley Beard, who plays a central role in this matter, was employed on July 24, 1971, as a Service Station Attendant, Grade 1, at one of the stations run by the Activity. She remained in that position until July 28, 1973, at which time she was promoted to Cashier-Checker, Grade 2.

5. On Friday, February 9, Mrs. Beard had a conversation with her supervisor, Robert Dupuis, in which he told her that she would not be affected by a planned revision of work schedules and that her hours would remain the same so that, as Union Steward, she could have contact with other people. They discussed the duties of a Union Steward and he asked her if she would come to him first with employee problems, instead of going to the Union, and she agreed. As of this date, Beard was only rumored to become a steward and had not been officially designated.

6. Marie C. Brogan, President of the Union, testified that soon after the organization was certified she contacted Thomas W. Johnson, General Manager of the Base Exchange, and Mrs. Stordahl, Personnel Officer of the Exchange, regarding the scheduling of consultation meetings. It was agreed that regular meetings would be held the second Tuesday of each month. Brogan submitted to Johnson a list of four employees designated to represent the Union at these meetings until stewards were selected for that purpose. Among the four individuals so designated was Shirley Beard.

7. The initial meeting was set for February 13, 1973. On February 5, 1973, Brogan submitted to Johnson an agenda of topics for discussion at the first meeting. Because of scheduling difficulties the meeting was rescheduled for 1:00 p.m. on February 15, 1973. Johnson undertook to inform the supervisors of designated union representatives of their participation in the conference and to direct their release from work assignments for the meeting. Among those notified was Robert Dupuis, supervisor of the gas station where Shirley Beard worked. On the morning of February 15, Dupuis informed Beard of the meeting.

8. The meeting was held as scheduled with Johnson and Stordahl present for management and Brogan and the four employee representatives present for the Union. Discussion centered upon the topics listed in Brogan's agenda. Beard was substantially tardy for the meeting because her supervisor had failed to release her in time to allow her prompt attendance. 1/ Although the topic was not on the agenda, Beard raised the subject of break time as the meeting was about to conclude. It was her contention that she and other attendants at the self-service pumps of the service station were not being allowed two fifteen-minute break periods during the work day as required by the regulations. Mrs. Beard's complaint was made on behalf of herself and other employees who worked on the "discount self-service" island. She knew of their complaints because she had discussed them prior to February 15. The employees on "full-service" were not complaining.

Beard testified that when she was first hired at the Service Station, business was rather light and the station manager, Robert Dupuis, had instructed her to use the time when no cars needed attention as her break or "goof-off" time. Beard agreed to this arrangement. When business increased at the station and Beard was assigned to the popular self-service pump islands, idle time became scarce and Beard and similarly situated employees found break time unavailable under Dupuis' informal system. She explained this to Johnson as the February 15 meeting was terminating. Johnson told Beard that she should speak with Dupuis

1/ Mr. Dupuis' explanation for not releasing Mrs. Beard on time is that he simply forgot about the meeting. This explanation was accepted by Mrs. Beard and I attach no significance to this event insofar as this complaint is concerned.

regarding the problem and that in the event there was no resolution of the problem at the lower level she should return to speak with him. Johnson told Beard that he would call Dupuis to alert him that she would be discussing the subject with him. After the meeting ended Beard and the other employee representatives returned to their work stations.

9. Beard testified that when she returned to the service station she found Dupuis on the telephone and heard him say to the party with whom he was speaking: "Well, all she does is sit on her god damn ass anyway." Beard presumed that Johnson was on the other end of the line but Dupuis did not indicate who it actually was. 2/ Dupuis told Beard to wait for him in the outer office and when he joined her he said, according to Mrs. Beard's account, which I credit, "Well, you won the first god damn round, but I won round two." Beard testified that Dupuis then turned to his assistant, Joseph Letourneau, and said, "Joe, her schedule will be changed . . . to 10:45 to 7:15." 3/

10. According to Beard, this was the first she had heard of a change in her work schedule. 4/ She was aware that Dupuis was preparing a new schedule which would change the work hours

2/ Dupuis admits that Johnson called him after the meeting and reprimanded him for not giving his employees their 15 minute breaks. However, he denies that he was talking to Johnson when Mrs. Beard entered the room. He says he was talking to a customer. Mrs. Johnson did not testify. While I credit Mrs. Beard's account, I am unable to conclude on this record, however suspicious the timing may be, that Dupuis was talking to Johnson and referring to Mrs. Beard.

3/ The transcript of these proceedings clearly shows that the change actually made in Mrs. Beard's working hours was from 7:15 a.m. until 3:45 p.m. to 10:45 a.m. until 7:15 p.m.

4/ The Complaint charges that Mr. Dupuis informed Mrs. Beard of the change in her work schedule on February 20, 1973. The Complaint is clearly inconsistent with the proof on this point. Respondent has not been prejudiced, however, and therefore the error is not critical to the present inquiry.

of certain other employees, but testified that prior to the February 15 meeting Dupuis had assured her that no change would be made in her hours. In addition, Beard recalled having read earlier that same day a draft copy of a new schedule in which her working hours remained 7:15 a.m. to 3:45 p.m. It is not clear from the record, however, whether she was looking at a proposed or final schedule.

11. Mrs. Beard also testified about what Dupuis told her, as follows:

He told me that I would have to take my ass out there and clean the pumps all day and that I would keep doing it, if I am not doing anything, if I wasn't busy making change or writing credit cards, that I would sweep and I would wash the damn pumps down and I would wash the windows and I would sweep the booths and I just sat there and looked at him.

Although these functions were part of her normal duties, she was not usually required to be doing them constantly as a form of "make work."

12. Dupuis denied that he ever explained to Beard that her schedule had been disapproved (Tr. 94) but admits that within 5 or 10 minutes after the discussion of the "break period" he had a conversation with her about the new schedule and she stated she didn't like being transferred to the night shift (Tr. 95). Mr. Dupuis' explanation (Tr. 118, 123, 124) for this discrepancy is that he was discussing the subject with his assistant, Mr. Heard, and Mrs. Beard overheard him and inquired as to what her hours would be. Dupuis states that he responded to her question by informing her of her new schedule.

13. Subsequent to the February 15 incident, Mrs. Beard spoke with Robert Heard, Dupuis' subordinate, about the change in her schedule and he commented that scheduling a woman to night hours was unfair and that with her new hours Beard would not be able to attend union meetings. In the context in which the statement was made, Heard was not in my opinion stating a reason why Beard's hours were changed but, rather, was only commenting upon the effect of this change on her ability to attend union meetings at night. The change in Beard's schedule never did have this effect, however, as arrangements were made for her early release on the days when union meetings were held.

Discussion

Respondent's defense to the allegation that Dupuis changed Beard's work schedule in retaliation for her engaging in protected activity is that he was not in a position to change the schedule and that, indeed, it had already been changed by Mr. Zielinski, the Service Operations Manager, and Dupuis' supervisor. Zielinski testified that he had previously asked Dupuis to draw up a new work schedule to better accommodate the customer flow at the station throughout the day and to avoid premium pay for employees required in certain circumstances by recently enacted legislation. Dupuis had prepared a draft schedule in which Beard's hours were not changed and had submitted it to Zielinski for his approval. However, Zielinski did not approve Dupuis' submission and in conjunction with Mr. Heard, Dupuis' assistant, prepared a new schedule in which the hours of Mrs. Beard, among others, were changed. Zielinski testified that the new schedule was arranged solely on the basis of maximizing employee presence at peak business hours and minimizing payroll expenditures. Zielinski testified that he sent the revised schedule back to Dupuis in the week of February 15, but prior to February 15.

Since it is admitted that Dupuis originally planned not to change Beard's hours, and that this was conveyed to Beard by Dupuis, the import and purpose of Zielinski's testimony is to place on his shoulders the ultimate responsibility for making the change in Beard's schedule. My impression of Zielinski is that he willingly and happily assumed this responsibility. The Complainant could not, of course, introduce any contrary evidence. But there is one critical aspect of Zielinski's testimony that does not ring true. If he had the final authority, as he testified, to determine what the schedule would be, why did he return it to Dupuis? What purpose was served by doing this? Why didn't he simply have it typed in final form in his office and disseminate it in accordance with applicable procedures.

In this regard, Zielinski testified that he "asked Mr. Heard to take that schedule over to Mr. Dupuis and return it to me so proper notification could be given." In attempting to ascertain why the schedule was being returned to Dupuis, the testimony of Respondent's witness Robert Heard is helpful. Heard testified that he brought back the schedule "for Mr. Dupuis to look at." Heard testified that the copy of the schedule was

in longhand and was "for Mr. Dupuis to look at and see what he thought." Heard conceded that Dupuis could make some changes or suggestions if he wished to, but did not know if he did. Heard's testimony makes a good deal of sense. After Dupuis had gone to the trouble of submitting his own proposed schedule, common courtesy would seem to require that a new and drastically different schedule should be returned to him as manager of the employees involved so that he could approve it, veto it, or make recommendations for changes, depending upon the nature and extent of his authority. Also, the fact that the Zielinski schedule was in longhand suggests, to me at least, that this was not necessarily the final schedule, and was subject to possible change. Finally, I would note that Heard, when asked whether he was aware of any occasion when Beard was informed of her schedule change, responded as follows, with respect to the incident on February 15: "The only one I think I might know of was when Mr. Dupuis brought his proposal into the office where Mr. Letourneau and myself was." (emphasis supplied) Mr. Heard's use of the word "proposal" is rather strange. On the one hand, it could be simply a mistake as to the proper terminology to be used at this stage in the proceeding. On the other hand, it sounded more like an honest slip of the tongue denoting a mental state of mind and would be consistent with my conclusion that the Zielinski schedule was still not final and irrevocable when it was returned to Dupuis. I further conclude that Dupuis had an opportunity to revise the Zielinski schedule if he wished to or at least make some recommendations concerning changes.

This brings me to another matter. Why did Zielinski change Beard's hours in the first place? He testified that there was "no real particular reason" why Beard was put on the later part of the day. He testified that it "just so happened the way we drew up the schedule Mrs. Beard came out to that particular shift." On the contrary, however, Dupuis testified that Beard was intentionally placed on the later shift because she was an experienced employee.

As previously noted, Beard testified that Dupuis told her she had won round one but he had won round two. Was he simply referring to the more onerous make-work he was telling her to do? Had he already called Zielinski and discussed her work schedule? Had he decided to change Zielinski's schedule

to accommodate Beard's known desire and was now going to rescind this change? Why did he ever choose this particular time when he was obviously very angry with Beard to introduce the subject of work schedules? Well, according to Dupuis, he had completed his discussion with Beard about 15 minute breaks, and had returned to the rear office where he had been discussing the shift schedule with Mr. Heard "all day long." About 5 or 10 minutes later he returned to the front office where Beard happened to be sitting and he gave a work schedule to Heard and told him that this was the new schedule to be implemented on March 10. (Didn't Heard already know this since he assisted Zielinski in preparing the schedule?) Mr. Letourneau, night shift supervisor, was also there. He did not testify. According to Dupuis, Mrs. Beard then inquired about her schedule and he told her about her being transferred to the night shift.

The foregoing version by Dupuis is different from Beard's testimony--previously recited herein--but contains some common elements. For example, Dupuis, Heard, and Beard all agree that Dupuis left the front office area after the initial conversation in which the word "damn" was used, went to the rear office, and then returned to the front office with a work schedule at which time Beard learned of her new hours. I find Heard's testimony (Tr. 149) to be evasive as to what Dupuis said to Beard on this occasion and, as noted above, Letourneau did not testify. I conclude from my analysis of the foregoing evidence and the entire record, including my observation of the witnesses and their demeanor, that Shirley Beard's account of what transpired on February 15 is the more plausible and creditable version.

Conclusions of Law

Section 19(a) (1)

Section 19(a) (1) makes it unlawful for management to "interfere with, restrain or coerce an employee in the exercise of the rights assured by. . ." Executive Order 11491. Included in these assured rights are those granted in §1(a) of the Order which reads in pertinent part:

Each employee of the executive branch of the Federal Government has the right, freely and

without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority.

There is no doubt that Mrs. Beard's presentation to Mr. Johnson of a complaint regarding break time represented privileged and protected activity under the language above quoted.

It is likewise certain, from the evidence adduced, that when informed by Mr. Johnson of Beard's complaint, Mr. Dupuis became very angry and lost his temper. As indicated by the credited testimony of Mrs. Beard, he intended her change in work hours to be his victory in "round two" following his "defeat" before Mr. Johnson at the hands of Mrs. Beard in "round one." The relationship between the two incidents is clear. Discriminatory action taken against an employee because of his or her activity as a union representative is a violation of §19(a) (1), Environmental Protection Agency, Perrine Primate Laboratory, A/SLMR No. 136.

Section 19(a) (2)

Section 19(a) (2) provides that it is an unfair labor practice to "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment." The Assistant Secretary has said with regard to this language that evidence of actual encouragement or discouragement of membership is not necessary to support a finding of a violation if the discriminatory acts, by their very nature, inherently would tend to encourage or discourage membership in a labor organization, Environmental Protection Agency, Perrine Primate Laboratory, supra. Nor should "membership" as used in Section 19(a) (2) be confined in meaning to the mere joining or remaining on a union roster. All the prerogatives preserved to federal employees by Section 1 of the Order with regard to union activity are protected against discrimination by §19(a) (2).

On the basis of all the evidence I find that the change in Mrs. Beard's work schedule and the addition of onerous work chores to her duties was in retaliation for her protected actions in complaining to Mr. Johnson about not being allowed adequate break time. The change in assigned duties made only with respect to Mrs. Beard is clearly discriminatory. 5/ The Activity argues, however, that the rescheduling of Mrs. Beard's work hours was effected solely in the interest of improving the management of the service station and in an effort to legitimately avoid additional payroll costs. The Supreme Court has held in an analogous situation under the Labor Management Relations Act, 29 U.S.C. 151 et seq., that when it is found that by his action an employer subjectively intended to encourage or discourage union membership, any claim that the action was undertaken for a legitimate business purpose will be overcome, NLRB v. Erie Resistor Corporation, 373 U.S. 221, 83 St. Ct. 1139 (1963). The test, as stated by the Tenth Circuit in NLRB v. Okla-Inn, 488 F.2d 498, 507, 84 LRRM 2585, 2592 (1973), is as follows:

"In determining whether an employee's working conditions have been changed or his employment terminated for discriminatory reasons, it is necessary to assess 'the degree of significance to be given to the employer's explanation' and to infer from all the available evidence whether the stated explanation is the real reason or merely a pretext to mask anti-union motivation." (citations omitted)

In the light of the sequence of events leading to the change in Mrs. Beard's work hours and duties and the attitude of Mr. Dupuis in announcing the change to her, I find that the change so effected was discriminatory and was intended to

5/ It is clear that management had no knowledge prior to the 15 February meeting that Mrs. Beard would be serving as an employee representative; neither does the Union seriously contend that it had such prior knowledge. Its complaint alleges that the 15 February meeting was the first occasion on which it gave notice to management; Mrs. Beard was not aware that she was to be a representative and forthrightly admits that she was not acting as a Union steward until she actually appeared at the meeting. I find no merit in the Complainant's contention that the discrimination against Beard was based upon her status as a Union representative.

discourage the exercise by Mrs. Beard and by example other employees of the rights guaranteed by Section 1. In the circumstances of this case, noting that Shirley Beard was subsequently promoted to a different position, I find it unnecessary to order that her previous work schedule be reinstated.

Section 19(a) (6)

The Complaint further contends that the Respondent Activity refused to consult, confer, or negotiate with the Complainant Union regarding the charge filed by the Union and refused to cooperate in an attempt to informally resolve the dispute involving Mrs. Beard. This, the Complainant argues, worked a violation of Section 19(a) (6) of the Order.

The duty to attempt an informal resolution of pending charges of unfair labor practices is not one found in the Executive Order. If at all, such duty is imposed by the regulations propounded by the Assistant Secretary for the conduct of unfair labor practice proceedings, 29 CFR Part 203.

It is not necessary in this proceeding, however, to examine whether the Activity has run afoul of certain of the regulations of the Assistant Secretary. For as the Assistant Secretary has held,

. . .the obligation to consult, confer, or negotiate relates to the collective bargaining relationship between an incumbent labor organization and an agency or activity. It does not relate to whether one of the parties in a collective bargaining relationship is complying with Section 203 of the Assistant Secretary's Regulations. U.S. Department of Defense, Department of the Army, et al., A/SLMR No. 211.

The Assistant Secretary has recently reiterated his view that a 19(a) (6) charge grounded on an alleged violation of Part 203 is inappropriate for resolution in an unfair labor practice proceeding, Long Beach Naval Shipyard, A/SLMR No. 352.

In view of the Assistant Secretary's position, and based upon my own independent evaluation of the evidence in this proceeding, I recommend dismissal of that portion of the Complaint raising the Section 19(a) (6) allegation.

Recommendations

In view of my findings and conclusions above, I make the following recommendations to the Assistant Secretary:

(a) that the allegations in the complaint regarding a violation of Section 19(a) (6) be dismissed;

(b) that having found and concluded that the Respondent has engaged in conduct prohibited by Section 19(a) subsections (1) and (2) of Executive Order 11491, the Assistant Secretary adopt the following recommended order designed to effectuate the purposes of Executive Order 11491.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Army and Air Force Exchange Service, Vandenberg Air Force Base, California, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Mrs. Shirley Beard or any other employee in the exercise of the rights assured by Executive Order 11491 by discrimination with regard to the assignment of additional and more onerous work duties and by changing her work schedule.


(b) Encouraging or discouraging membership in National Federation of Federal Employees, Local 1001 or any other labor organization by discrimination with regard to the assignment of additional and more onerous work duties and by changing her work schedule.

2. Take the following affirmative action to effectuate the purposes and provisions of the Order:

(a) Post at its facilities at Vandenberg Air Force Base, California, copies of the attached notice worded "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall

be signed by the General Manager of the Base Exchange and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The General Manager shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.


Francis E. Dowd
Administrative Law Judge

Dated: May 21, 1974
Washington, D.C.

(Recommended Notice)
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, United States Department of Labor, whose address is: Room 9061, Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102.

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Mrs. Shirley Beard or any other employee in the exercise of their rights assured by Executive Order 11491 by discrimination with regard to the assignment of additional and more onerous work duties and by changing her work schedule.

WE WILL NOT encourage or discourage membership in National Federation of Federal Employees, Local 1001 or any other labor organization by discrimination with regard to the assignment of additional and more onerous work duties and by changing her work schedule.

Agency or Activity

Dated: _____ By _____
Signature

Title

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

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY
A/SLMR No. 438

This matter involved five unfair labor practice complaints which were consolidated for hearing. The complaint in Case No. 32-2927(CA), jointly filed by Local 1340, National Federation of Federal Employees (NFFE), American Federation of Government Employees, Local 2335, AFL-CIO, and National Association of Government Employees, Local R2-43, alleged a violation of Section 19(a)(6) of the Order based upon the Respondents failure to afford the Complainants the opportunity to participate in the formulation and implementation of a Plan for the reduction of the average grade of employees.

The Administrative Law Judge concluded that, under the provisions of Sections 11(b) and 12(b) of the Order, the Respondent was not required to bargain with the Complainants concerning its decision to issue the Plan. However, under the principles enunciated by the Assistant Secretary in United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289, he found that the Respondent was obliged to meet and confer with the Complainants on the formulation of and procedures to be utilized in effectuating the Plan and on the impact of the Plan with respect to adversely affected employees. Under the circumstances of this case, the Administrative Law Judge concluded that the Respondent fulfilled its obligation in this regard by affording the Complainants an opportunity to make proposals and recommendations. He noted, however, that the Complainants did not avail themselves of this opportunity. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed. The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge in this matter.

The complaint in Case No. 32-3306(CA), filed by the NFFE, alleged violations of Sections 19(a)(1), (5) and (6) of the Order based upon the conduct of the Respondent in holding three separate meetings with employees concerning the implementation of a mandatory 48-hour workweek and failing to provide the NFFE with an opportunity to be present at such meetings, which were contended to be "formal discussions" within the meaning of Section 10(e) of the Order.

The Administrative Law Judge, in recommending dismissal of the complaint, found it unnecessary to determine whether or not the three meetings in question were "formal discussions" within the meaning of Section 10(e) based on the view that the NFFE was afforded an opportunity to be present at the meetings and, in fact, was present at the first meeting in the person of its Vice President. The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge in this matter.

The complaint in Case No. 32-3071(CA), filed by the NFFE, alleged violations of Sections 19(a)(1), (5) and (6) of the Order based on the Respondent's failure to inform an employee of her right to union representation or to afford her exclusive representative the right to be present during a discussion between the employee and her supervisor.

The record revealed that the employee involved had five separate meetings with various supervisors of the Respondent concerning her performance evaluation. The first such meeting with her immediate supervisor resulted in the employee meeting with two first level supervisors and a second level supervisor on the following day where the suggestion was made and acceded to by the employee that a period of "close supervision" be performed by two different supervisors and a training officer who would supervise the employee individually for evaluation purposes. The second level supervisor acknowledged that such a procedure was "unorthodox" or "unprecedented." Thereafter, approximately one week later, the employee met with the first and second level supervisors and the Respondent's EEO Officer where her evaluation and the unprecedented evaluation procedure were discussed. The following day the employee and the first level supervisor met privately and discussed the former's evaluation which resulted in the supervisor altering one rating in the evaluation. Subsequently, the employee again met with her first and second level supervisors and was informed that nothing else in the evaluation could be changed and she proceeded to file a grievance.

The Administrative Law Judge concluded that certain of the above meetings were "formal discussions" within the meaning of Section 10(e) of the Order, and that the failure of the Respondent to notify the NFFE and afford it the opportunity to be present constituted a violation of Sections 19(a)(1) and (6) of the Order. In reaching this conclusion, the Administrative Law Judge noted, among other things, that certain of the meetings involved the institution of a departure from the mere review of an individual work performance evaluation and entered into matters which had potentially far reaching effects with wider ramifications than the dispute relative to the employee's individual rating. Thus, he noted that a new method of evaluation was developed which admittedly would have to be applied to other employees if they so desired. As to one of the meetings involved herein, the Administrative Law Judge

found that it did not constitute a "formal discussion" within the meaning of Section 10(e) because the matter discussed was restricted solely to the individual employee and her supervisor. The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge in this matter.

The complaint in Case No. 32-3297(CA), filed by the NFFE, alleged violations of Sections 19(a)(1), (5) and (6) of the Order based upon the Respondent's conducting of a particular meeting concerning the reprimand of an employee without affording the employee's exclusive representative an opportunity to be present at such meeting. In addition, the complaint alleged that the Respondent violated Section 19(a)(1) in refusing to allow the employee involved in such meeting to have a personal representative present.

The Administrative Law Judge concluded that the meeting involved, between a division chief and the employee, was a formal discussion within the meaning of Section 10(e) of the Order. In this regard, he noted that the meeting was with a fourth level supervisor, that such meeting was an integral and necessary part of taking formal disciplinary action against the employee, and that the subject matter under discussion concerned personal conduct under which an employee's job tenure could be affected.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the meeting involved in this matter did not constitute a formal discussion within the meaning of Section 10(e) of the Order. In this regard, he noted that the subject matter of the meeting related only to the application of the Respondent's regulations to an individual employee and that no grievance had been filed. Accordingly, because the meeting did not involve matters cognizable under Section 10(e) of the Order, the Assistant Secretary found that the denial of union representation at the meeting did not constitute a violation of Sections 19(a)(1) and (6) of the Order.

The complaint in Case No. 32-3300(CA), filed by the NFFE, alleged violations of Sections 19(a)(1), (5) and (6) based upon the Respondent's conducting of a particular meeting concerning the grievance of an employee without affording the employee's exclusive representative an opportunity to be present.

The Administrative Law Judge found that the meeting involved, pertaining to a grievance filed by the employee, constituted a "formal discussion" within the meaning of Section 10(e) of the Order and, therefore, the failure of the Respondent to afford the NFFE an opportunity to be present at such meeting constituted a violation of Sections 19(a)(1) and (6) of the Order. The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY

Respondent

and

Case No. 32-2927(CA)

LOCAL 1340, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2335, AFL-CIO

Complainant

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R2-43

Complainant

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY

Respondent

and

Case Nos. 32-3071(CA),
32-3297(CA),
32-3300(CA) and
32-3306(CA)

LOCAL 1340, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On June 13, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaints in Case Nos. 32-3071(CA), 32-3297(CA), and 32-3300(CA) and had not engaged in unfair labor practices alleged in the complaints in Case Nos. 32-2927(CA) and 32-3306(CA). With regard to those matters found violative of the Order in Case Nos. 32-3071(CA), 32-3297(CA), and 32-3300(CA), the Administrative Law Judge recommended that the Respondent take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendations, and that all other matters alleged in the complaints in Case Nos. 32-3071(CA), 32-2927(CA), and 32-3306(CA) be dismissed. Thereafter, the Respondent and the Complainant, Local 1340, National Federation of Federal Employees, (NFFE), filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendations. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject cases, including the exceptions and supporting briefs filed by the Respondent and the NFFE, I hereby adopt the Administrative Law Judge's findings, conclusions 2/ and recommendations, except as modified below.

With regard to Case No. 32-3297(CA), the Administrative Law Judge found that the meeting of May 9, 1973, involving employee Kravitz and Mr. Quig, Chief of the Respondent's Logistics Division, constituted a "formal discussion" within the meaning of Section 10(e) of the Order.

1/ The NFFE filed timely exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations in Case No. 32-2927(CA). The Respondent filed timely exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendations in Case Nos. 32-3071(CA), 32-3297(CA) and 32-3300(CA). No other exceptions were filed.

2/ In adopting the findings and conclusions of the Administrative Law Judge in Case No. 32-2927(CA), it was noted that, as distinguished from the circumstances involved in National Labor Relations Board, A/SLMR No. 246, the Complainants in this matter at no time specifically indicated to the Respondent that there was insufficient time to review the draft Average Grade Control Plan and to formulate meaningful comments, or requested additional time in which to do so. Moreover, as found by the Administrative Law Judge, at no time subsequent to the July 26, 1972, meeting with the Respondent did any of the Complainants seek to meet and discuss the matter further nor did they offer any suggestions or comments relative to the Plan.

Accordingly, he concluded that the Respondent's failure to afford the NFFE with an opportunity to be present at that meeting constituted a violation of Sections 19(a)(1) and (6) of the Order. I do not agree.

The evidence establishes that the sole purpose for the meeting on May 9, 1973, was for Mr. Quig to inform employee Kravitz of the basis upon which the Respondent intended to issue an official letter of reprimand. In this context, I find that the subject matter of the meeting did not involve grievances, personnel policies and practices, or matters affecting general working conditions of employees in the unit within the meaning of Section 10(e) of the Order. Thus, noting particularly the absence of a pending grievance, in my view the meeting of May 9, 1973, pertained merely to the application of the Respondent's regulations to an individual employee and had no wider ramifications for other employees in the unit. Accordingly, as this meeting did not involve matters encompassed within Section 10(e) of the Order, I find that the failure of the Respondent to afford the NFFE the opportunity to be present at such meeting did not constitute a violation of Sections 19(a)(1) and (6) of the Order. 3/ Accordingly, I shall order the complaint in Case No. 32-3297(CA) be dismissed in its entirety.

In a companion case involving the same employee, Case No. 32-3300(CA), the Administrative Law Judge found that a May 14, 1973, meeting attended by employee Kravitz, her personal representative Plofker, and Williams, the Executive Officer of the Respondent, was a "formal discussion" within the meaning of Section 10(e) of the Order. Accordingly, he concluded that the failure of the Respondent to afford the NFFE an opportunity to be present at this meeting constituted a violation of Section 19(a)(1) and (6) of the Order. I agree.

In reaching this conclusion, noted particularly was the Administrative Law Judge's finding that the purpose of the meeting was to discuss a written grievance filed by employee Kravitz under the Agency grievance procedure pertaining to her treatment at an earlier meeting at the hands of Mr. Quig, Chief of the Respondent's Logistics Division. Section 10(e) of the Order specifically provides that an exclusive representative must be given the opportunity to be represented at formal discussions between management and employees or employee representatives which concern grievances. 4/ Because, in the instant case, the meeting

3/ See Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336 and Internal Revenue Service Mid-Atlantic Service Center, A/SLMR No. 421.

4/ Thus, Section 10(e) of the Order provides, in pertinent part: "The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (emphasis supplied)

involved concerned an existing grievance filed by Kravitz, I find, in agreement with the Administrative Law Judge, that the subject of such meeting involved matters cognizable under Section 10(e) of the Order. 5/ Accordingly, as the meeting of May 14 constituted a "formal discussion" within the meaning of Section 10(e), it follows that the failure of the Respondent to afford the NFFE an opportunity to be represented therein constituted a violation of Sections 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Local 1340, National Federation of Federal Employees, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Interfering with, restraining or coercing its employees by failing to provide Local 1340, National Federation of Federal Employees, the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Notify Local 1340, National Federation of Federal Employees of, and give it the opportunity to be represented at, formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

5/ Cf. United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400

(b) Upon request of Local 1340, National Federation of Federal Employees, rescind Executive Officer Harold Williams' report of May 18, 1973, pertaining to a grievance filed by employee Dorothy L. Kravitz.

(c) Post at its facility at Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaints in Case Nos. 32-2927(CA), 32-3297(CA), and 32-3306(CA) be, and they hereby are, dismissed in their entirety and that the complaints in Case Nos. 32-3071(CA) and 32-3300(CA) insofar as they allege independent violation of Section 19(a)(1) of the Order or violation of Section 19(a)(5) of the Order, be, and they hereby are, dismissed.

Dated, Washington, D. C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions concerning employees in the unit without giving Local 1340, National Federation of Federal Employees, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491, as amended.

WE WILL, upon request of Local 1340, National Federation of Federal Employees, rescind Executive Officer Harold Williams' report of May 18, 1973, pertaining to a grievance filed by employee Dorothy L. Kravitz.

(Agency or Activity)

Dated _____ By _____
(Signature and 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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515, 1515 Broadway, New York, New York 10036.

In the Matter of

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY

Respondent

and

LOCAL 1340, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
LOCAL 2335, AFL-CIO

Complainant

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES,
LOCAL R-2-43

Complainant

FEDERAL AVIATION ADMINISTRATION,
NATIONAL AVIATION FACILITIES
EXPERIMENTAL CENTER,
ATLANTIC CITY, NEW JERSEY

Respondent

and

LOCAL 1340, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

Case No. 32-2927 (CA)

Case Nos. 32-3071 (CA)
32-3297 (CA)
32-3300 (CA)
32-3306 (CA)

Jane Golden, Esq.
& E.L. Jack Embrey
800 Independence Avenue, S.W.
Washington, D.C. 20591

On Behalf of Respondent

Michael Forcey, Esq., On Behalf of Complainant
Local 1340,
National Federation of Federal Employees
1737 H Street, N.W.
Washington, D.C. 20006

Joseph Girlando, On Behalf of Complainant
American Federation of Government Employees
Local 2335, AFL-CIO
300 Main Street
Orange, New Jersey 07050

Mr. Paul Riley, On Behalf of Complainant
National Association of Government Employees,
Local R-2-43
102 South Richards Avenue
Ventnor, New Jersey 08406

Before: SALVATORE J. ARRIGO
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Preliminary Statement

These cases, heard in Atlantic City, New Jersey, on October 2 and 3, 1973, arise under Executive Order 11491 as amended, (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereafter called the Assistant Secretary), an Amended Notice of Hearing and Order Consolidating Cases issued on September 17, 1973, with reference to alleged violations of various sections of the Order as set forth in the above captioned complaints filed against the Federal Aviation Administration, National Aviation Facilities Experimental Center (NAFEC), Atlantic City, New Jersey (hereafter called the Activity or Respondent).

At the hearing all parties were represented and were afforded full opportunity to adduce evidence, call, examine and cross examine witnesses, and argue orally.^{1/} Briefs were filed by Respondent and Complainant Local 1340, National Federation of Federal Employees.

Upon the entire record in this matter, from my reading of the briefs and my observation of the witnesses and their demeanor, Findings of Fact and Conclusions of Law are made as follows:

I. Case No. 32-2927.(CA)

Findings of Fact

On September 8, 1972, a complaint was filed against the Activity by Local 1340, National Federation of Federal Employees, (NFFE) and American Federation of Government Employees Local 2335, AFL-CIO, (AFGE) and National Association of Government Employees, Local R-2-43, (NAGE), said labor organizations hereafter sometimes jointly referred to as the Unions or Complainants. The Unions contend that the Activity violated Section 19(a)(6) of the Order by ignoring its obligation to afford them an opportunity to participate in the formulation and implementation of a new Activity plan designed to reduce and control the average grade of employees at the Atlantic City facility. The Unions allege that the plan constituted a personnel policy and practice affecting employees conditions of employment and the Activity refused to consult in a meaningful manner in good faith with regard thereto.

Respondent contends that under the Order it was not obligated to confer with the Unions with regard to the average grade control plan. Respondent relies on the language of Section 11(b) and Section 12(b) of the Order, which sections limit the Activity's obligation to "meet and confer"

^{1/} During the hearing the parties indicated their desire to have separate decisions issue on a number of the complaints which are the subject matter of this proceeding. However, in Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, which issued on December 4, 1973, the Assistant Secretary held, in similar circumstances, that an Administrative Law Judge does not possess the authority to sever cases which previously had been consolidated for hearing. Accordingly, since it would be improper to sever the cases by issuing separate Reports, I shall issue one Report which shall encompass the allegations of all the above captioned complaints.

on specific matters sometimes referred to as "management rights." Respondent further contends that in any event it fulfilled any obligation it might have had to consult with the Union on the matter.

The Activity employs approximately 1400 full-time employees. Each of the Complainants herein represents one or more collective bargaining units of employees at the Activity. NFFE represents approximately 600-700 employees; AFGE represents approximately 370 employees; and NAGE represents approximately 33 employees.

On Thursday July 20, 1972, the Activity received a letter 2/ from the Department of Transportation, Federal Aviation Administration, notifying it that an agency-wide freeze in promotions which had been in effect since February 18, 1972, was cancelled. The letter set the Activity's average grade goal to be achieved by June 30, 1973, at 9.3255. The Activity's average grade as of June 30, 1972, was 9.6198. The Activity was responsible for controlling its average grade and was given "...the flexibility needed to make the decisions required in managing their programs and organizing their work force." In addition, the letter from the Federal Aviation Administration also provided inter alia:

"In arriving at your individual action plans to meet your average grade goals, the following specific measures for reducing your average grade should be applied.

1. Backfill vacancies at grade levels below those of the previous occupants.
2. Hire at entry levels.
3. Use technicians where professionals are not being utilized at their full skill levels.
4. Eliminate "layering," unneeded deputy or assistant positions, and projected supervisory positions that do not have sufficient subordinates.
5. Review local organizational structure of each unit to determine if existing staffing patterns

2/ Joint Exhibit No. 1.

are still appropriate in view of program changes. Although we are not planning on any nationwide reorganization at this time, there is some leeway for local restructuring of the subordinate organizations within the framework of the standard organizations."

Upon receipt of the letter, Harold Williams, the Activity's Executive Officer, discussed the matter with "Washington" and with the Activity's Director. It was Williams' conclusion that, based upon the letter from the Federal Aviation Administration, promotions could not proceed without a promotion "plan." Accordingly, after receiving information collected by his staff, Williams, on July 25, 1973, drafted the "NAFEC Position Management and Average Grade Control Plan of Action, July 1972." 3/ The Plan was divided into various sections entitled: Problems; Objectives; Action; Review Procedures; Responsibilities; and Reports.

The "Action" portion of the Plan provides:

"Initial action will consist of a review of all current vacancies to ascertain (a) if they must be filled, and (b) considering essential mission requirements, determine the lowest possible grade for those which must be filled.

Subsequent actions will consist of:

- a. A careful review of each position which becomes vacant during the remainder of the fiscal year for the same reasons as the initial review.
- b. A systematic review of the organizational structure on a continuing basis throughout the fiscal year. The purpose of this review shall be to eliminate high level positions through consolidation and/or elimination of functions and staffing.

Positions may be filled at supervisory or journeyman levels only after the Division/Staff chief involved has ascertained and documented that such action is essential to his mission. This documentation will accompany the request for personnel action (Form 52) and will be subject to review by the Position Management Committee and approval by the Director."

3/ Hereafter referred to as the Plan.

The "Review Procedures" section of the Plan states:

"A. Organization. Each organizational element will be carefully evaluated to determine if it could be eliminated or combined with another element. In addition, the staffing levels will be analyzed to determine if lower level positions can be substituted for high level jobs. Adjustments by RIF are not contemplated; however, concerted efforts to effect reassignments will be made when imbalances are identified.

B. Vacancies. Each vacancy will be reviewed individually in accordance with the following criteria:

1. Is the vacancy essential or could it be eliminated or reallocated.
2. Could the nature of performance be altered to a lower grade-range occupational category, e.g., professional to subprofessional or technician, specialist to clerical, stenographer to typist, etc.
3. Can supervisory duties be eliminated by reassigning them upward, downward or laterally.
4. Can duties be redistributed among positions reassigning the higher grade-determining duties so that grade levels can be lowered.
5. Can grade levels be lowered through assessment of workloads, span of control or program requirements.
6. Can internal processes and procedures be simplified or streamlined to reduce the need for high grade duties.

C. Reclassifications. Reclassification actions will be requested only when the higher level duties are essential and at least one of the following conditions prevail:

1. The higher level duties cannot be redistributed.
2. The employee is in a developmental status and has clearly demonstrated promising potential.
3. Where reclassification is the result of changes in classification standards and guides, to correct classification errors or when directed by CSC or higher administrative authority."

Under "Responsibilities" the Plan provides that "(T)he Manpower Office will not process personnel actions which have not been reviewed according to this Plan or with individual service plans in the case of NAFEC tenants. "

At 8:15 a.m., on July 26, 1972, Williams presented the Plan to various of the Activity's management officials for consideration and comment. At 10:30 a.m., that same morning, representatives of the Activity met with representatives of each of the three Unions involved. The Unions had been notified of the time and subject matter of the meeting earlier that morning. At the meeting with the Unions, copies of the Plan were provided to the Unions' representatives. The Activity representatives informed the Unions that the freeze on promotions had been rescinded and the Plan was an attempt to permit promotions and at the same time decrease the average grade at the facility. The Plan was presented as a "draft" and the Unions' representatives were given a brief oral resume of the Plan and asked to submit any comments on the Plan by 4:00 p.m., that same day. The Unions asked various questions and there was some discussion as to how the Activity could promote employees and still decrease the average grade. The Activity assured the Unions' representatives that no one would be downgraded as a result of the Plan. The Activity representatives were asked why such a short period for comment was provided and they replied that comments had to be received by the end of the day so that the Plan could issue and promotions could begin again as quickly as possible. The Unions' representatives voiced some dissatisfaction with the time limit for comment, one Union representative making the statement that "this was a very short time to study a document of this kind," since it could possibly have far reaching effects. The meeting adjourned after approximately one-half hour and no further comment on the proposed Plan was made by the Unions at any time thereafter.

Having received no comments on the Plan from any one from management or the Unions, on July 27, 1972, Executive Officer Williams had the draft Plan typed in final and signed by the facility Director. On July 28 the Plan was implemented by dissemination to various management officials who were responsible for taking specific actions under the Plan. Promotions were thereby unfrozen and approximately 80 employees received promotions effective August 6, 1972.

Apparently, on or about August 3, 1972, the Unions filed unfair labor practice charges against Respondent relative to the issuance of the average grade Plan. By letter dated August 22, 1972, the Activity responded to the Unions stating, inter alia:

"We readily acknowledge that the time which you were given to respond to this proposed plan was exceptionally short. We submit, however, that there were, in this instance, overriding considerations which, at least in our judgment, justified this short suspense. As you know, we have had a freeze on upgrading positions since August 1971. In addition, there had been a total freeze on promotions since February 1972. It was necessary that we develop and implement a plan for average grade control so that we could proceed with deserving promotions. This was the only reason for the short suspense.

It is true that the draft was issued, as the plan, without change. However, it was not intended to be so. This draft was intended only as a starting point and we fully intended to include suggestions by NAFEC labor organizations and NAFEC management where possible. It was drafted during the afternoon of 25 July 1972 and was intended to serve as a working paper only. A secretary worked late on 25 July to reproduce the draft so it would be available the first thing Wednesday morning. It was passed out at the Director's staff meeting Wednesday morning and all Division and Staff office chiefs were requested to review it and provide suggestions for changes and/or additions. They were given until 4:00 p.m. the same day (26 July 1972) to provide these suggested changes. In other words, management had essentially the same amount of time as that afforded labor organizations.

Your conviction that we did not intend to consider your suggestions is in error. We did want your suggestions and still do for that matter. We would be pleased to consider any suggestion you will present and assure you that anything you suggest that will lessen the impact on employees and contribute to the reduction goal will be given most serious consideration. We will revise the plan at any time

to achieve this result. Furthermore, we are ready and willing to meet with you at a mutually convenient time and place to discuss any suggestions you might have....

... In summary, please be assured that participation by you in the formulation of implementing procedures to achieve the average grade reduction goals would be most most welcome and any suggestions you have will receive very serious consideration. The misunderstanding engendered by our eagerness to get promotions started again is genuinely regretted."

At no time thereafter did the Unions seek to meet or discuss the matter further nor did they offer any suggestions or comments relative to the Plan in any manner whatsoever. The Activity never reached its average grade goal and in July 1973, the Plan was suspended.

Discussion and Conclusions

I find that the Average Grade Control Plan constituted a personnel policy and matter affecting working conditions within the meaning of Section 11(a) of the Order. Thus, the Activity acknowledges that under the Plan it has eliminated some technical, supervisory and administrative positions and eliminated and redistributed some duties of some of its employees. However, I further find that under Section 11(b) and 12(b) of the Order the Activity's decision to issue the Plan was not a matter about which it was obliged to meet and confer with the Unions.

Nevertheless, the Activity was obliged to meet and confer with the Unions with regard to the formulation of the final Plan and implementation thereof. In United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289, the Assistant Secretary held in a case involving a RIF action that "the formulation of the final plan of carrying out the RIF should be done with the benefit of consultation...." In addition the Assistant Secretary has held on numerous occasions ^{4/} in similar circumstances that notwithstanding the fact that a particular management decision is non-

4/ New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, A/SLMR No. 362, and cases cited therein including Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329.

negotiable, agency or activity management is required under the Order to meet and confer on procedures management intends to use in implementing the decision involved and on the impact of such decision on adversely affected employees. Accordingly, I find that Respondent herein was obliged to afford Complainants a reasonable opportunity to meet and confer to the extent consonant with law and regulations on the formulation of and procedures to be utilized in effectuating the new Average Grade Control Plan and on the impact, if any, such new plan may have on adversely affected employees.

Respondent's contention that it was not obligated to meet and confer with the Union since Respondent did not contemplate separation, down-grading or realignment of employees, is without merit. Under the Plan Respondent has a wide latitude to make whatever decisions are required to control average grades including elimination and redistribution of duties, reorganization of the work force and refraining from filling vacancies at higher level positions. Accordingly, the potential affect upon the work force could have been substantial and wide-spread and Respondent acknowledges that the Plan could have affected incumbent's had they elected to do so. The Plan was the predicate for a new approach to promotions. Further, Respondent admits that under the Plan some employees' duties have been redistributed and some positions eliminated.

However, in the circumstances of this case I find that the Activity fulfilled its obligation to meet and confer on the matter. Thus, on July 26, 1972, the Activity met with the Unions and presented a "draft" Plan and requested their comments. The Plan was introduced not as a final document but rather as a "draft" and as such could have been modified prior to its promulgation if appropriate comments or suggestions were received. The Unions had the opportunity at this meeting and at any time prior to the promulgation of the Plan on July 28, 1972, to make suggestions or proposals with regard to modifying the Plan. This it failed to do and there is no evidence that Respondent exhibited a "closed mind" on the subject so that the Unions could have reasonably believed that their suggestions would have been futile. 5/ Moreover the Unions, during the meeting of July 26 and thereafter could have voiced its opposition with regard to the amount of time the Activity set for comments

5/ United States Department of Defense, Department of the Navy, Naval Air Reserve Training Unit, Memphis, Tenn., A/SLMR No. 106.

in such a manner so as to clearly convey their desire to forestall implementation of the plan so that the Unions might have additional time to review and engage in further consultation on the Plans. No such request was made. 6/ Nor do I interpret the Unions expression of dissatisfaction with the short duration of time allowed for comments at the July 26 meeting to constitute an objection by the Unions. Although the period of time between notification and implementation of the Plan was short, the Unions were made aware, if they were not already aware, of the desirability of promptly promoting deserving employees. In such circumstances the Activity could reasonably conclude that while the Unions would have preferred more time to review the Plan, they had no objections to it and the Activity could thereupon proceed accordingly. Therefore I find that the Unions, after having received prior notification of the Activity's Plan and intentions relating thereto, have, by their silence and inaction, waived any right to claim a failure to consult after the Plan was implemented. 7/

In view of the entire foregoing I recommend that the complaint herein be dismissed.

II. Case No. 32-3306 (CA)

Findings of Fact

The complaint herein, filed on August 3, 1973, by Local 1340, National Federation of Federal Employees, (hereafter referred to as the Union or Complainant) alleges that Respondent violated Section 19(a)(1), (5), and (6) of the Order by conducting three separate meetings with employees relative to the implementation of a mandatory 48-hour workweek. Complainant contends that the meetings with employees were "formal discussions" within the meaning of Section 10(e) of the Order and the Union was not afforded an opportunity to be present at the meetings as representatives of the Union. Respondent contends that the meetings were not "formal discussions" within the meaning of Section 10(e) of the Order, and in any event, the Union was notified of the Activity's intention to have such meetings and accordingly had an opportunity to be present and indeed a Union representative was present at one of the meetings.

6/ Id.

7/ Cf. U. S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261.

On June 11, 1973,, Mr. John K. Lacy, the Activity's Chief of Air Traffic Systems Division at NAFEC, held a meeting with representatives of the Union for the purpose of consulting with the Union on a proposed mandatory 48-hour workweek in the Activity's computer operator section. Complainant is the exclusive collective bargaining representative of employees in that section. 8/ Two other Activity officials attended the meeting; Mr. Yannetti, Branch Chief, and Mr. Roger Mingo, Chief of Operations Section 8131. The Union was represented by its President, Mr. Michael Massimino, and its Vice-president, Mrs. Chick Bradbury.

At the meeting, which was approximately two hours in duration, the details of the proposed 48-hour mandatory workweek which was to be put into effect on June 25, were explained and discussed. The Union representatives expressed dissatisfaction over the mandatory nature of the scheduled workweek and Mr. Lacey explained the reasons why the Activity felt compelled to increase the workweek from 40 hours to 48 hours on a mandatory basis. The parties discussed various alternatives to a mandatory 48-hour workweek as well as the adverse impact the enlarge workweek might have on the employees. The discussion also included the subject of possible disciplinary actions which could have resulted from a refusal to perform the additional mandatory 8 hours work.

Near the conclusion of the meeting, the Activity informed the Union that it would notify computer operators of the mandatory 48-hour workweek by posting a notice at least 7 days prior to a change in work schedule and possibly also notify the employees by letter. Mr. Lacy in the presence of the Union representatives advised Mr. Yannetti and Mr. Mingo that they should devise a way to personally inform the affected employees, "eyeball-to-eyeball," of the new workweek before the formal notice was posted. The Union representatives did not object or express any interest in being present at the employee meetings.

Without further discussion with the Union, on June 12 and 13, 1973, the Activity conducted three meetings with employees in the computer operator unit. The meetings were conducted after each of the three workshifts at approximately 4 p.m., 12 midnight, and 8 a.m. The employees were notified

8/ The parties do not have a collective bargaining agreement covering the employees in this unit.

that attendance at the meetings was voluntary. Mr. Mingo addressed the employees at each of the three meetings informing them of the new workweek and answering questions related thereto.

The first such meeting was held at approximately 4 p.m., on June 12, 1973, and was attended by approximately 15 employees including the Union's Vice-president, Mrs. Bradbury, a computer operator on the 8 a.m. to 4 p.m., shift. Although Mrs. Bradbury did not testify in this proceeding, it denied that although she did not receive an invitation to attend this meeting as the Union's representative, she nevertheless did attend the meeting and partake in the discussion. 9/ Mrs. Bradbury was the Union's "point of contact" for the computer operator unit and as such was expected to represent the Union at any meetings between the Activity and Union relative to matters affecting this group of employees.

Discussion and Conclusions

Putting aside the question of whether the three meetings discussed above were "formal discussions" within the meaning of Section 10(e) of the Order, I find that the Union was afforded an opportunity to be present at the meetings and accordingly no violation of the Order has been established. 10/ Thus, at the meeting of June 11, 1973, between representatives of the Activity and the Union, Complainant was made aware that in the near future personal meetings were to occur between the Activity and unit employees to explain the change in workweek. However, the Union made no inquiries about the intended meetings with unit employees nor did they offer any objections or express any interest in attending such meetings. Moreover, the Union's Vice-president and "point of contact," Mrs. Bradbury, obviously received specific notification of the first meeting and was present and participated in whatever discussion transpired.

9/ No evidence was presented relative to notice of or attendance at the next two meetings other than that the meetings took place and were voluntary in nature.

10/ Section 10(e) provides in relevant part: "The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of the employees in the unit."

The Union urges that some form of personalized notice of the specific meetings was required to be given to Mrs. Bradbury or the Union President as representatives of the Union. I reject this contention in the circumstances of this case. Since the Union was put on notice that meetings with employees were to be held in the immediate future and from its lack of concern the Activity could have reasonably concluded that the Union was not interested in attending such meetings. In any event, actual notice of the June 12 meeting to Mrs. Bradbury, the Union's "point of contact," irrespective of whether she received notification as the Union's representative or an employee, satisfies any requirement of Section 10(e) of the Order that the Union be given an opportunity to be represented at the meeting. ^{11/} Further, I note that at the time of the June 12 meeting Mrs. Bradbury did not object to having not received notification of the meeting as a "union representative" ^{12/} and through her attendance at the meeting she was again put on notice that other such meetings would in all likelihood occur. She was, at that time, in a position to inquire as to the details of the following meetings, such as the time and place, but apparently made no effort to do so. I can only assume that if Mrs. Bradbury did not attend the subsequent meetings, she knew or should have known of these meetings but decided to do nothing with respect thereto.

Accordingly I find that in the circumstances of this case Complainant has not met its burden of proving the allegation in the complaint by a preponderance of the evidence and I recommend that the complaint herein be dismissed in its entirety.

^{11/} Cf. Air Traffic Control, Federal Aviation Administration, Anchorage, Alaska, A/SLMR No. 379.

^{12/} No evidence was adduced at the hearing to indicate that the Activity's failure to notify Mrs. Bradbury of the meeting as a Union representative was for the purpose of demeaning the Union in the eyes of the unit employees.

III. Case No. 32-3071(CA)

Findings of Fact

The complaint in this matter, filed on November 14, 1972, by Local 1340, National Federation of Federal Employees, (hereafter referred to as the Union or Complainant) alleges that Respondent violated Section 19(a)(1), (5), and (6) of the Order. Complainant contends that Respondent violated the Order when the Activity's representatives met with an employee on various occasions without affording the Union an opportunity to be present as required by Section 10(e) of the Order and without informing the employee of her right to Union representation at the meetings.

On August 16, 1972, Mrs. Cleo Jones, a simulator operator ^{13/} at the Activity had a meeting with her supervisor, Mrs. Louise Dilks and was given a performance evaluation on a project she had recently completed. In the normal course of her employment Mrs. Jones could be expected to work on three or four projects during the course of a year and upon the completion of a project an employee is given a project evaluation. During the meeting of August 16, Mrs. Jones was given her evaluation for a project she worked on between April 11, 1972, and July 28, 1972. The evaluation disclosed that Mrs. Jones was generally rated as "Meets Requirements" ^{14/} in those areas of her performance for which she was rated. Mrs. Jones contested her evaluation contending that if any simulator operator received a rating of "Exceeds Requirements" or "Far Exceeds Requirements" then she should also receive such a rating. ^{15/} Accordingly,

^{13/} At all times material hereto the Union was exclusive collective bargaining representative for a unit of Activity's simulator operators. Mrs. Jones is a member of that unit.

^{14/} The project evaluation report (Respondent Exhibit No. 1) indicates that there are four categories of ratings: "Needs to Improve to Meet Requirements;" "Meets Requirements;" "Exceeds Requirements;" and "Far Exceeds Requirements."

^{15/} Mrs. Jones was concerned about her performance rating since she felt that these ratings would ultimately be considered on questions of promotion.

Mrs. Jones would not sign the evaluation. Mrs. Dilks asked Mrs. Jones to indicate in writing why she felt she should be rated higher and in what categories. Mrs. Jones refused. Since the parties could not agree on the evaluation, Mrs. Dilks suggested that the matter be taken up with Mrs. Doris Canada, who was Mrs. Dilks' superior and Mrs. Jones' second-level supervisor.

On the following day (August 17) while walking in the cafeteria Mrs. Jones met Michael Massimino, the Union President. Mrs. Jones informed Mr. Massimino of her dissatisfaction with her evaluation and her refusal to sign it. Massimino told Mrs. Jones that if she wished, she could sign the evaluation and place a comment on the document to the effect that she objected to the ratings. Mr. Massimino also told Mrs. Jones that she could appeal the evaluation if she wanted and invited her to keep him "informed."

Later that day Mrs. Dilks told Mrs. Jones that she was wanted in Mrs. Canada's office for a meeting. Mrs. Jones reported to Mrs. Canada's office where she was met by Mrs. Canada, 16/ Mrs. Dilks and Mrs. Kirks, a supervisor who supervised Mrs. Jones during a portion of her work on the project in question and accordingly had some partial input with regard to Mrs. Jones' evaluation. It is standard procedure that when a simulator operator does not agree with her first line supervisor's rating, then it is thereafter discussed with Mrs. Canada. Mrs. Canada had been advised by Mrs. Dilks of the controversy and at the meeting had Mrs. Jones' evaluation in her possession. Mrs. Canada asked Mrs. Jones if she could justify her assessment of her work which might warrant a higher rating and Mrs. Jones again repeated that if any one of the simulator operators received an "exceeds" or "far exceeds," she deserved the same rating. Mrs. Jones was requested to put her position in writing and she refused. The parties continued to discuss the evaluation process and Mrs. Canada suggested that, in order to get an independent view of Mrs. Jones' work since there appeared to be a "stand-off," two different supervisors and a training officer watch Mrs. Jones work during a "run" on her machine at separate times. Those who observed Mrs. Jones would then determine whether or not her rating was proper, and all parties would be bound by this determination. Mrs. Canada acknowledged that such a procedure was "unorthodox" or "unprecedented" and

16/ Doris W. Canada is the Simulator Operations Supervisor and although she signs the evaluation of employees under her general supervision, she plays no part in the actual rating of these employees.

informed Mrs. Jones that if another similar case arose, this new procedure would have to be followed. The original evaluation would be held in abeyance until the evaluations were obtained from the close supervision approach. Mrs. Jones agreed with this suggested procedure but nonetheless, toward the conclusion of the meeting, indicated that she intended to file a grievance on the rating. The meeting lasted approximately 45 minutes.

Sometime after her meeting in Mrs. Canada's office, but on the same day, Mrs. Jones went to the Activity's personnel office to inquire about a "bid" she had placed for a computer operator job. During her conversation with a personnel employee Mrs. Jones discussed her difficulties with regard to her current evaluation. The personnel employee suggested that Mrs. Jones talk to Mr. John Carroll, the Activity's EEO Officer.

Shortly thereafter, Mrs. Jones met with Mr. Carroll in his office. Mrs. Jones explained the nature of her problem with regard to her evaluation and indicated her concern that the evaluation might effect her promotional opportunities. Mrs. Jones also complained of being treated unfairly. Mr. Carroll informed Mrs. Jones that he would look into her problem and indicated that his inquiry would not be made in secret.

On August 23, 1972, Mr. Carroll met with Mrs. Canada and requested that a meeting be conducted with all the parties in order to discuss Mrs. Jones' problem. Thereupon Mrs. Canada sent for Mrs. Jones and Mrs. Dilks. The meeting was conducted in Mrs. Canada's office and lasted approximately one hour. In attempting to ascertain the nature of the problem Mr. Carroll questioned the participants about the evaluation process and inquired into areas relative to personal hostility and the fairness of the rating process itself. Mrs. Canada's proposal to have separate close supervision observe Mrs. Jones to resolve the evaluation problem was also discussed. Mr. Carroll indicated that he felt it was not a good policy to have Mrs. Jones' work "monitored." While seeking an informal resolution of Mrs. Jones' problem, Mr. Carroll suggested that Mrs. Jones and Mrs. Dilks meet privately to review the rating since it appeared to him that such a discussion with some "give and take" on both sides might settle the matter. This suggestion was acceptable to both Mrs. Jones and Mrs. Dilks.

On August 24, 1972, Mrs. Jones was informed by supervisor that Mrs. Dilks wished to see her in the "A LAB." During this meeting Mrs. Dilks informed Mrs. Jones that she reviewed the evaluation and could not see any area where Mrs. Jones' rating should be changed. After some further discussion Mrs. Dilks gave Mrs. Jones a higher rating in one category and Mrs. Jones accepted her rating in another category.

On the following day, August 25, Mrs. Jones was called into Mrs. Canada's office. Mrs. Canada had been advised by Mrs. Dilks of the meeting she had with Mrs. Jones. They reviewed the meeting of the prior day between Mrs. Dilks and Mrs. Jones and apparently cleared up some misunderstanding with regard to Mrs. Jones accepting a rating in one category. Mrs. Canada informed Mrs. Jones that nothing else in the evaluation could be changed and it would go on file in that manner. Mrs. Jones stated that she was still not satisfied with the evaluation and would file a grievance. Mrs. Canada replied that she had ten days to do so.

Mrs. Jones filed an informal grievance on August 28, 1972, and a formal grievance on September 2, 1972, concerning her evaluation. The Union represented her throughout the processing of this grievance.

Positions of the Parties

The Union contends that the meetings of August 17 and 23, 1972, between the Activity's supervisors and Mrs. Jones were "formal discussions" within the meaning of Section 10(e) of the Order and accordingly the Activity was obligated to afford the Union an opportunity to be present and to inform Mrs. Jones of her right to Union representation at these meetings. At the hearing the Union did not contend that the meetings of August 16, 24, and 25, 1972 between Activity representatives and Mrs. Jones were "formal discussions" but nevertheless it took the position that if the meetings of August 17 and 23 were not found to be "formal discussions" within the meaning of the Order, then all five meetings taken as a whole constituted "formal discussions" under Section 10(e) of the Order and obligations to the Union and the employee as explained above would flow therefrom. However, in its brief, Complainant contends that the meetings of August 24 and 25 between the Activity and the employee also meet the criteria of "formal discussions" as defined in Section 10(e) of the Order and accordingly the Union should have been afforded the opportunity to be present at those meetings as well.

The Activity denies that any of its meetings with Mrs. Jones in contention herein were "formal discussions" within the meaning of Section 10(e) of the Order. It contends that such meetings were personal and spontaneous and did not concern any matters affecting general working conditions of employees in the unit and accordingly it contends no unfair labor practice can be found to have occurred with regard to either Union or employee rights.

Discussion and Conclusions

Section 10(e) of the Order provides:

"When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interest of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

Accordingly, in order to establish an obligation on the part of the Activity to give the Union an opportunity to be represented at any of the meetings it must be established that the meeting: was a "formal discussion;" and concerned "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

With regard to the meeting of August 17, 1972, 16/ I find that this meeting constituted a "formal discussion" within the meaning of Section 10(e) of the Order. Thus the meeting was held before the employee's second level supervisor who attempted to resolve the matter, in her office, and in the presence of both of Mrs. Jones first level supervisors who participated in her evaluation. 17/

16/ It is not alleged and I do not find that the meeting of August 16 between Mrs. Jones and her supervisor Mrs. Dilks, independently constituted a "formal discussion" within the meaning of Section 10(e) of the Order. Nor do I find that this meeting, when considered in conjunction with the other meetings discussed herein, constituted a "formal discussion" within the meaning of the Order.

17/ U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facilities, Fort Jackson, South Carolina, cont'd

I further find that the meeting of August 17 dealt with matters affecting general working conditions of employees in the unit within the meeting of Section 10(e) of the Order. The decision departed from merely a review of an individual's work performance evaluation and attempts to resolve differences relative to that evaluation 18/ and entered into matters which had potentially far reaching effects with wider ramifications than the resolution of the dispute relative to Mrs. Jones' individual ratings. At the meeting Mrs. Canada suggested and Mrs. Jones agreed to an "unorthodox" or "unprecedented" method of evaluating Mrs. Jones, i.e. close supervision by two supervisors and a training officer. This method of evaluation constituted a departure from past practice in the evaluation of employees when disputes arose, which departure Mrs. Canada admitted would have to be applied to other employees if they so desired thereby acknowledging

17/ Cont'd
A/SLMR No. 242, and U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278.

18/ In my view it is unnecessary to resolve the question of whether a "formal discussion" relating to an agency's evaluation of an employee's work performance is a matter affecting general working conditions of employees of the unit. While it is arguable that a "formal discussion" on an employee's evaluation has no wider ramification than a resolution of a dispute between the employee and the Activity (Cf. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336) it is also arguable that the agency's evaluation of an individual's work performance and the standards used affect other employees since those standards are generally uniformly applicable to all similar employees. Thus a misuse or misapplication of a standard may well operate to the detriment of unit employees generally since an advantage or disadvantage given to one employee in an evaluation could well result in a corresponding disadvantage or advantage to another employee or employees in the unit. Evaluations are used in appraising promotion potential and the relative capabilities of employees and in this sense employees are in competition with one another. Therefore an employee's evaluation inherently has a potential to affect the promotional possibilities of other employees which, it could be argued, constitutes a general working condition of employees in the unit. However as stated above, this question need not be resolved to meet the issues herein and accordingly I specifically make no findings in this regard.

the presidential nature of this new procedure. Moreover, close to the conclusion of this meeting it became apparent that Mrs. Jones' challenge to her evaluation was in reality an incipient grievance. Indeed Mrs. Jones expressly stated that she was going to file a grievance and in fact a written grievance was subsequently filed on the matter.

While at the beginning of the meeting of August 17 the Activity might not have been able to foresee the turn of events which occurred, in my view at some point during the discussion, at least before a definite conclusion and agreement was reached with regard to the new evaluation procedure, it became incumbent on the Activity to notify the Union of the status of the discussion and afford it an opportunity to be present at whatever further discussion might ensue. This it failed to do. Accordingly, I conclude that the Activity's failure to afford the Union an opportunity to be present at this meeting, in the circumstance herein, constituted a violation of both 19(a)(1) 19/ and 19(a)(6) 20/ of the Order.

Even if this meeting did not constitute a Section 10(e) discussion I would nevertheless find that Respondent violated Section 19(a)(1) and (6) of the Order through its negotiating with an individual employee at this meeting and thereby agreeing to a change in evaluation procedures without consultation with the Union. In my view, the procedure used in evaluating employees is a condition of employment and the Activity was not privileged to propose and agree to change such a condition without affording the Union an opportunity to bargain on the matter since the Union herein is the exclusive collective bargaining representative of all employees in the unit. The Assistant Secretary has previously held that to bypass or disregard the exclusive representative and to deal with unit employees directly concerning grievances, personnel policies and practices or other matters affecting the working conditions of unit employees, improperly undermines the status of the employees' exclusive representative and thereby violates Section 19(a)(1) and (6) of the Order.21/

19/ Cf. U.S. Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SLMR No. 341.

20/ U.S. Army Headquarters etc., (Fort Jackson), supra and U.S. Department of the Army etc., (Fort Wainwright) supra.

21/ Veterans Administration, Veterans Administration Center, Hampton, Virginia, A/SLMR No. 385, and United States Army School/ Training Center, Fort McClellan, Alabama, A/SLMR No. 42.

I also conclude that the meeting of August 23, 1972, between Mrs. Jones, Mrs. Canada, Mrs. Dilks, and Mr. Carroll held in Mrs. Canada's office constituted a "formal discussion" within the meaning of Section 10(e) of the Order. Both the nature of the meeting and the capacity of the Activity's participants support this conclusion. Further, in the attempt to resolve the dispute relative to Mrs. Jones' evaluation, the close supervision procedure originally suggested by Mrs. Canada was again discussed although such procedure was rejected by Mr. Carroll. Indeed it was entirely foreseeable that the discussion would involve this new procedure and might well have played a major role in the discussion and the attempt to resolve the dispute. Accordingly, I conclude that this meeting concerned a matter affecting general working conditions of employees in the unit and the Activity violated Section 19(a)(1) and (6) of the Order by not affording the Union an opportunity to be represented thereat.

I further conclude that the meeting of August 25, 1972, between Mrs. Jones and Mrs. Canada in Mrs. Canada's office was, in effect, an extension of the meetings of August 17 and 23 and the Union should have been afforded an opportunity to be present. I do not find it controlling that there was no discussion of the close supervision procedure at this meeting. At this meeting there existed a strong possibility of further discussion with regard to the plan for close supervision of Mrs. Jones to resolve the dispute. According to Mrs. Canada's testimony her first knowledge of Mrs. Jones' withdrawal from her agreement for close supervision came when Mrs. Jones filed her informal grievance in writing on August 28. Therefore in my view it was only by happenstance that the close supervision procedure was not discussed in detail on August 25. Under such circumstances I find that the requirements for a Section 10(e) discussion were met and the Union should have been afforded an opportunity to be represented at this meeting.

I reject Respondent's contention that the Union's right to be given an opportunity to be represented at the meetings described herein would arise only upon Mrs. Jones requesting Union representation. Under Section 10(e) of the Order the Union's right to be represented at "formal discussions" flows primarily from its right and responsibility to represent all unit employees and is independent of an employee's concomitant right to chose the exclusive representative as his representative. 22/

22/ U.S. Department of the Army etc., (Fort Wainwright) supra.

I also reject Complainant's contention that the meeting between Mrs. Jones and Mrs. Dilks in "A Lab" on August 24, 1972, was a formal discussion within the meaning of Section 10(e). What transpired at this meeting was merely a review of an employee's evaluation by a first line supervisor in an attempt to reach some form of agreement with regard to the evaluation. The meeting was akin to the initial meeting between these two individuals on August 16 both of which I find lacked the requisite formality to constitute a Section 10(e) meeting. Moreover it is obvious that Mrs. Dilks, unlike Mrs. Canada, did not possess the authority to revise the evaluation process or alter Mrs. Canada's agreement with Mrs. Jones.

Further, I do not conclude that under the Order Respondent was obliged to inform Mrs. Jones of her right to Union representation at the August 17, 23, and 25 meetings. 23/ While the Assistant Secretary had held that under Section 10(e), employees have a concomitant right to request union representation during "formal discussions" 24/ I do not read Section 10(e) of the Order as to require the Activity to notify Mrs. Jones of her right to request Union representation in the circumstances herein. 25/

Recommendations

In view of the foregoing, I make the following recommendations to the Assistant Secretary:

1. That Respondent be found to have engaged in conduct violative of Section 19(a)(1) and (6) of Executive Order 11491, as amended, and that an order, as hereinafter set forth which is designed to effectuate the policies of the Order, be adopted.
2. That any alleged violations of the Order not specifically found herein be dismissed.

23/ U. S. Department of Army, etc., (Fort Wainwright), supra.

24/ See generally U. S. Department of the Army, etc., (Fort Wainwright) supra. In that case, when considering an Activity's denial of an employees request to be represented in a formal discussion, the Assistant Secretary held that Section 7(d) of the Order does not establish any rights for employees enforceable under Section 19 of the Order.

25/ This is not to say, however, such an obligation might not arise in another case due to the particular facts and circumstances of that case. However, I do not find that the facts of this case support such a finding.

IV. Case Nos. 32-3297(CA) and 32-3300(CA)

Findings of Fact

The above captioned complaints were filed on July 23, 1973 and July 25, 1973, respectively, by Local 1340, National Federation of Federal Employees (hereafter referred to as the Union or Complainant) and alleged that Respondent violated Section 19(a)(1), (5) and (6) of the Order. The cases involve two meetings the Activity had with an employee which meetings the Union contends and the Activity denies were "formal discussions" within the meaning of Section 10(e) of the Order.

On April 25, 1973, the Activity issued an official letter of reprimand to Mrs. Dorothy L. Kravitz who was employed by the Activity in a unit for which the Union had exclusive representational rights.^{26/} On this same day or shortly thereafter, Mrs. Kravitz brought the matter to the attention of Mr. Michael Massimino, President of the Union. Mr. Massimino felt that if there were any further proceedings regarding the letter of reprimand they would involve the agency grievance procedure and accordingly informed Mrs. Kravitz that he did not, at the time, believe that it was something that the Union could do anything about "as a Union." Mr. Massimino told Mrs. Kravitz that he would ask Mr. Eugene Polfker if he would serve as her employee representative in the matter. Mr. Polfker had previously successfully represented another employee in an adverse action case, having been involved in that matter for the past five years due to the complex nature of the situation. Mr. Massimino contacted Mr. Polfker and requested that he act as Mrs. Kravitz's personal representative in the matter. Mrs. Kravitz also called Mr. Polfker and he agreed to act as her personal representative.

By letter dated May 1, 1973, to Mr. Robert Quig, Chief of the Activity's Logistics Division and originator of Mrs. Kravitz's letter of reprimand, Mrs. Kravitz notified Mr. Quig that she was designating Mr. Plofker as her representative with regard to the letter of reprimand of April 25, 1973.^{27/} On May 4, 1973, Mr. Plofker

^{26/} At no time material hereto did the Union and the Activity have a collective bargaining agreement for this unit of employees.

^{27/} Complainant Exhibit No. 6.

telephoned Mr. Quig and requested a meeting. Mr. Quig then called Mrs. Kravitz and asked her to be in his office at the appointed time of the meeting and also called Mr. Massimino, informed him of the meeting and asked him if he wished to attend. In response to a question on cross-examination as to why he asked Mr. Massimino to attend the meeting of May 4, Mr. Quig testified: "I had issued a letter of reprimand which I considered to be an official disciplinary action and I -- with my previous meetings with Mr. Massimino, I think he and I were in agreement that an action such as this being an official action, that any meetings subsequent to such an action would be attended by the Union representative either Mr. Massimino or someone he might designate."

The meeting of May 4 was held in Mr. Quig's office and was attended by Mr. Quig, Mrs. Kravitz, Mr. Plofker, and Mr. Massimino. During the discussion Mr. Plofker pointed out several procedural defects with respect to the letter of reprimand indicating that the letter was in violation of various regulations especially since the letter of reprimand did not specifically set forth the matter about which Mrs. Kravitz was being reprimanded. Mr. Quig defended the letter indicating that it was similar to other letters of reprimand he had issued in the past. After some discussion Mr. Quig agreed to withdraw the letter of reprimand because of the procedural deficiencies and issue a new letter in strict accordance with FAA regulations. On that same day the letter of reprimand was officially withdrawn by Mr. Quig. The withdrawal letter^{28/} indicates that separate copies of the letter were sent to Mr. Plofker and Mr. Massimino.

On May 9, 1973, Mr. Quig had his secretary call Mrs. Kravitz's supervisor and request that Mrs. Kravitz report to his office. Upon meeting with Mrs. Kravitz, Mr. Quig advised her that he wanted to discuss, in accordance with FAA procedures, the basis for which he felt a letter of reprimand should be issued to her. Mrs. Kravitz replied that she did not want to discuss the matter without her representative Mr. Plofker being present. Mr. Quig informed her that it was not necessary to have Mr. Plofker present since the meeting involved a personal matter of a supervisor-employee relationship.^{29/} Mrs. Kravitz did not agree with Mr. Quig and again requested the attendance

^{28/} Complainant Exhibit No. 2.

^{29/} There are three levels of supervision between Mr. Quig and Mrs. Kravitz. The intermediate supervisors include Unite Chief, Section Chief, and Branch Chief.

of Mr. Plofker. Mr. Quig again refused this request and informed Mrs. Kravitz that she could call the personnel office to ascertain her entitlement to representation at the meeting and offered to call himself if she desired. Mrs. Kravitz rejected this proposal and indicated that she did not wish to talk to anyone but Mr. Plofker. During the discussion Mr. Quig spelled out the specific offenses with which Mr. Kravitz had been charged and the specific regulations dealing therewith. Mr. Kravitz questioned a number of matters dealing with the factual background for the reprimand and also questioned Mr. Quig's authority to discipline her for off-the-job conduct. 30/ Throughout the meeting Mrs. Kravitz continually expressed the desire for Mr. Plofker's presence.

A new official reprimand was issued to Mrs. Kravitz by Mr. Quig on May 10, 1973. This letter spelled out in some detail the reasons for the reprimand. 31/ On that same day Mrs. Kravitz discussed the matter with Mr. Plofker and he assisted her in drafting a letter of complaint 32/ addressed to Mr. Harold Williams, the Activity's Executive Officer. In the letter, Mrs. Kravitz stated that she wished to file an informal complaint against Mr. Quig alleging harassment by him with regard to various matters including Mr. Quig's failure to permit her to have a representative present at the meeting of May 9.

After receiving the complaint Mr. Williams concluded that he needed more specifics and accordingly directed his secretary to ask Mrs. Kravitz to come to his office and advise her that she could bring with her anyone she wished. Mr. Williams secretary called Mrs. Kravitz who indicated that she wished to have Mr. Plofker represent her. Thereupon Mr. Williams secretary called Mr. Plofker and informed him of the meeting to be held on May 14, 1973. The Activity made no effort to notify any Union official of the intended meeting. 33/

30/ The basis for the letter of reprimand consisted of Mrs. Kravitz being arrested and convicted on a disorderly person's charge and being fined \$25.00.

31/ The prior letter of reprimand of April 25, 1973, merely indicated that Mrs. Kravitz was being reprimanded "for misconduct which is considered to be prejudicial to the government."

32/ Complainant Exhibit No. 4.

33/ Mr. Massimino testified that while it was possible that Mr. Plofker or Mrs. Kravitz may have informed him of the May 14

On May 14, a two-hour meeting was held in Mr. Williams' office and was attended by Mr. Williams, Mrs. Kravitz and Mr. Plofker. Mr. Williams testified that the purpose of the meeting was to "pin down" some specifics of the allegations. 34/ Accordingly, at the meeting Mr. Williams indicated that the charge was a serious one and he required more information relative to the nature of the alleged harassment. Mr. Plofker did most of the talking on behalf of Mrs. Kravitz and at one time was admonished by Mr. Williams for not letting Mrs. Kravitz speak. Mr. Plofker objected to this admonishment stating that he was "her representative." At this meeting Mr. Plofker contended that the second letter of reprimand given to Mrs. Kravitz on May 10 was also procedurally defective. The parties reached no agreement and Mr. Williams concluded the meeting by indicating that he would file his report in response to the complaint.

Mr. Williams' report dated May 18, 1973, a three page document, 35/ found no evidence to support Mrs. Kravitz's claim of harassment by Mr. Quig. The letter informed Mrs. Kravitz that if she desired to file a formal grievance in the matter she should submit it within five days after receipt of his informal decision.

The Status of Eugene Plofker

The Activity contends and the Union denies that Mr. Plofker was a representative of the Union. If Mr. Plofker was a representative of the Union then the notification to him with regard to the meeting of May 14, 1973, would constitute notification to the Union. Thus the Union would have been accorded an "opportunity to be represented" at the meeting of May 14 and no breach of a duty under Section 10(e) of the Order would be established.

33/ Cont'd

meeting prior thereto, he did not recall receiving any such information. There is no evidence that either Mrs. Kravitz or Mr. Plofker notified Mr. Massimino of the scheduled meeting at any time beforehand. Accordingly I find that the Union received no notification of the pending meeting prior to the actual conduct of the meeting on May 14, 1973.

34/ Mr. Williams testified that although he talked to Mr. Quig prior to the May 14 meeting and indicated that he had the complaint, he did not discuss the matter with Mr. Quig in any detail until May 15.

35/ Respondent Exhibit No. 3.

The evidence reveals that in October 1972, the Union issued a notice to its members which stated inter alia: "ADJUSTMENT AND GRIEVANCE COMMITTEE Gene Plofker is chairman and will appoint members as required." The notice also contained the notations "do not post" and "for members only." Mr. Plofker testified that while he is a member of the Union he holds no office. He asserts that the notice of October 1972, was issued without his consent and no committee was ever organized nor did he at any time represent the Union in any grievance matters although he acknowledged that from time to time he discussed grievances with Mr. Massimino.

The evidence also discloses that on two occasions Mr. Plofker sat in at a meeting between the Activity and the Union as a representative for the Union. On one occasion in September or October 1972, Mr. Massimino could not attend the meeting and requested Mr. Plofker to represent the Union. On another occasion in March or April 1973, Mr. Massimino sought Mr. Plofker's attendance to accompany him to a meeting with the Activity.

I do not conclude that the evidence establishes that Mr. Plofker was a Union representative. Thus the notification of October 1972, was never published to the Activity and thereafter Mr. Plofker did not engage in any activity which could be construed as acting as chairman or representative of a grievance committee. Nor am I persuaded that based upon Mr. Plofker's intermittent, adhoc appearances as a Union representative the Activity could have reasonably assumed that he was a representative of the Union for all purposes. Moreover I find that at no time was Mr. Plofker designated to Act for Mrs. Kravitz as a representative of the Union. Rather, his actions on behalf of Mrs. Kravitz were as a personal representative. I further find that the Activity was well aware of Mr. Plofker's status as a personal representative of Mrs. Kravitz, noting particularly Mrs. Kravitz's notice to Mr. Quig of May 1 designating Mr. Plofker as her representative; 36/ Mr. Quig's separate notification to Mr. Massimino of the May 4 meeting and his testimony that Mr. Massimino was invited since he thought the Union should be represented at the meeting; Mr. Quig's notification to both Mr. Plofker and Mr. Massimino that as a result of the

36/ Complainant Exhibit No. 6.

May 4 meeting Mrs. Kravitz's notice of reprimand was being withdrawn; 37/ and Mrs. Kravitz's letter of complaint to Mr. Williams dated May 10, 1973, 38/ wherein she alleges that Mr. Quig caused difficulty and inconvenience not only personally, but also to her representative Mr. Plofker and to Union officials. Further there was no testimony at the hearing that either Mr. Quig or Mr. Williams at the time of the meetings with Mrs. Kravitz were aware of or relied on the October 1972, Union notice discussed above or considered Mr. Plofker to be anything more than Mrs. Kravitz's personal representative.

Positions of the Parties

The Union contends that the Activity violated the Order by its failure to afford the Union an opportunity to be represented at the meetings of May 9 and May 14, 1973, which it alleges were "formal discussions" within the meaning of Section 10(e) of the Order. The Union further alleges that the Activity violated Section 19(a)(1) of the Order by its refusal to permit Mrs. Kravitz to be represented by her personal representative during the meeting of May 9.

The Activity takes the position that the meetings of May 9 and May 14, 1973, with Mrs. Kravitz did not constitute "formal discussions" within the meaning of Section 10(e) of the Order. It contends that the meetings lacked the formality required by Section 10(e) and did not involve subject matter encompassed by Section 10(e). The Activity also contends that a Union representative (Mr. Plofker) in fact attended the meeting of May 14. Further the Activity argues that no violation of Section 19(a)(1) of the Order is established where, during a Section 10(e) meeting, an Activity denies an individual an opportunity to be represented by a personal representative.

Discussion and Conclusions

The Meeting of May 9

I conclude that the meeting of May 9, 1973, between Mr. Quig and Mrs. Kravitz was a "formal discussion" within the meaning of Section 10(e) of the Order both as to the formality of the discussion and the subject matter under consideration. Thus the formality of the meeting is supported by the fact that Mrs. Kravitz met

37/ Complainant Exhibit No. 2.

38/ Complainant Exhibit No. 4.

with the Chief of the Activity's Logistic Division, her fourth level supervisor in his office. The meeting was an integral and necessary part of taking formal disciplinary action against Mrs. Kravitz. The decision to issue a letter of reprimand to Mrs. Kravitz had long since been made. In a memo dated April 25, 1973, from Mr. Quig to the Activity's Security Division 39/ Mr. Quig stated, inter alia: "...In view of such conduct, I have determined in accordance with Handbook 3750.4, Mrs. Kravitz should be issued a letter of reprimand. Accordingly, a letter of reprimand will be issued to Mrs. Kravitz not later than April 27, 1973." The serious nature of a formal letter of reprimand is attested to by the Activity's own regulations which include letters of reprimand under "Formal Disciplinary Actions" 40/ and states inter alia: "This type of disciplinary action should be used when the situation or offense is serious and warrants more than an informal correction, or in the case of repeated infractions of a minor nature."

I further conclude that the subject matter of the discussion was a matter "affecting general working conditions of employees of the unit." 41/ Regulations concerning personal conduct under which an employee's job tenure may be affected are one of the conditions of employment. The Union has a vital interest on behalf of all employees in the unit as to how these regulations are interpreted and applied. Thus the interpretation and applications of regulations often times have precedential value with regard to other employees conduct and by particularizing those situations where disciplinary action may be taken, the parameters of acceptable and unacceptable employee conduct is demonstrated and employees in the unit must govern their actions accordingly. Moreover, Mr. Quig indicated that the issuance of a letter of reprimand to Mrs. Kravitz was discretionary with him. Accordingly, the Union should have been accorded an opportunity to observe and partake in the

39/ Complainant Exhibit No. 8.

40/ Complainant Exhibit No. 1.

41/ The relevant portion of Section 10(e) of the Order provides: "The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices or other matters affecting general working conditions of employees in the unit."

discussion since they were in a position to know more than any individual employee whether the interpretation and application of the regulations with regard to Mrs. Kravitz followed or deviated from past practice or was relevant to other concurrent situations. 42/ The Union as the collective bargaining representative of all employees in the unit therefore must be accorded an opportunity to observe and partake in such discussions .

In view of the foregoing I find that Respondent violated Section 19(a) (1) and (6) of the Order by its failure to afford the Union an opportunity to be represented at the meeting between Mrs. Kravitz and Mr. Quig on May 9, 1973.

I do not find however that Respondent's conduct violated Section 19(a) (5) of the Act and accordingly shall recommend dismissal of the allegation. The Assistant Secretary held in United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42, that Section 19(a) (5) refers to matters related to according appropriate recognition rather than the conduct of the bargaining relationship as involved herein.

Nor do I find that Section 19(a) (1) of the Order was violated when the Activity refused to allow Mrs. Kravitz to have a personal representative present at the meeting of May 9. The Assistant Secretary held in U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278 that under Section 10(e) of the Order employees have a concomitant right to chose the exclusive representative as their representative in "formal discussions." A right to a personal representative is not established by operation of the Order and accordingly refusal to allow representation by a personal representative in a "formal discussion" within the meaning of Section 10(e) of the Order does not establish a violation of Section 19(a) (1). 43/

42/ I do not find the fact that an employee may appeal a letter of reprimand to be controlling. In such subsequent proceedings the employee may not remember what transpired during the meeting and indeed may not consider certain topics which were disussed to be particularly relevant when such matters would be immediately recognized by the Union as being detrimental to the unit as a whole.

43/ Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 344.

The Meeting of May 14

The meeting of May 14, 1973, between Mr. Williams, Mrs. Kravitz and Mr. Plofker was part of Mr. Williams inquiry into the details of Mrs. Kravitz's complaint against Mr. Quig regarding an allegation of harassment by Mr. Quig. Under Agency regulations Mrs. Kravitz's complaint of May 10 was labeled an "informal complaint" and under Agency regulations the meeting was a step in the "Informal Grievance Procedure." However these labels do not dispose of the question of whether a "formal discussion" within the meaning of Section 10(e) of the Order was involved herein. Rather we must look to the facts and circumstances of the meeting to see whether or not a Section 10(e) discussion took place on May 14.

I find the meeting of May 14 was a "formal discussion" within the meaning of Section 10(e) of the Order both as to the formality of the discussion and the subject matter under consideration. The formality of the meeting is established in that the meeting was held in the office of and by the Activity's Executive Officer, a high managerial officer for the Activity who was directly responsible to the Activity's Director. Moreover the meeting concerned a grievance against another high ranking member of management.

I also find that the meeting of May 14, 1973, concerned subject matters cognizable under Section 10(e) of the Order. Thus a grievance had been filed and that grievance concerned the treatment of an employee in her meetings with a supervisor.^{44/} In my view, this grievance concerned a matter affecting general working conditions of all employees in the unit since meetings between supervisors and employees are normal incidents of employment. The nature of an employee's treatment in such meetings and a resolution of the question of what constitutes harassment by a management official is a legitimate concern of and has a general impact on all employees in the unit. It is frequently through the resolution of grievances that the "law of the shop" is established and the future conduct of management and all employees is guided by such decisions. Therefore the Union should have been afforded an opportunity to be present during the meeting and fulfill its responsibility to represent the interest of all employees in the unit.^{45/} Accordingly, I find that the Activity by its failure to afford the Union an opportunity to be present at the meeting of May 14, violated Section 19(a) (1) and (6) of the Order.^{46/}

^{44/} Compare Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336.

^{45/} U. S. Department of the Army, etc., (Fort Wainwright), *supra*.

^{46/} For the reasons stated above, I recommend that the 19(a) (5) allegation be dismissed.

As to both meetings of May 9 and May 14, the fact that a Union representative was not requested by Mrs. Kravitz is immaterial to a finding of violation of Section 19(a) (1) and (6) of the Order with regard to the Activity's failure to afford the Union an opportunity to attend the meetings. Section 10(e) of the Order provides specifically that a labor organization shall be given the opportunity to be represented at such formal discussions. This is a right granted to a labor organization under the Order by virtue of its function as the exclusive representative of all unit employees and does not depend upon a particular employee requesting its presence at such a meeting.

Remedy

Since the Union was not accorded an opportunity to be present at the meetings of May 9 and 14, 1973, it is impossible to ascertain what affect the Union's presence might have had on both Mr. Quig's decision to issue the letter of reprimand to Mrs. Kravitz and Mr. Williams' report of May 18, 1973. It is also impossible under such circumstances to ascertain what rights of unit employees might have been affected by the Activity's conducting such meetings in derogation of the Union's representational rights. Moreover, the restraining and coercive effects such conduct has on unit employees can best be dissipated by demonstrating to the employees that such past conduct in derogation of the Union's rights of representation will not be allowed to remain unremedied. Accordingly I shall recommend that, upon request of the Union, Mrs. Kravitz's letter of reprimand and Mr. Williams' response to her grievance be rescinded. If the Activity wishes to pursue these matters further they may proceed in accordance with the dictates of the Order.

Recommendation

Having found that Respondent in Case Nos. 32-3297(CA) and 32-3300 (CA) has engaged in certain conduct prohibited by Section 19(a) (1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is design to effectuate the policies of the Order. I also recommend that the Section 19(a) (5) allegation and the independent Section 19(a) (1) allegation, as hereinbefore set forth, be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Local 1340, National Federation of Federal Employees, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:


(a) Notify Local 1340, National Federation of Federal Employees, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, of other matters affecting general working conditions of employees in the unit.

(b) Upon request of Local 1340, National Federation of Federal Employees, rescind the letter of reprimand given to Mrs. Dorothy Kravitz on May 10, 1973, and Executive Officer Harold Williams' report of May 18, 1973.

(c) Post at its facility at Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary

of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: June 13, 1974
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions concerning employees in the unit without giving Local 1340, National Federation of Federal Employees, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491, as amended.

WE WILL, upon request of Local 1340, National Federation of Federal Employees, recind the letter of reprimand given to Mrs. Dorothy Kravitz on May 10, 1973, and Executive Officer Harold Williams' report of May 18, 1973.

(Agency or Activity)

Dated _____ By _____
(Signature and 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 its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, United States Department of Labor, whose address is Room 3515, 1515 Broadway, New York, New York 10036.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES AIR FORCE,
WEBB AIR FORCE BASE, TEXAS
A/SLMR No. 439

This case involved an unfair labor practice complaint filed by American Federation of Government Employees (AFL-CIO), Local 1926 (Complainant) against the United States Air Force, Webb Air Force Base, Texas (Respondent), alleging that the Respondent violated Section 19(a) (1) and (2) of Executive Order 11491, as amended, by the issuing of a directive reducing the weekly hours of certain hourly-rated unrepresented employees while an organizing drive was being conducted by the Complainant among such employees. It was alleged further that the directive was issued for the purpose of discrediting the Complainant and to discourage membership by making it more difficult for prospective members to pay dues.

The Complainant is the exclusive representative of all civilian non-supervisory employees at the Base who are paid from appropriated funds, but it does not represent the non-appropriated fund employees in which the organizing campaign herein was conducted. The Complainant undertook an organizing campaign among the non-appropriated fund employees and, on May 15, 1973, a notice was posted on bulletin boards of an organizing meeting to be held on May 22. The prime organizers of the campaign were the maids who worked in the various quarters on the Base and were employed by the Billeting Fund.

For the seven months since October 1972, the Billeting Fund had operated at a deficit. About February 1973, the accounting department of the Respondent made suggestions that the Billeting Fund's problems arose mainly from its labor which was too costly, and it suggested that the labor cost be reduced. On May 1, 1973, a new Billeting Officer was appointed and he became Custodian of the Billeting Fund. The Custodian had been instructed by, among others, the Base Commander to develop a plan to make the Billeting Fund profitable and, pursuant to these instructions, he made a detailed study from which he concluded that the only way that a savings could be effected and a profit shown was by cutting labor (which meant reducing the maids to a 35-hour instead of a 40-hour week), eliminating the maid supervisor, discontinuing some maids' duties, increasing the charge for maid service, and increasing some of the charges to transients. All these recommendations were approved by the Base Commander on May 31, 1973, and he ordered that they be implemented as soon as possible and that adequate notice be given to the affected personnel. On June 1, 1973, the Custodian gave the maids notice of the reduction in hours effective July 1, 1973.

The instant complaint was precipitated by the reduction in weekly hours of the maids and the consequent reduction in their weekly earnings.

Such conduct was alleged to have had a substantial effect on the campaign to organize the non-appropriated fund employees, with some of the maids construing the reduction in hours as retaliation by the Respondent for their organizing efforts.

In his decision, the Administrative Law Judge concluded that there was no evidence of anti-union animus by the Respondent. Thus, he found that the Custodian believed that the plan he had developed was the best way to cut the operating deficits of the Billeting Fund and, to show a profit as he had been instructed to do, and that the Custodian did not know that the organizing effort was taking place at the time when he was working on the plan. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the case, and noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,
WEBB AIR FORCE, TEXAS

Respondent

and

Case No. 63-4784(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFL-CIO), LOCAL 1926

Complainant

DECISION AND ORDER


On August 6, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-4784(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



.....
UNITED STATES AIR FORCE :
WEBB AIR FORCE BASE, TEXAS :
Respondent :
and :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES (AFL-CIO) LOCAL 1926 :
.....

Case No. 63-4784 (CA)

Appearances:

Peter Evans
National Representative, AFGE
4347 South Hampton Road
Dallas, Texas 75232

Jose A. Perez
President, Local 1926
909 South Runnels Street
Big Spring, Texas 79720

For the Complainant

Captain Donald L. Schwendiman
Captain Donald J. Ellis
78th Flying Training Wing
Office of the Staff Judge Advocate
Webb Air Force Base, Texas 79720

For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated November 28, 1973 and filed November 29, 1973. The complaint alleged a violation by the Respondent of Sections 19(a)(1) and (2) of the Executive Order on or about June 1, 1973. The violation was alleged to consist of an authorized representative of the Respondent issuing a directive reducing the weekly hours of certain hourly-rated employees (and hence their weekly earnings) while an organizing drive was being conducted by Complainant among those employees (theretofore unrepresented). It was alleged that the directive was issued for the purpose of discrediting the Complainant and to discourage membership in the Complainant by making it more difficult for prospective members to pay dues.

The Area Administrator investigated the complaint and reported to the Assistant Regional Director. Pursuant to a Notice of Hearing issued by the Assistant Regional Director dated February 27, 1974, amended April 5, 1974, hearings were held on May 7, 1974 in Big Spring, Texas. The Complainant was represented by a National Representative and by the President of Local 1926. The Respondent was represented by two attorneys who were officers in the Staff Judge Advocate of Respondent.

At the conclusion of the hearing the time for filing briefs was extended to June 3, 1974. Neither party filed a brief or requested a further extension of time.

Facts

The Complainant is the exclusively recognized representative of all civilian non-supervisory employees at Webb Air Force Base who are paid from appropriated funds. There are about

85 employees paid from non-appropriated funds. They do not have a representative. About fifteen of them are maids in the bachelor enlisted quarters, bachelor non-commissioned officers quarters, bachelor officers quarters, and visitors quarters. At the time of the alleged unfair labor practice there were about thirteen maids.

In late March 1973 the Complainant undertook an organizing campaign among the non-appropriated fund employees. On May 15 a notice was posted on appropriate bulletin boards of an organizing meeting to be held May 22. Some employees had signed authorization cards between the time the organizing campaign began and May 22, and some signed at the May 22 meeting. The principal organizers, other than the officers of the Local, were the maids.

The quarters where the maids were employed were operated by a separate non-appropriated fund known as the Billeting Fund. It had about sixteen employees, three janitors and about thirteen maids. It received its income from billeting charges and a separate charge for optional maid service for permanent residents. Beginning with October 1972 the Billeting Fund operated at a deficit for seven consecutive months. Beginning in February, 1973 the accounting department of Respondent made suggestions that labor costs be somehow reduced. Labor costs were about 85% of the Fund's expense.

On May 1, 1973 John D. Hill, Jr. became the Billeting Officer and on June 1, 1973 he became also the custodian of the Billeting Fund. Prior to coming to Webb Air Force Base he had been employed in similar work at another Air Force base. Upon entering his duties with the Respondent he was informed of the status of the Billeting Fund and was told by several officers, including the Base Commander, to work up a plan to make the Billeting Fund profitable.

Hill made a detailed study and on May 24, 1973 submitted a detailed plan to the Base Commander. It included the elimination of a civilian maid supervisor paid from the Billeting Fund and the substitution of an officer as supervisor; the reduction of the maids' work week to not more than 35 hours; the discontinuance of some maid duties; increases in the charge for maid service; and an increase in some charges to

transients. The Base Commander approved all the recommendations on May 31, 1973 and ordered that all necessary steps be taken to put them in effect as soon as possible and that adequate notice be given to the personnel to be affected.

On June 1, 1973, the day after the Base Commander's approval and direction, Mr. Hill gave individual notice to each maid that effective July 1, 1974 their working hours would be changed from eight hours per day to seven hours per day five days per week. ^{1/} In addition, the afternoon fifteen-minute coffee break was eliminated. Some of the recommendations required the approval of the Billeting Fund Council which was composed primarily of representatives of the residents of the quarters involved. They met on June 6 and approved ten of Mr. Hill's recommendations three of which affected the maids.

After July 1, 1973 the Billeting Fund operated at a profit. Three part-time additional maids were employed to work on weekends and such other days as they might be needed. Since July 1, 1973 the only maids added by the Billeting Fund were hired to replace maids who quit and to perform a function formerly financed with appropriated funds that was transferred to the Billeting Fund.

The reduction in weekly hours of the maids and the consequent reduction in weekly earnings had a chilling effect on the campaign to organize the non-appropriated fund employees. The maids were the most interested of the non-appropriated fund employees in the organizing effort. For the most part they were of meagre education and English was not their native tongue. Some of them construed their reduction in hours as retaliation by the Respondent for their organizing efforts (although only two or three of them were active), and some felt that with the reduction in earnings they could not afford to pay union dues.

At the time Mr. Hill worked on and prepared his plan to convert the Billeting Fund from a deficit operation to a profitable operation he did not know of the organizing drive

^{1/} The Air Force Manual provides that a regular full time employee is one with no foreseen termination date within a year and with a regular tour of duty of at least 35 hours per week.

of the Complainant. He testified, and I credit his testimony, that before he held supervisory positions he belonged to two unions and believed in the desirability of unions. The Chairman of the Billeting Fund Council that approved the reduction in the weekly hours of the maids and the reduction in their duties did not know of the organizing efforts until a month after the Council's actions.

There was no evidence that the reduction in hours was made for the purpose of discrediting the Complainant or in fact discredited the Complainant; on the contrary, after the reduction the maids believed that unionization was even more desirable than before the reduction. But after June 1, 1973, the day the maids received notice of the reduction in hours effective a month later, organizing efforts ceased because the maids were fearful that the reduction was in retaliation for the organizing effort and to make the payment of dues more cumbersome. At the time the hourly wage of the maids, which varied with length of tenure, averaged \$1.68. In April 1974 the maids were given an increase of 26 cents per hour retroactive to September 1973. In May 1973 union dues were \$3.50 per month. Shortly thereafter they were raised to \$4.00 per month.

There was no evidence that the hours or earnings of any non-appropriated fund employees other than the maids were reduced. Only the maids and the three janitors were under the jurisdiction of Mr. Hill.

Discussion and Conclusions

A reduction in hours and consequent reduction in earnings during an organizing effort could foreseeably have a chilling effect on the organizing effort. Thus, such action, standing by itself, could be found to constitute interference with the right conferred on employees by the first sentence of Section 1 of Executive Order 11491 and thus a violation of Section 19 (a)(1). Similarly, where such reduction is made only in the hours of that group of the employees being organized among which were the employees more active in the organizing effort such fact, standing by itself, could be found to constitute

a violation of Section 19(a)(2) by discouraging membership by discrimination in regard to a condition of employment.

But when, as here, the evidence is overwhelming that the action was taken out of economic necessity and that the employer official who worked out the plan did not even know that the organizing effort was taking place, to find a violation of the Executive Order would be unrealistic. Cf. National Lab. Rel. Bd. v. Great Dane Trailers, 388 U. S. 26, 87 S. Ct. 1792 (1967).

So far as the record shows, it was only the Billeting Fund that was in economic difficulty. Hill had jurisdiction only over the non-appropriated fund employees paid from the Billeting Fund. Except for the three janitors, the maids were the only employees paid from the Billeting Fund. The suggestions that economies in salaries paid from that Fund be made began before the organizing effort was commenced. Payroll constituted about 85% of the expenses of the Billeting Fund; there was no room for significant economies elsewhere.

The Complainant already represented the civilian non-supervisory employees paid with appropriated funds, and there is no indication that relations between Complainant and Respondent were anything but completely harmonious. There was no evidence of anti-union animus. Improper motivation has not been shown. Although there was argument, and perhaps what could be considered evidence, that the economies could have been effectuated without reducing weekly hours and earnings, I conclude that when Mr. Hill was working out the plan, which was adopted, he sincerely believed it was the best plan to end the persistent operating deficits of the Billeting Fund. Even if we assume, as the Complainant argued, that his judgment was mistaken, that would not constitute a violation of the Executive Order so long as it was sincere. I have no doubt of its sincerity.

The complaint alleges that the reduction in hours was for the purpose of discrediting the Complainant and to discourage membership in the Complainant. The evidence falls

short of sustaining the allegation by the burden of proof required by Section 203.14 of the Regulations. Indeed, the preponderance of the evidence is decidedly to the contrary.

Recommendation

I recommend that the complaint be dismissed.



MILTON KRAMER
Administrative Law Judge

DATED: August 6, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES NAVAL ORDNANCE STATION,
UNITED STATES DEPARTMENT OF THE NAVY,
DEPARTMENT OF DEFENSE,
LOUISVILLE, KENTUCKY
A/SLMR No. 440

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES NAVAL ORDNANCE STATION,
UNITED STATES DEPARTMENT OF THE NAVY,
DEPARTMENT OF DEFENSE,
LOUISVILLE, KENTUCKY

Respondent

and

Case No. 41-3408(CA)

This case involved an unfair labor practice complaint filed by Local Lodge 830 of the International Association of Machinists and Aerospace Workers, AFL-CIO (Complainant), against the Naval Ordnance Station, Louisville, Kentucky (Respondent). It was alleged that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by the actions of one of its supervisors in allegedly tearing up an insert to the negotiated agreement and stating that the agreement was "no good."

LOCAL LODGE 830 OF THE
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

Complainant

The evidence revealed that two individuals who were employed in the Respondent's Print Shop were directed to work in the Print Shop's bindery section on a temporary basis. The two employees took the position that the negotiated agreement prohibited such temporary assignments, and showed the Print Shop supervisor an insert to the agreement which was then being printed and bound in the Print Shop. During the ensuing conversation the supervisor tore the insert in half.

DECISION AND ORDER

On July 31, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

Based upon his credibility resolutions and the established Print Shop custom of destroying marked documents, the Administrative Law Judge concluded that the tearing of the marked agreement insert did not constitute a violation of Section 19(a)(1) of the Order. In this regard, he noted that the supervisor made no special show or display of tearing the insert, agreed with the two employees that they could consult with the Complainant since they disagreed with him, and stated that he would review their job description to see if they could get credit for their assignment to the bindery section. The Administrative Law Judge further concluded that the supervisor did not state that the agreement was "no good," but, rather, in response to a question advised the employees that he did not feel the agreement was relevant in that situation. The Administrative Law Judge also concluded that the record did not establish that the Respondent had engaged in conduct which violated Section 19(a)(2) and (6) of the Order. Accordingly, he recommended that the complaint be dismissed in its entirety.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-3408(CA) be, and it hereby is, dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, and noting that no exceptions were filed the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed in its entirety.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



REPORT AND RECOMMENDATIONS

Statement of the Case

.....
In the Matter of

UNITED STATES NAVAL ORDNANCE STATION
UNITED STATES DEPARTMENT OF NAVY
DEPARTMENT OF DEFENSE
LOUISVILLE, KENTUCKY

Respondent

and

LOCAL LODGE 830 OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Complainant
.....

Case No. 41-3408 (CA)

Edward Borda, Esq.
Navy Labor Relations Advisor
Department of the Navy
Office of Civilian Manpower Management
Washington, D.C. 20390

For the Respondent

Lewis S. Schmidt
Grand Lodge Representative
International Association of Machinists
and Aerospace Workers
AFL-CIO
6500 Pearl Road, Suite 200
Cleveland, Ohio 44130

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

Pursuant to a Complaint filed on August 20, 1973, Under Executive Order 11491, as amended (herein called the Order) by Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter called the Complainant or the Union) against United States Naval Ordnance Station, United States Department of Navy, Department of Defense, Louisville, Kentucky (hereinafter called the Activity or Respondent) a Notice of Hearing on Complaint was issued by the Assistant Regional Director for labor-Management Services for the Atlanta Region on January 7, 1974.

A hearing was held in this matter before the undersigned on March 12, 1974 in Louisville, Kentucky. All parties were represented and afforded a full opportunity to be heard and to present witnesses and to introduce other relevant evidence on the issues involved. Upon the conclusion of the taking of testimony, both parties were given an opportunity to present oral arguments and to file briefs. 1/

Upon the entire record herein, including the relevant evidence adduced at the hearing and my observation of the witnesses and their demeanor, I make the following findings, conclusions, and recommendations.

Findings of Fact

At all times material herein the Union and the Activity have been parties to a collective bargaining agreement covering certain civilian employees at the Activity, including Robert Wood and Paul Begley.

On June 5, 1973, Mr. Wood and Mr. Begley were employed as wrappers in the mail section of the Print Shop. Also part of the Print Shop located adjacent to the mail section is the bindery section. On June 5 Mr. Moorman, leader bindery worker, called to Mr. Wood and Mr. Begley to ask them to work in the bindery section because the bindery section had a lot of work. Mr. Begley went over to Mr. Moorman with a four page insert containing Article 15 of the collective bargaining agreement. Section 7 of that Article had been underlined in red by Mr. Begley. 2/ Mr. Begley handed the contract insert to Mr. Moorman and said that he did not believe Mr. Moorman could assign them to the bindery section. Mr. Moorman stated that he could.

1/ The Activity filed a brief on April 15, 1973. The Union filed no brief.

2/ Section 7 of Article 15 states:

Mr. Moorman saw Mr. Maurice Cope, the Print Shop Supervisor, standing nearby. He went over to Mr. Cope, handed him the contract insert, stating that Mr. Begley had given it to him. Mr. Moorman advised Mr. Cope that Mr. Wood and Mr. Begley did not want to assist in the bindery section. Mr. Cope followed by Mr. Moorman walked over to where Mr. Begley was standing. Mr. Wood also walked over.

As to the subsequent conversation there is some difference between the versions of the various witnesses as to what precisely occurred and was said.

Mr. Wood testified that in response to his question Mr. Cope replied that he could move them around anywhere that he wanted without a detail. Mr. Wood replied that he thought a person was suppose to have a detail 3/ for 30 days. Mr. Wood then testified that he then asked Mr. Cope "...you mean the Union contract isn't any good..." and Mr. Cope replied "No" and then tore up the pages of the contract that he held. 4/ Mr. Wood further testified that there then was some general discussion during which he said something about an impending big layoff and that these employees would probably

Footnote 2/ continued

"The Employer agrees to compensate employees on the basis of the highest level of duties performed for a representative period of time. In this regard ungraded unit employees who are unassigned to and perform a majority of their duties above the level of their rating for periods of ninety(90) days or more, or where it can reasonably be determined in advance that such assignments will be made for periods in excess of ninety(90) days, such employees shall be temporarily promoted to the higher level position no later than the next pay period, provided such employees meet the minimum requirements for promotion. It is further agreed that the Employer will refrain from rotating higher level duties among employees to avoid compensating employees at the higher level.

3/ By "detail" the employees were apparently referring to some formal written action.

4/ Mr. Cope retained possession of the torn pages.

have to work almost any place before that problem was over. Mr. Cope further allegedly stated that Mr. Wood would probably be safe because of his long government service. 5/ Mr. Cope then left the area.

Mr. Wood testified that Mr. Cope was perturbed, although he did not swear or shout. 6/ Mr. Wood at first characterized Mr. Cope as angry and then modified his observation characterizing it only as perturbed. The main objection that Mr. Wood and Mr. Begley had to working in the bindery area was that it was a higher paying job and when they worked at it they did not receive the higher pay and it was not recorded on their records that they had performed work at the higher classification. They felt this recording of this work was important if they applied for higher paying positions. This entire conversation lasted not more than 5 minutes.

In the area of the conversation 7/ there were many copies of the four page contract insert that Mr. Begley had given to Mr. Moorman. These pages were being inserted in the back of the contract which was already bound. 8/

Mr. Begley substantially corroborated Mr. Wood's version except he testified that in reply to Mr. Wood's inquiry, Mr. Cope stated that wasn't the way he read the clause of the contract, ripped the insert in half and said that this thing is "no damn good" and that he had been through it before. Further, with respect to the layoff he raised this in the context that he was asking for employee cooperation so it could be avoided. Mr. Begley in addition testified that Mr. Cope was mad.

5/ Mr. Begley had substantially less service than Mr. Wood

6/ According to Mr. Wood, Mr. Cope's voice was somewhat raised.

7/ Within 10 or 15 feet.

8/ There were some other employees in the general area, but the record failed to establish, especially in the view of the fact that the employees were some distance away and a collating machine and printing machine were operating and making substantial noise, that these other employees overheard what was said.

Mr. Cope testified that when he approached the employees they advised him that according to Section 7 of Article they couldn't be moved. Mr. Cope advised the employees that he needed their help on a rush job. He tried to appeal to them for help. Mr. Begley stated, however, that according to the contract they couldn't be moved. Mr. Cope replied that this Article didn't pertain to this situation." and testified that he probably said he could move them for a period of 29 days. Mr. Cope testified that he thought Mr. Begley might have said that in other words this particular Article doesn't mean anything. Mr. Cope denied having said that either the contract or the Article was no good. Further, although Mr. Cope denies having mentioned the word "layoff," he testified that in connection to asking the employees to help out and work where needed, he might have advised the two employees that he was trying to scrape up the money to pay salaries for next year and that the more time he could spend devoted to that objective, the better the chance of obtaining the necessary funds. He further testified that he might have said that he would rather not lose anybody, and that he would rather see everybody gainfully employed.

Mr. Cope testified that near the close of the conversation, which lasted only about 5 minutes, he tore the four page contract insert in half because it was marked and this was the custom in the print shop when some piece or page of printing was disfigured. Mr. Wood and Mr. Begley then allegedly advised him that they would take it up with the Union. He advised them that that was their prerogative. Mr. Cope testified that the two employees did say that they objected to being moved to high paying jobs because they were not getting credit for that time and that he advised them that he would review the job descriptions and, if necessary, rewrite them to make sure that the employees received credit for the time they spent.

In fact, Mr. Cope testified he reviewed and rewrote the job descriptions immediately, met with the two employees and a Union representative, and discussed the new job descriptions.

In late May Mr. Cope advised the entire staff that there had been a budget cut and that he was trying to raise funds in order to keep everyone gainfully employed.

Mr. Moorman testified that he was standing behind Mr. Cope during the conversation, wasn't really paying attention, and didn't hear most of what was said.

Although the versions seem substantially different, in fact, there are only two main areas of difference that are relevant, and they are not to great.

It is found that Mr. Cope did not say that either the contract or the Article was no good but rather, I credit Mr. Wood and Mr. Cope that Mr. Wood, in the context of discussing Mr. Cope's right to move employees, stated or asked something to the effect of whether Mr. Cope meant that the contract wasn't any good and Mr. Cope indicated agreement by saying that it wasn't or it didn't pertain to that situation.^{9/}

It is found, as testified by Mr. Wood and Mr. Begley that Mr. Cope mentioned a possible layoff, and that it would probably not affect Mr. Wood. However it is further found as Mr. Cope testified, that he was seeking the cooperation and assistance of these employees and was advising and reminding them of the budget cut, the financial problems and that he would rather see everyone gainfully employed. It is found that Mr. Cope did use the word "layoff;" although he denies it his admitted statements are tantamount to advising the employees of a possibility of a layoff and the reasons therefore.

Conclusions of Law

In the complaint in this case the Union alleges that the Activity violated Sections 19(a)(1), (2), and (6) of the Order based on the facts that on June 5 Mr. Cope "tore up a labor contract in the presence of approximately fifteen (15) bargaining unit employees during a discussion about an alleged contract violation and emphatically informed the employees that the contract was no good."

A. Alleged Violation of Section 19(a)(1) of the Order

Section 19(a)(1) of the Order makes it an unfair labor practice for an Activity to "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order..." The issue presented then is whether the statements and conduct of Mr. Cope on June 5 interfered with, restrained or coerced employees in the exercise of their protected rights.

^{9/} It is found that this difference in answers is immaterial and mean virtually the same.

The Complainant alleges that Mr. Cope's statements were made in the presence of fifteen employees. Although the record establishes that a number of other employees were in the work area, because of the noise and distances involved, it does not establish that they were aware of or should have been aware of what Mr. Cope was saying and doing. The record does establish, however, that Mr. Wood, Mr. Begley and Mr. Moorman, who were present at the conversation, were employees in the collective bargaining unit represented by the Union. It is also clear that Mr. Wood and Mr. Begley were engaging in activity protected by the Order when they brought to Mr. Cope's attention their contention that the attempt to move them to the bindery section would violate the collective bargaining agreement. This attempt on the part of Mr. Wood and Mr. Begley to invoke those contract rights secured by the Union, at least as they interpreted them, is one of the most basic activities that the Order is designed to secure and protect.

Finally then it must be determined whether Mr. Cope's statements and conduct would foreseeably have the effect of interfering with, restraining, and coercing these employees in exercising their protected rights. As has been found above while discussing Mr. Cope's position that he could, despite Article 15 Section 7 of the contract, assign the two employees to the bindery section, Mr. Wood commented, or asked, if that meant that the contract or clause was no good or didn't mean anything. In the context of that discussion and Mr. Cope's position that Section 7 was irrelevant, Mr. Cope replied that it wasn't. In these circumstances, and clearly in reply to Mr. Wood, who might have used an unfortunate phrase, Mr. Cope was merely advising the employees that he interpreted the contract differently than they did and that the specific clause upon which they were relying, was not applicable to that situation. In response to Mr. Wood's question, Mr. Cope was not generally saying the contract was no good or generally derogating the contract and the Union, but rather he was stating that in Mr. Wood's terms, the clause wasn't "any good" in so far as the employees contended it prevented them from being shifted; he, in context, was clearly advising them that he did not feel the contract clause was relevant to that dispute and did not prevent him from moving the employees.

It is concluded that when a supervisor merely advises employees, at their request, of his interpretation of a contract clause, absent any promises of benefits or threats of retaliation, he does not violate Section 19(a)(1) of the Order.

The record establishes that Mr. Cope tore up Mr. Begley's contract insert towards the close of their discussion. The record further indicates that while Mr. Cope was advised by Mr. Moorman that Mr. Begley had given Mr. Moorman the contract insert, Mr. Cope was not advised that it was Mr. Begley's personal copy. Mr. Cope stated he tore it up because it was marked there were many copies of the same insert nearby being worked on, and it was a habit or custom in the printing room to destroy marked documents. Mr. Cope's motivation in tearing up the contract is irrelevant, if such action would foreseeably have the effect of interfering with employee rights, unless there were some overriding business consideration.

In all the circumstances here present it could hardly be concluded that the tearing up of the contract constituted conduct sufficiently serious to constitute a violation of Section 19(a)(1) of the Order. 10/ In this regard it is noted that apparently Mr. Cope made no special show or display when he tore up the contract insert; he agreed with the employees that they could consult with the Union since they disagreed with him; and that he would review their job descriptions to see if they could get credit for the assignment to the bindery section. 11/

With respect to the mention of "layoff" this was in the context of asking employees' cooperation in the work assignment because the Activity had experienced a budget cut and Mr. Cope was trying to raise additional funds. This had been raised during the latter part of May with the entire staff and he was again, in these circumstances, seeking the cooperation of employees so that he could spend time seeking additional funds. The record does not establish that he threatened them with a layoff because they were engaging in any protected activity, but merely, was seeking cooperation in light of these financial difficulties. Again, rather than threatening them for engaging in protected activity, he advised them that he would review their complaint of not receiving credit for the work assignment, and see what could be done.

In light of all of the foregoing, and noting there was no allegations of Union animus on the part of the Activity, it is concluded that the Activity did not engage in conduct which violated Section 19(a)(1) of the Order.

10/ This does not mean that in all cases the tearing up of a contract, or part of a contract, would not violate the Order.

11/ In fact the employees did consult the Union and subsequently met with the Union representative and Mr. Cope.

B. Alleged Violation of Section 19(a)(2) of the Order.

Section 19(a)(2) of the Order provides that it is an unfair labor practice for an Activity to "encourage or discourage membership in a labor organization by discriminating in regard to hiring, tenure, promotion or other conditions of employment."

The record establishes that the shifting of Mr. Begley and Mr. Wood to help out in the bindery section was the custom and practice and had occurred on many occasions prior to June 5. The record totally fails to establish that they were, on June 5, moved to the bindery section because of their Union membership ^{12/} or because they engaged in any other activity protected by the Order. In fact the only other possible protected or Union activity that they engaged in, according to the record, was the attempt to enforce the contract in such a way as to prevent their assignment to the bindery section and they engaged in that conduct only after they had been assigned to the bindery section by Mr. Moorman. In such circumstances it can be hardly found that they were so assigned to the bindery section because they engaged in conduct subsequent to the assignment. The record does not establish any other action taken by the activity which could be considered "discrimination" within the meaning of Section 19(a)(2) of the Order.

In these circumstances it is concluded that the record does not establish that the Activity engaged in conduct which violated Section 19(a)(2) of the Order.

C. Alleged Violation of Section 19(a)(6) of the Order:

Section 19(a)(6) of the Order provides that is an unfair labor practice for an Activity to "refuse to consult, confer, or negotiate with a labor organization as required by this Order..."

The record herein does not contain any evidence to the effect that Mr. Cope at any time refused any request by any Union representative ^{13/} to consult, confer or negotiate about any matter. In fact he made it quite clear to Mr. Wood and Mr. Begley that they were free to consult a Union representation and he did subsequently meet with the Union representative and the two employees to discuss the work assignment, problem and revised job description.

^{12/} The record fails to establish that Mr. Wood and Mr. Begley were actually Union members or that the Activity knew that they were.

^{13/} There is no evidence in the record that establishes that either Mr. Begley or Mr. Wood were Union representatives.

The only possible violation of the duty to negotiate ^{14/} might be a contention that the Activity unilaterally changed working conditions by assigning the two employees to the bindery section. However, as discussed above the record establishes that the past practice and custom was for these two employees, quite often, to be assigned to the bindery section when needed. Further the Union submitted no evidence, other than the general position of the two employees, that in fact Mr. Cope's position that he could assign the employees, violated Article 15, Section 7 of the Contract. In any event, where the existing practice was to permit such assignments, this would at most constitute a breach of the collective bargaining agreement involving an interpretation of the contract, but not a refusal to bargain. In fact Mr. Cope indicated he was willing to, and did, upon request, meet with the Union representative concerning this matter.

The record therefore does not establish that the Activity in any way refused to negotiate in violation of Section 19(a)(6) of the Order.

In view of all of the foregoing, I conclude that the record herein does not establish that the Respondent Activity violated Section 19(a)(1), (2) and (6) of the Order.

Recommendation

Upon the basis of the above findings and conclusions, I recommend that the Complaint herein be dismissed.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: July 31, 1974
Washington, D.C.

^{14/} The position of the Union was not precisely set forth at the hearing and the Union filed no brief to clarify its contention.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NEW YORK ARMY AND AIR
 NATIONAL GUARD,
 ALBANY, NEW YORK
 A/SLMR No. 441

This case involved an unfair labor practice complaint filed by the New York State Council, Association of Civilian Technicians (Complainant) against the New York Army and Air National Guard, Albany, New York (Respondent). The complaint alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by unilaterally changing the working conditions of certain unit employees through the issuance of instructions which called for the strict enforcement of National Guard Bureau regulations which require civilian technicians in the excepted service to wear military uniforms when performing their technician functions and which, as a corollary, are interpreted as requiring that the technicians use military forms of address even when in their civilian job status, although by past practice many employees neither wore uniforms nor used military forms of address. The evidence revealed that these changes were implemented at a time when the parties were negotiating for a collective bargaining agreement.

After some preliminaries, the parties, in March 1971, began negotiating their first collective bargaining agreement. Soon thereafter, it became apparent that they were diametrically opposed regarding the above-noted issues. National Guard Bureau Regulation (NGR) 690-2 requires that all civilian technicians in the excepted service wear military uniforms while performing in their civilian job status. The regulation also had been interpreted as requiring that the technicians use military forms of address in their formal dealings when in their civilian employment status. However, NGR 690-2 gave the chief officer of each of the state National Guards the prerogative of authorizing other than military attire for the technicians when he deemed it appropriate. The Administrative Law Judge found, in this regard, that the Respondent tolerated extensive deviations from the regulatory requirement. In May 1971, the Respondent issued memoranda to some unit employees which reiterated the requirement that military forms of address be used in formal correspondence, thereby effectively changing the working conditions of unit employees who had not used rank. Sporadic negotiations continued for over a year. On May 22, 1972, the Respondent submitted a proposal that stated that as of September 1, 1972, the regulation regarding uniform wearing would be fully implemented throughout the Activity. At this stage of the negotiations, the Complainant was submitting proposals framed in terms of the exceptions clause of the regulation. On June 2, 1972, the Respondent stated that exceptions to the regulation would be considered only if it could be shown that a job could not be done in uniform or that to wear the uniform would be detrimental to the safety or health of an employee.

On August 5, 1972, the Respondent issued a pamphlet to the unit employees notifying them of its intention to implement fully the uniform wearing requirements of the regulation as of September 5, 1972.

The Administrative Law Judge found that the Respondent had the obligation to meet and confer in good faith with the Complainant regarding those exceptions to the requirements of NGR 690-2 which are within the authority of the chief officer of each state (in this case, the Chief of Staff to the Governor in New York) to determine. He found that the May 1971 memoranda regarding the use of military forms of address, issued to some of the Respondent's employees, constituted a unilateral change in the working conditions of certain unit employees. The Assistant Secretary agreed with the Administrative Law Judge in this regard finding that the Respondent's failure to notify the Complainant and afford it the opportunity to meet and confer regarding the change in policy with respect to the use of military titles constituted a violation of Section 19(a)(6). In the Assistant Secretary's view, such unilateral conduct by the Respondent, in effect, constituted a by-pass of the exclusive bargaining representative, undermined its exclusive representative status, and was clearly inconsistent with the Respondent's obligations set forth in Section 11(a) of the Order. Further, the Assistant Secretary found that such conduct by the Respondent was in violation of Section 19(a)(1) of the Order as it necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order.

The Administrative Law Judge further found that the May 22, 1972, proposal made by the Respondent with respect to its intention to implement the regulation regarding uniform wearing constituted appropriate notice of that change in policy which it formally announced to the employees on August 5, 1972. In his view, by negotiating for over a year regarding the issue of uniform wearing, the Respondent met its obligation to consult with the Complainant on this issue. He concluded, therefore, that the evidence failed to establish that the Respondent violated the Order by changing its policy through the issuance of the August 5, 1972, pamphlet. He also found that the Respondent had not violated the Order by failing to provide its chief negotiator with sufficient bargaining authority. He noted in this regard that the Complainant had made proposals which went to the question of the Respondent's authority under the Bureau's regulations and, therefore, it was not improper for the Respondent's negotiators to seek time to evaluate and discuss such broad proposals. He also found that the Respondent's May 22, 1972, proposal, which contemplated the establishment of a study group to evaluate possible exceptions to the uniform wearing regulation while leaving the final decision with the Chief of Staff, was a proposal which the Complainant was free to reject, and that, standing alone, it was not violative of the Order.

The Administrative Law Judge found, however, that the Respondent failed to fulfill its obligation to meet and confer in good faith when it established unilateral criteria for the discussion of exceptions to the uniform wearing regulation which went beyond the limits inherent in the

regulation. While the Respondent could ultimately refuse to accede to the Complainant's position on exceptions to the uniform requirement and the criteria therefor, in the Administrative Law Judge's view, it could not unilaterally limit discussion to its own criteria for exceptions. The Assistant Secretary adopted the finding of violation of Section 19(a) (1) and (6) in this regard by the Administrative Law Judge.

Based on the foregoing circumstances, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Executive Order and that it take certain affirmative actions consistent with his decision.

A/SLMR No. 441

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NEW YORK ARMY AND AIR
NATIONAL GUARD,
ALBANY, NEW YORK

Respondent

and

Case No. 35-1785(CA)

NEW YORK STATE COUNCIL,
ASSOCIATION OF CIVILIAN
TECHNICIANS, INC.

Complainant

DECISION AND ORDER

On March 22, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. The Administrative Law Judge also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, both parties filed exceptions and supporting briefs with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, including the exceptions and supporting briefs filed by both parties, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations. 1/

1/ The Administrative Law Judge recommended that the Respondent's motion to dismiss, based on the Complainant's alleged noncompliance with the pre-complaint charge requirements of the Assistant Secretary's Regulations, be denied on the grounds that, "When the alleged violations occurred the parties positions and dispositions were well-known to one another and it is obvious that ritualistic adherence to the Regulation requiring the filing of a formal written charge on the matter before filing a complaint would have been a futility and have served no useful purpose." While I agree with the Administrative Law Judge's recommendation in this regard that the motion to dismiss be denied, I do not adopt his rationale set forth above. Rather, I find that denial of the motion to dismiss is warranted based on the view that the Respondent failed to raise this matter in a timely fashion with the Area Administrator during the investigation period provided for in Section 203.5 of the Assistant Secretary's

(Continued)

The Administrative Law Judge found that, while the employees of the United States Property and Fiscal Office, Brooklyn, New York, and the Headquarters, 42nd Infantry Division, components of the Respondent, were required by regulation to use military titles in formal communications, the regulation was not strictly or uniformly enforced. In May 1971, the employees at these facilities were informed, by memoranda, that the regulation henceforth would be strictly enforced. The Administrative Law Judge found that, by virtue of an exceptions clause within the regulation which gave discretion to the chief officer of the Respondent to authorize modifications thereto, and the fact that an exception to the regulation at the facilities in question had been tacitly authorized since January 1, 1969, the Respondent was obliged to meet and confer with the Complainant, to the extent consonant with law and regulations, regarding any change in the enforcement of the requirement that employees use military titles. In this connection, the evidence established that the Respondent did not meet and confer with the Complainant prior to the issuance of the May 1971, memoranda announcing its intention to enforce strictly the above-mentioned regulation.

Under these circumstances, I find, in essential agreement with the Administrative Law Judge, that the Respondent's failure to notify the Complainant and afford it the opportunity to meet and confer regarding the change of policy with respect to the use of military titles constituted a violation of Section 19(a)(6) of the Order. Thus, in my view, such unilateral conduct by the Respondent, in effect, constituted a by-pass of the exclusive bargaining representative, undermined its exclusive representative status, and was clearly inconsistent with the Respondent's obligations set forth in Section 11(a) of the Order. ^{2/} Further, I find that such conduct by the Respondent necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order. Consequently, I conclude that the Respondent's improper conduct described above also violated Section 19(a)(1) of the Order.

THE REMEDY

Having found that the Respondent engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

1/ Regulations or with the Assistant Regional Director prior to the issuance of the Notice of Hearing in this case. Cf. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

2/ Cf. Veterans Administration, Wadsworth Hospital Center, Los Angeles, California, A/SLMR No. 388; Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301; and United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the New York Army and Air National Guard, Albany, New York, shall:

1. Cease and desist from:

(a) Failing to notify the New York State Council, Association of Civilian Technicians, or any other exclusive representative, concerning changes in the implementation of regulations which require some of its employees to use military forms of address, or other matters affecting the working conditions of employees in the unit, and affording such representative the opportunity to meet and confer in good faith on such matters to the extent consonant with law and regulations.

(b) Refusing to meet and confer in good faith with the New York State Council, Association of Civilian Technicians, or any other exclusive representative, with respect to exceptions to the requirement that uniforms will be worn by affected employees by limiting discussions to its unilaterally established criteria for such exceptions.

(c) Interfering with, restraining, or coercing its employees by failing to notify the New York State Council, Association of Civilian Technicians, or any other exclusive representative, concerning changes in the implementation of regulations which require some of its employees to use military forms of address, or other matters affecting the working conditions of employees in the unit, and affording such representative the opportunity to meet and confer in good faith on such matters to the extent consonant with law and regulations.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

(a) Notify the New York State Council, Association of Civilian Technicians, or any other exclusive representative, concerning changes in the implementation of regulations which require some of its employees to use military forms of address, or other matters affecting the working conditions of employees in the unit, and afford such representative the opportunity to meet and confer in good faith on such matters to the extent consonant with law and regulations.


(b) Upon request, meet and confer in good faith with the New York State Council, Association of Civilian Technicians, or any other exclusive representative, with respect to exceptions to the requirement that uniforms will be worn by affected employees without limiting discussions to its unilaterally established criteria for such exceptions.

(c) Post at the facilities of the New York Army and Air National Guard, State of New York, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chief of Staff to the Governor of New York State and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Chief of Staff shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(1) and (6) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 30, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT implement changes in the enforcement of regulations which require some of our employees to use military forms of address, or other matters affecting the working conditions of employees in the unit, without affording the New York State Council, Association of Civilian Technicians, or any other exclusive representative, prior notification of such changes, and affording such representative the opportunity to meet and confer in good faith on such matters to the extent consonant with law and regulations.

WE WILL NOT refuse to meet and confer in good faith with the New York State Council, Association of Civilian Technicians, or any other exclusive representative, with respect to exceptions to the requirement that uniforms will be worn by affected employees by limiting discussions to our unilaterally established criteria for such exceptions.

WE WILL NOT interfere with, restrain, or coerce our employees by failing to notify the New York State Council, Association of Civilian Technicians, or any other exclusive representative, concerning changes in the enforcement of regulations which require some of our employees to use military forms of address, or other matters affecting the working conditions of employees in the unit, and affording such representative the opportunity to meet and confer in good faith on such matters to the extent consonant with law and regulations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the New York State Council, Association of Civilian Technicians, or any other exclusive representative, of any intended change in the enforcement of regulations which require some of our employees to use military forms of address, or other matters affecting the working conditions of employees in the unit, and afford the New York State Council, Association of Civilian Technicians, or any other exclusive representative, the opportunity to meet and confer in good faith on such matters to the extent consonant with law and regulations.

WE WILL, upon request, meet and confer in good faith with the New York State Council, Association of Civilian Technicians, or any other exclusive representative, with respect to exceptions to the requirement that uniforms will be worn by affected employees without limiting discussion to our unilaterally established criteria for such exceptions.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



Dated _____ BY _____
(Signature and 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 with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor, whose address is: Suite 3515, 1515 Broadway, New York, New York 10036.

..... :
In the Matter of :
NEW YORK ARMY AND AIR NATIONAL GUARD :
Respondent :
and :
NEW YORK STATE COUNCIL, ASSOCIATION :
OF CIVILIAN TECHNICIANS, INC. :
Complainant :
..... :

Case No. 35-1785 (CA)

Noel J. Cipriano
Colonel, JAGC-Ret.
Legal Officer
Division of Military and Naval Affairs
Public Security Building
State Campus, Albany, New York
For the Respondent

Victor Alan Oliveri, Esquire
& Thomas H. Palmer, Esquire
786 Ellicott Square Building
Buffalo, New York 14203
For the Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

Preliminary Statement

This proceeding, heard in Albany, New York, on June 13, 14, and 15, and July 10 and 11, 1973, arises under Executive Order 11491, as amended, (hereinafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations, (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on March 2, 1973, with reference to an alleged violation of Section 19(a)(6) of the Order and on May 30, 1973, the hearing was ordered rescheduled by New York Regional Administrator Benjamin B. Naumoff.

On July 26, 1971, a complaint was filed by New York State Council, Association of Civilian Technicians, Inc., (hereinafter called Complainant or the Union) against New York Army and Air National Guard (hereinafter called Respondent or the Activity) alleging that during contract negotiations the Activity unilaterally required civilian technician employees at various of its facilities to use military titles on official correspondence and in business discussions, thereby violating Section 19(a)(6) of the Order. On August 22 1972, the Union amended the complaint by alleging that during contract negotiations Respondent further violated Section 19(a)(6) of the Order by unilaterally requiring National Guard members to wear military uniforms while employed as civilian technicians. Further, at the hearing, over objection of counsel for Respondent, I permitted the Union to amend the complaint to include an allegation of violation of Section 19(a)(1) of the Order relative to alleged Activity conduct at certain negotiating meetings.

During the hearing Respondent moved to dismiss the complaint contending that Complainant failed to state a claim upon which relief can be granted. Respondent argued that the matters giving rise to the complaint were non-negotiable and until the question of negotiability was ruled upon by the Federal Labor Relations Council through the procedures set forth in Section 11(c) of the Order, the complaint may not be adjudicated by the Assistant Secretary. Respondent also moved to dismiss the complaint alleging that no charge was filed before the complaint was filed in this matter as required by the Regulations and, accordingly, the complaint was not properly before the Assistant Secretary. Complainant opposed the motions to dismiss. At the hearing, I reserved ruling on the above motions.

For reasons which hereinafter will be set forth, I find that the complaint does state a claim which is litigable before the Assistant Secretary. As to the contention that the Union failed to follow appropriate complaint procedures as required by the Regulations, Respondent relies on Section 203.2(a) of the revised Regulations which requires, prior to filing a complaint, the filing of a written charge, etc., as well as an investigation by the parties and an attempt to informally resolve the matter.

The record reveals that Complainant notified Respondent, by letter dated 31 May 1971, 1/ that it was objecting to the matters which gave rise to its complaint of July 26, 1971, and specifically indicated that the letter constituted notification required by the Regulations. Further, while a written unfair labor practice charge was not filed prior to the filing of the amended complaint on August 22, 1972, it is apparent that the additional alleged violations contained therein occurred during contract negotiations between the parties and was orally protested during negotiations. The purpose of filing a written charge is to enable the parties to informally resolve the alleged unfair labor practice. 2/ When the alleged violations occurred the parties positions and dispositions were well known to one another and it is obvious that ritualistic adherence to the Regulation requiring the filing of a formal written charge on the matter before filing a complaint would have been a futility and have served no useful purpose. Accordingly, under the circumstances herein, I recommend that Respondent's motions to dismiss be denied.

At the hearing both parties were represented by counsel and had full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

Upon the entire record in this matter, and from my reading of the briefs and my observation of the witnesses and their demeanor, I make the following:

-
- 1/ Complainant Exhibit No. 5.
2/ Assistant Secretary Report No. 33.

Findings of Fact

I. Introduction

At all times since May 1970 Complainant has been the exclusive collective bargaining representative of the Activity's Army, Air and Air Defense National Guard technicians and employees in the United States Property and Fiscal Office (USP&FO) located in the State of New York, excluding all supervisors, management officials, employees engaged in personnel work other than clerical and guards. 3/ The collective bargaining unit totals approximately 1,800 employees and is comprised of approximately 900 Army National Guard technicians of which approximately 50 percent are employed as mechanics; 300 Army National Guard Air Defense technicians; and 600 Air National Guard technicians. At the time of the hearing herein no collectivizing bargaining agreement had been executed between the parties.

By statute effective January 1, 1969, former State employees serving in their respective National Guard units were converted to excepted Federal service employees. The statute also required employees entering the excepted service be members of the National Guard in order to retain employment as technicians with the Activity. A small number of the Activity's technicians were transferred to the Federal competitive service at this time.

The "Adjutant General" is the highest ranking officer and the commanding officer in most state's national guard units. However, in New York State, the "Chief of Staff to the Governor of New York" is the highest ranking officer and, as such, is responsible to the Governor for some purposes and is responsible to the National Guard Bureau of the Department of the Army and Air Force and the Department of Defense for other purposes.

II. Chronology of Events 4/

After the May 1970 recognition of the Union as the collective bargaining representative of unit employees, the parties met in November 1970 to discuss procedures for negotiating a collective bargaining agreement. Thereafter,

- 3/ For some time prior thereto Complainant was afforded formal recognition as collective bargaining representative of various of the Activity's technicians located in certain of the Activity's facilities within the State of New York.
- 4/ To a large extent the facts are not in dispute. While there was some disparity in the testimony of witnesses, it appears that, in the main, variances in testimony is the result of faulty recollection of events which occurred many months

contract proposals were exchanged between the parties in December of 1970. With regard to the wearing of military uniforms and the use of military rank or titles, the Union's proposal read:

"No military uniform to be worn. No military titles to be used during working hours."

The Activity's proposal in this regard stated:

"Employees in the excepted service shall wear the military uniform in accordance with the instructions of the Chief of Staff to the Governor" and "Employees in the excepted service shall be addressed by their military title."

The first negotiation session between the parties was held on March 19, 1971. 5/ Early in negotiations, perhaps at the second meeting on March 20, 1971, the proposals with regard to the wearing of uniforms and use of military titles were discussed. Both parties adamantly adhered to their initial written proposals on these issues but by mutual agreement decided to defer negotiations on them until after other less controversial proposals had been negotiated.

From the inception of negotiations the Activity relied upon existing National Guard regulations to support their position relative to their proposal on the wearing of uniforms and the use of military titles. Specifically the Activity relied upon National Guard regulations NGR 690-2, paragraph 2-5, to support its position. 6/ That regulation, effective March 1, 1970, provides:

"Wearing of the Uniform. Technicians in the excepted service will wear the military uniform appropriate to

Con't.

prior to the date of testimony rather than deliberate falsification of facts.

5/ The parties held approximately 19 negotiating sessions between March 19, 1971, and August 31, 1972.

6/ The applicable Air National Guard regulation is identical to NGR 690-2, paragraph 2-5.

their service and federally recognized grade when performing technician duties. When the uniform is deemed inappropriate for specific positions and functions, adjutants general may authorize other appropriate attire...."

The regulation governing the wearing of uniforms by technicians between January 1, 1969, and March 1, 1970, was identical to NGR 690-2, paragraph 2-5 as quoted above. The appropriate predecessor regulation covering the wearing of uniforms was in effect from 1964 to January 1, 1969, and provided:

"Army Air Defense technicians are required to wear authorized ARADCOM shoulder sleeve insignia and the uniform prescribed by the Defense Commander. All other technicians will wear the uniform prescribed by the State Adjutant General."

The Union relied upon past practice to support their position on their proposal relative to the wearing of uniforms and the use of military titles. The record reveals that the past practice with respect to the wearing of uniforms at all times relevant hereto was that while Army National Guard Air Defense technicians and Air National Guard technicians generally wore their uniforms while performing their technician duties, Army National Guard technicians generally did not. The record further reveals that with regard to the use of military titles in oral communications, the general practice varied widely depending upon the circumstances of the discussion, the rank of the individuals involved and the degree of the parties personal familiarity. Thus, technicians frequently were not required and indeed did not use rank or titles when discussing business matters with fellow technicians of the same rank or below. However, it was the usual practice to address a superior, especially an officer, by rank. Moreover, it is apparent that whether the uniform was worn during work hours affected whether or not titles were used during discussions. 7/

7/ Respondent takes the position that the use of military titles by technicians is controlled by military custom and practice and since uniforms were required to be worn, it follows that titles were to be used by technicians when performing on-the-job duties. However, it is acknowledged that 50 to 55 percent of the technicians (virtually all of the Army National Guard technicians) were out of uniform during the period from Union recognition to September 1972. While the Chief of Staff,

As negotiations proceeded the parties reached agreement on various items of discussion, deferring discussion on disputed provisions to future sessions. When the discussions touched the proposals relative to the wearing of uniforms and the use of titles, the Activity maintained its position that the Union's proposals were contrary to regulations, and the Union continued to support its proposals by relying on past practice. However, the parties did not engage in any in-depth discussion of these issues until the eight negotiating session which occurred on May 21, 1971.

Colonel McClure testified that in early May 1971 "it came to his attention" that for the entire length of the technician program, United States Property in Fiscal Office (USP&FO) personnel 8/ had not complied with what he believed to be standing policy and practice with regard to the use of military titles in correspondence and communications. Colonel McClure further testified that he had no indication that any other Activity personnel were not using military titles in correspondence and communications. After consultation with Major General Baker, Colonel McClure issued, on May 5, 1971, the following memorandum to Colonel Holsclaw, the Chief Executive Officer at the USP&FO:

Footnote con't.

Major General Baker and Colonel Charles J. McClure, Technician Personnel Officer and the Activity's chief negotiator, both testified that they presumed that technicians were using military titles while performing technician duties, nevertheless they both knew the extent of which technicians were out of uniform. Further, Major General Baker who became Chief of Staff in February 1971, acknowledged that it was reasonable to assume that where uniforms were not worn, people would be somewhat remiss in using military titles. Accordingly, under all circumstances, I find that in May 1971 the Activity was well aware that the prevailing practice with regard to the use of military titles varied widely as set forth above.

8/ The USP&FO is a facility of the Activity located in Brooklyn, New York, and employs approximately 100 unit technicians.

"1. Reference is made to our telephone conversation of 3 May 1971 regarding the use of military titles by technicians.

"2. The policy of DAMNA is that in all actions involving a member of the organized militia of the State of New York, the military title of the individual will be used.

"3. Therefore all actions or correspondence containing a reference to, or signature of, an excepted technician should indicate his military grade."

Colonel McClure's memorandum was apparently posted on the facility's bulletin board together with a memorandum from Colonel Holsclaw's office dated May 10, 1971, which stated that "military titles will be shown on all correspondence" and "all military personnel be addressed by rank" 9/ A similar memorandum dated May 11, 1971, from Colonel Gannon, Administrative Assistant, USP&FO to "All Level Supervisors" was also posted on the facility's bulletin board. That memorandum states as follows:

" A recent directive announced that all members of the New York Army National Guard employed as federal technicians would use their National Guard titles in correspondence and in business discussions.

"Attached hereto is a list of the individuals employed as technicians in the USP&FO-New York who are members of the NYARNG. The second column indicates the rank which will be shown on all correspondence. The third column indicates the manner in which these individuals will be addressed orally." 10/

9/ Complainant Exhibit No. 5.

10/ The attachment to Colonel Gannon's memorandum reveals, for example, that a Sergeant First Class would, in correspondence, be designated as "SFC" and be orally addressed as "Sergeant."

Thereafter the Activity's 42nd Infantry Division 11/ issued a "Weekly Bulletin" dated May 18, 1971, which announced inter alia,

"a. All members of the 42nd Infantry Division employed as federal technicians will use their National Guard military titles in all correspondence and business discussions, and

"b. When answering the telephone, technicians in addition to indicating the unit they represent will announce both their name and military rank."

The first negotiating meeting after the distribution of the above directives to the USP&FO and the 42nd Infantry Division occurred on May 21, 1971. At this meeting Frederick S. Tedesco, the Union's New York State Chairman, chief negotiator and a unit employee, charged the Activity with having changed its policy with regard to the use of rank by unit employees at the facilities in question. Chairman Tedesco objected to the Union receiving no advance notice of the alleged change in policy and contended that the change should not have been put into effect while the matter was being negotiated. The Activity took the position that the announcements did not constitute a change in policy but were merely a reiteration of existing policy and practice.

The evidence reveals that on April 1, 1966, a memorandum was sent to all USP&FO-New York personnel from Colonel Holsclaw relative to military correspondence originating within the office of USP&FO. That memorandum provides inter alia as follows:

"Officers and Warrant Officers currently members of the New York Army or Air National Guard will use their military rank. Non National Guard personnel will use, as appropriate, Mr., Mrs. or Miss. Enlisted personnel of the Army or Air National Guard personnel may use their military rank or the prefix of Mr., at their option. However, once selected, continuity of the prefix chosen should be maintained."

11/ While the 42nd Infantry Division is a separate facility it is located in the same general area as the USP&FO and the facilities are in close association with one another.

Other than as stated above, there existed no other specific regulation governing the use of military rank or titles by technicians at the USP&FO or the 42nd Infantry Division.

Based upon the record evidence I find that prior to the aforementioned directives distributed to technicians in May of 1971, the policy at the USP&FO with regard to the use of military titles in written correspondence provided technicians with an option as set forth in Colonel Holsclaw's memo of April 1, 1966. As to the use of military titles by technicians in oral communications, I find that at the USP&FO and the 42nd Infantry Division the prevailing practice varied from individual to individual and did not preclude technicians addressing one another without using rank or title while performing their civilian technician duties, at least as to conversations between technicians of similar rank and when technicians of a higher rank addressed technicians of a lower rank. 12/

The next negotiating session was conducted on June 2, 1971. By this time numerous contract proposals had been agreed to. However, the parties had not come to agreement on four issues: (1) wearing of uniforms; (2) use of military titles; (3) lower grade technicians training higher grade technicians; and (4) National Guard status of a technician on leaving the technician program. With regard to the issues of uniform and titles, the parties at the June 2 meeting adhered to their initial positions. The Activity interpreted NGR 690-2, paragraph 2-5 so as to render non-negotiable the Union's proposal since it would have the effect of taking all technicians out of uniform. It was the Activity's position that the regulation spoke for itself--that uniform wearing was required and exceptions could be granted only on the basis of inappropriateness. However, Respondent did not feel that any technician function or position was inappropriate. Rank was inherently tied to and followed the wearing of uniforms. The Union contended that their proposal was negotiable and based its position on past practice. Accordingly since both parties rigidly maintained their positions, the meeting adjourned without any agreement on the unresolved matters. The parties agreed that an impasse had been reached.

12/ Indeed, as stated above, the record clearly establishes that such practice was not limited to the USP&FO and the 42nd Infantry Division but rather extended to the entire Activity. However, the record does not contain sufficient evidence to reach a finding as to the practice of technicians with regard to the use of military titles in written communications either at the USP&FO or anywhere else within the Activity.

The next negotiating session occurred on September 2, 1971. At this meeting the parties positions still did not vary. However, the Activity suggested that the Union reword its proposal on uniforms and such proposal would be discussed with Major General Baker. By letter dated September 11, 1971, 13/ Chairman Tedesco informed Colonel McClure that although it was agreed at the September 2, 1971, negotiating session that the Union would submit an alternate proposal concerning the wearing of uniforms, since the Activity did not in any way alter its position from that previously stated, the Union's negotiating team decided not to submit a revised proposal but rather would "go to impasse" unless the Activity felt that further negotiations would be fruitful, or if it desired to submit their own modifications on any of the four points remaining in dispute. By letter dated September 24, 1971, Colonel McClure informed Chairman Tedesco inter alia:

"The Chief of Staff to the Governor does not consider that the wearing of the uniform is a negotiable matter and therefore, not an item for contract discussion. This, of course, would pertain also to the use of military rank....

"It is therefore proposed that the presently agreed upon articles and sections constitute the contract and that it be signed by Union and management as a final agreement."

On September 28, 1971, the Union sent a request to the Federal Service Impasses Panel asking it to consider the parties negotiation impasse. Before the Panel the Activity maintained that the Union's proposal that technicians not wear uniforms was not a negotiable matter referring to NGR 690-2. The Activity also argued that the Union's proposal that military titles not be used was also not negotiable, contending that since uniforms are to be worn by regulation, "it stands to reason" that military rank must also be used.

Before the Panel the Union contended that the wearing of uniforms was a negotiable matter pointing to the fact that originally the Activity made a counterproposal on the item. In addition, the Union represented that a contract had been signed by the State Adjutant General for the State of Illinois which contained a clause relating to the wearing of uniforms. That clause provided for the wearing of military uniforms and allowed for exceptions (a) on occasions when the Adjutant General deemed the wearing of a military uniform inappropriate and (b) in certain designated functional areas where the wearing of military uniforms or civilian attire was optional. Thereafter, by letter dated November 10, 1971, the Panel concluded that since the parties did not have the opportunity to consider the Illinois contract language, a re-evaluation

13/ Complainant Exhibit No. 5.

by the parties of their positions on the issues in light of such labor agreement could contribute to the resolution of the impasse. The Panel determined that negotiations should be resumed.

The parties returned to negotiations on November 23, 1971. At this time Vincent J. Paterno, National President of the Association of Civilian Technicians, entered negotiations. During this session the Union attempted to modify its original position on uniforms by offering an oral "exploratory" proposal dealing with technician's functions which might be excepted from the requirement that technicians wear uniforms, based upon the language of NGR 690-2. Other matters such as locker space, badges, civilian dress clothes and uniform allowances were also discussed. The Activity rejected the Union's proposal contending that the exceptions as defined by the Union would put virtually all technicians out of uniform. Toward the end of the meeting the parties discussed the possibility of subsequently reviewing each technician position regarding the wearing of the uniform. ^{14/} The Union was told by the Activity that there could be no negotiations which would result in all the technicians being taken out of uniform and the Union was encouraged to submit another proposal. Thereafter, in December 1971 the Union mailed the following proposal to the Activity:

"Uniforms"

"1. Army National Guard"

a. All technicians in the Army National Guard performing work of an Administrative nature will wear civilian clothing during their technician duty time. Such civilian clothing will be in good taste and will be neat and clean and will be appropriate to their job assignment and position.

b. All technicians in the Army National Guard assigned to shops, ATEP, OMS's, warehouses, who perform work of a nature other than Administrative will wear a standard work outfit mutually agreed upon by management and the union, but bearing no military rank or insignia.

"2. Air Defense"

a. All Air Defense Technicians will wear a fatigue type (OG-107) outfit bearing no insignia and no rank but with a standard patch bearing the last name over the left breast pocket and a patch bearing the words

^{14/} Apparently rank was not discussed in any detail. Chairman Tedesco testified that in his opinion "once you took the uniform off a man, he had no rank."

'National Guard Missile Technician' over the right breast pocket. Said clothing will be maintained in a clean and neat manner commensurate with job assignment.

"3. Air National Guard"

a. Military uniforms to be optional to each individual on a daily basis. When option is for civilian attire, it will be neat and orderly. Shirt, tie and jacket will be worn.

b. Foul weather gear and protective clothing is permitted to be worn with both the military uniform and the prescribed work clothes indicated in the preceding paragraphs (Section _____).

"4. The military uniform may be worn to all social functions (balls, reviews, dances) as deemed appropriate.

"Military Rank"

"1. Military rank will only be used when individual is wearing the military uniform."

The next negotiating session was conducted on January 4, 1972. The Activity rejected the December proposal since it was the same as the Union's original proposal and accordingly unacceptable. One of the Activity's negotiators suggested preparing a list and reviewing each particular job by function and thereby determining whether wearing the uniform would be appropriate. Colonel McClure, the Activity's chief negotiator, countermanded this suggestion because of the great length of time which he felt would be involved due to the substantial number of positions in the technician program. At this meeting President Paterno made an oral proposal based upon the exceptions to the wearing of the uniform that had been in existence throughout the time technicians had been governed by NGR 690-2. There was no meeting of the minds during this session and the Activity therefore informed the Union that it would refer the matter to the National Guard Bureau for a negotiability determination. By letter dated February 2, 1972, pursuant to Section 11(c) (2) of the Order and relevant Department of Defense directives, the Activity requested that the National Guard Bureau make a determination as to the negotiability of the four Union proposals the parties had not yet resolved which included the

wearing of uniforms and the use of military titles. The Activity's letter 15/ states inter alia:

"1. The attached proposals 16/ were submitted by the Association of Civilian Technicians as items to be included in an agreement between the organization and the Chief of Staff to the Governor of New York. Previous similar proposals were the subject of prior communications between this Division and your office.

"2. This Division does not consider the proposals as negotiable. The reasons for this are:

a. Uniforms. The exceptions proposed add up to the entire technician force.

b. Military Rank. The requirement for the uniform makes the use of rank a necessity. A similar conclusion was reached in your TWX of 24 November 1971....

"3. The labor organization disputes the position of management on these issues and maintains that all four items are negotiable...."

President Paterno received a copy of the Activity's letter to the National Guard Bureau 17/ and thereafter, by letter dated February 10, 1972, President Paterno requested the Federal Service Impasses Panel to send both parties back to the bargaining table with directions to negotiate with third party assistance. The letter disputed the Activity's claim that the "attached" proposals were the Union's final proposals.

On February 24, 1972, the National Guard Bureau responded to the Activity's request for a negotiability determination of the Union's proposals. The reply indicated that the Bureau received a copy of President Paterno's request to the Federal Service Impasses Panel but the Bureau could not make a negotiability determination on the proposals since they apparently were still in question with regard to finality. The Bureau further suggested that both parties clear up the issues and "if a question of negotiability still exist submit the proposals as outlined in Section 11(c) of Executive Order 11491."

15/ Respondent Exhibit No. 17.

16/ The Union's proposals of December 1971, supra.

17/ Paterno's copy of the correspondence did not contain the attached proposals.

Thereafter the parties met again on March 23, 1972. 18/ The four unresolved issues still remained in dispute. At this meeting the Activity indicated that it would be willing to allow Army National Guard maintenance mechanics and technicians employed at the USP&FO to remain out of uniform, if the Union was willing to sign an agreement which would provide that the remainder of the Army National Guard Administrative Supply Technicians would be required to wear the uniform. 19/ The Union suggested that mechanics performing similar work in the Air National Guard, who historically wore the uniform, also be excepted from the uniform requirement. The Activity refused and insisted that, except as proposed, all other unit employees would be required to wear the uniform. The Union rejected the Activity's proposal since the effect would be to reduce the total number of unit employees currently not wearing the uniform. Discussion on the issue continued and President Paterno without caucus, proposed that the parties sign a contract which would provide that the people who were presently out of uniform remain out of uniform and a joint study group be formed which would review unit positions and decide which positions would not require uniforms. The Activity countered with a proposal that all employees immediately get into uniform and then a study group would be formed but final decision on exceptions would rest with the Chief of Staff. The Union caucused and decided to withdraw Paterno's proposal. Thereafter the discussion returned to those positions which might be excepted from the uniform requirement. The Union bargaining team attempted to expand on those people who might be excepted from the wearing of uniform beyond Army National Guard technicians and the Activity resisted. The Activity contended that the exceptions became too broad and the session "got nowhere".

18/ Complainant Exhibit No. 13, a letter from the Activity to the Union dated March 13, 1972, reveals that the parties were in telephone communication on March 7, 1972. The letter states:

"As indicated, this Division, is prepared to meet at the time. You agreed to establish a time and a date. However, no further information or response has been received from you.

"When may we expect a decision on your part?"

The letter indicates that copies were sent to the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel.

19/ Mechanics and Administrative Supply Technicians make up the two largest employment groups in the Army National Guard. The group of 900 Army National Guard technicians is comprised of approximately 50 percent mechanics and 50 percent Administrative Supply Technicians, the latter including approximately 100 Administrative Supply Technicians located at the USP&FO.

The parties met again on April 13 and 14, 1972. At one of these meetings the Union offered an "exploratory" proposal which consisted of a two page written proposal with regard to the wearing of the military uniform. 20/ The proposal had the following introductory sentence:

"The military uniform of the appropriate service, and of a type befitting work of services to be accomplished shall be worn by the employees covered by this agreement except as provided below."

Thereafter the proposal listed extensive exceptions. Indeed the Union admits that almost all technicians would have been included under the exceptions. Although there was some discussion of the proposal, the Activity was quick to realize that the exceptions included practically all technicians and accordingly took the position that the proposal amounted to a blanket exception to the wearing of uniforms which could not be granted under the regulation. Nevertheless, the Activity's negotiators informed the Union they would take the proposal and show General Baker what had been submitted.

On May 22, 1972, the parties entered their sixteenth negotiating session. At this meeting the Activity presented the following proposal:

"ARTICLE-----UNIFORM REQUIREMENTS

Section 1. Technicians in the excepted services are required to wear the military uniform appropriate to their service and federally recognized grade when performing technician duties, pursuant to paragraph 2-5, NGR 690-2/ANGR 40-01.

Section 2. The Chief of Staff to the Governor, by the provisions of paragraph 2-5, NGR 690-2/ANGR 40-01, is permitted to authorize other appropriate attire when he deems the uniform is not appropriate for specific positions and functions.

Section 3. Those technicians who currently wear the uniform will continue to do so. Effective 1 September 1972, all technicians, regardless of service position or function will wear the prescribe uniform except those who have been expressly authorized by the Chief of Staff to the Governor to wear other appropriate attire.

20/ Complainant Exhibit No. 6.

"Section 4. Those technicians to be excepted from wearing the uniform and to be authorized to wear other appropriate attire will be determined as follows:

a). It is agreed that as soon as possible after this agreement has been signed by both parties, but no later than ten (10) days after the signing, a study group shall consider technician positions and functions in the excepted service, other than those in the Air Defense units, and will recommend to the Chief of Staff to the Governor which of the positions and functions need not be performed in military uniform.

b). The study group shall be composed of six members, three appointed by the employee organization and three by the employer. The group shall elect a member to perform the duties of chairman.

c). The study group shall consider the positions and functions of the technicians in the excepted service other than those in Air Defense units, and determine those for which other appropriate attire should be authorized. If this agreement is signed on or before 1 June 1972 the study group shall submit findings and recommendations within sixty days of the signing or 1 August 1972 whichever is later, with respect to each technician position and function for which the wearing of the uniform is not considered appropriate and what other attire in lieu thereof is appropriate. If the signing occurs after 1 June 1972, the study group shall submit its report no later than sixty days thereafter. The findings and recommendations will be addressed to the Chief of Staff to the Governor.

d). If the signing occurs on or before 1 June 1972, the Chief of Staff to the Governor agrees within ninety days of the signing or 1 September 1972, whichever is later to announce his decision, If the signing occurs after 1 June 1972, his decision will be announced no later than ninety days thereafter.

e). The decision of the Chief of Staff to the Governor shall be final."

The Union rejected the Activity's proposal since it gave nothing other than an agreement to discuss exceptions and left with the Chief of Staff the final decision as to who would be excepted from the uniform requirement. The federal mediator suggested that the parties go through technician functions, position by position, within the frame work of NGR 690-2. Colonel McClure expressed the opinion that going through the various positions would take too much time and requested that the Union come back to the next session with proposals for exceptions which the Activity would entertain if based on criteria that the job could not be done in uniform or that wearing the uniform would be detrimental to health or safety. The Activity made clear that NGR 690-2 would be implemented on September 1, and by that date all technicians would be in uniform unless the Union came up with valid exceptions. Apparently there was some attempt to go over various positions but because of Colonel McClure's concern with the time involved to go through the various positions, the Union suggested and the Activity agreed to discuss the positions of Administrative Supply Technician and general mechanics at the next meeting. However, the Activity stressed the above stated criteria for exceptions.

On June 2, 1972, the parties met again. At this meeting the Union submitted the following proposal:

"The following proposal submitted regarding the wearing of the Military uniform. [sic]

AST

1. As a Federal Civilian Employee wearing of the Military Uniform during civilian work hours would tend to create a feeling of uneasiness [sic] due to the fact that Military protocol and regulations would prevail rather than civilian regulations.

GENERAL MECH

1. As a Federal Civilian Employee wearing of the Military Uniform during civilian work hours would tend to create a feeling of uneasiness [sic] due to fact that Military protocol and regulations would prevail rather than civilian regulations."

There was considerable discussion as to the Administrative Supply Technician and mechanic positions. However, the Activity was of the opinion that the Union was merely presenting how well the job could be performed in civilian clothes and not that the job could not be performed in uniform which, Colonel McClure understood was the purpose of the meeting. Accordingly, Colonel McClure informed the Union representatives that if they were not going to present their arguments on the basis of a technician's inability to perform the job in uniform, there was no need for further discussion and the meeting was adjourned without agreement on the uniform issue. 21/

The next negotiating session was conducted on July 22, 1972. At this time the Union presented the following proposal with regard to the wearing of uniforms: 22/

"Knowing the difficulty that has served to hamper final contract terms with the Chief of Staff to the Governor of the State of New York, in the terms of direct experience on the negotiating team for some of the sessions, and concerned that the situation does not provoke rash or injudicious actions that could serve to destroy labor-management relations, I am taking the liberty of suggesting a proposal that could maintain equity, if accepted, and allow rational processes to develop.

Proposal

"The employer and the union, in recognition of the difficulties that have developed in the attempts to contractually define the functions and specific positions deemed inappropriate for the wearing of the military uniform by technicians, do herein agree that the union and the employer shall study the matter in full degree. These studies shall be conducted both independently and through such consultive procedures that may mutually be decided upon. These studies shall be presented to the Chief of Staff to the Governor, and to the Union, no later than four months from the date of this agreement. Such exceptions to the wearing of the uniform that have been in effect during the negotiation of this contract shall continue. Either party shall have the right, with or without mutual agreement, to open this and other effected sections of the contract, six months from the date of official approval of the contract.

21/ However the parties apparently reached some agreement on the issue of lower-grade technicians teaching higher grade technicians.

22/ The proposal is actually a letter sent by President Paterno to Chairman Tedesco.

"It is recognized that this proposal does not meet the desires of your membership, in terms of time or coverage, but I am certain that if it is explained to them as an attempt to utilize the procedures of good and responsible labor-management relations and to avoid crisis and the attitudes of confrontation, they will ratify it in good faith. Your well known persuasive abilities are certain to prevail.

"It is not common for the National to enter the negotiation process, as you know, but the obvious intensity of the dispute dictates an attempt to assist. Other members of the Executive Board are in agreement."

During the meeting the Union also submitted the following written proposal with regard to the use of military rank and courtesy.

"a. Military rank will be only required when the employee is actually performing military duties.

"b. Management recognizes the separate status of union officials when conducting union business and the use of military courtesy shall not be used to impair the rights given such union officials under the Executive Order 11616 and its predecessor orders."

After some discussion on the uniform and rank issues, the Activity agreed to study the Union's proposals and discuss the matter with the Chief of Staff who would have to make a determination on the matter.

Subsequently, Colonel McClure sent to Chairman Tedesco the following letter dated July 28, 1972:

"1. The proposal submitted by you on 22 July 1972, regarding the wearing of uniforms by technicians has been carefully reviewed by this Division.

"2. Following consideration of the negotiations to date, the directive of the National Guard Bureau and the changing circumstances affecting recruiting, the conclusion has been reached that no particular purpose is served by further delaying the implementing of the regulation concerning the wearing of the uniform.

"3. While there is no objection to the idea of study groups, it is pointed out that the procedures for requesting exceptions have been thoroughly discussed in the past. The Chief of Staff to the Governor will con-

sider any recommendations within the guidelines which have been previously stated.

"4. Agreement was reached on 17 April 1971 regarding the reopening of the contract, and the terms were considered to be in the best interests of both parties. Unilateral opening of any part of a contract does not appear to be a feasible method of operation.

"5. In view of the above, you are advised that your proposal in its present form is not acceptable."

By letter of July 28, 1972, the Activity made a request to the National Guard Bureau for a negotiability determination with regard to National Guard status of a technician leaving the technician program and the use of military rank and courtesy. The military rank proposal submitted by the Activity was the Union's proposal of May 22, supra.

Thereafter, and without further notification to the Union, the Activity, on August 5, 1972, issued a pamphlet to its technicians which, in effect, required that uniforms must be worn by all the Activity's technicians, effective September 5, 1972. 22a/

The parties final negotiating session occurred on August 31, 1972. The meeting which lasted approximately 10 minutes had been called by a federal mediator at the request of the Union. The parties were aware that outside the building where the session was held a number of technicians were demonstrating, apparently objecting to the Activity's requirement that uniforms were to be worn. As the meeting opened, Colonel Noel J. Cipriano, the Activity's counsel and a member of the Activity's negotiating team, informed the Union that the demonstration outside constituted an illegal act. President Paterno, who was the Union's spokesman, replied that if the Union had committed an illegal act "that was another problem." Paterno then expressed his opposition to the Activity's pamphlet of August 5, 1972. Colonel McClure asked if the meeting was called to discuss a proposal. Paterno answered "yes" and McClure asked to hear the proposal. Paterno continued with his expression of opposition to the pamphlet and McClure again asked if the Union had a proposal. Paterno indicated that the Union was prepared to negotiate exceptions to the wearing of uniforms and made a comment challenging McClure's credibility as a negotiator. McClure replied that the Union would have to accept General Baker's standards as to when it would be appropriate for uniforms not to be worn, apparently referring to the prior mentioned criteria that the Activity would consider exceptions to the uniform requirement if the Union could

22a/ The pamphlet (Complainant Exhibit No. 7) permitted certain limited exceptions to the uniform requirement upon supervisory recommendation and Chief of Staff approval.

show that a job could not be performed in uniform or wearing the uniform would be detrimental to the health or safety of the technician. Paterno then replied, "Goddam it to hell, we're equals at this table. I'm not going to accept your goddammed standards. We're going to talk about them." McClure replied "I'm not going to stay here any longer. I've asked you twice for a proposal. Obviously you called this meeting as a forum for the demonstration outside." With that, the Activity left the meeting and apparently no further meetings were held prior to the hearing herein.

By memorandum dated September 27, 1972, the Department of Defense issued its negotiability determination on the questions previously submitted by the Activity under Section 11(c) of the Order. ^{23/} The Department of Defense, based upon the language of the governing regulations as hereinbefore set forth, found that the Union's proposal regarding the use of military rank and courtesy:

"...conflicts with published regulations and is not within the authority of the State Adjutant General to negotiate. The proposal in question would eliminate any requirement that employees observe military rank while performing technician as opposed to military duties. This would also have the effect of precluding agency management from requiring employees to wear the military uniform during performance of technician duties, since the use of military rank and the wearing of the uniform are inseparably related. When technicians are in uniform, military rank must be observed. Negotiability questions concerning the use of military rank, therefore, cannot be decided without consideration of their relationship to the wearing of the uniform."

The Department's determination continued:

"...the proposal...is clearly inconsistent with this regulation, which establishes a requirement that technicians will wear the military uniform when performing technician duties. The authority of State Adjutants General to authorize exceptions to this requirement is limited to

^{23/} Part of this determination also dealt with the question of a technician's separation from the National Guard at the time he ceases to be a technician. That matter is not relevant to the issues herein.

'specific positions and functions' for which the uniform is deemed inappropriate. Adjutants General, under this regulation, do not have authority to agree to any general relaxation of the uniform requirement. Without such authority, Adjutants General also lack the authority to agree to any general relaxation of military rank. Although an Adjutant General may agree to a specific exception to the requirement for wearing of the uniform, he may do so only where he determines that the wearing of the military uniform would be inappropriate in a particular situation or under particular conditions. In view of this regulatory limitation on the authority of Adjutants General, including the Adjutant General of New York, we find...the proposal to be non-negotiable."

The Department went to state that it could not make a negotiability determination with regard to the use of military courtesy by union officials when conducting union business. The reason given was the the Department did not know what was meant by the phrase "the separate status of union officials" or the reference to the use of military courtesy "to impair the rights" of such officials.

By letter dated October 26, 1972, ^{24/} the Union appealed the Department of Defense's negotiability determination to the Federal Labor Relations Council. By decision dated December 27, 1973, ^{25/} the Federal Labor Relations Council found that the regulation as interpreted by the agency head was not invalid under applicable law or the Order and accordingly, the Council upheld the agency's determination of non-negotiability of the Union's proposal, based on the regulation.

III. Positions of the Parties

Essentially, Complainant contends that the Activity, during negotiations, failed to bargain in good faith thereby violating Section 19(a)(6) and (1) of the Order by: unilaterally changing terms and conditions of employment by requiring the use of military rank or titles; unilaterally changing terms and conditions or employment by requiring all technicians to wear military uniforms; and failing to provide negotiators, who had sufficient authority to conclude an agree-

^{24/} Complainant Exhibit No. 15.

^{25/} Association of Civilian Technicians, Inc., and State of New York National Guard, FLRC No. 72A-47.

ment on all relevant issues. ^{26/} In addition, Complainant contends that the Activity's bad faith bargaining is evidenced by the take-it-or-leave-it presentation of its May 22, 1972, proposal with regard to the wearing of uniforms which contained "inherent threats" and constituted "duress".

Respondent denies that any unilateral change occurred contending rather that it was merely attempting to have all technicians conform to existing regulations. Respondent reasons that since existing regulations governed the use of military rank or titles and the wearing of uniforms, these matters were not negotiable and questions of negotiability are for determination by the Federal Labor Relations Council under procedures set forth in the Order. Respondent also takes the position that it consulted, conferred and negotiated as far as it could under existing regulations and urges that in all other respects Complainant failed to meet its burden of proof to establish that Respondent violated the Order.

DISCUSSION AND CONCLUSIONS

1. Preliminary Considerations

Complainant alleges that the Activity has not fulfilled its obligation under Section 19(a)(6) of the Order to "consult, confer, or negotiate with a labor organization as required by (the) Order." Section 11(a) of the Order requires that:

"An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order." ^{27/}

^{26/} With regard to the latter contention, the Union alleges that the Activity presented a negotiating team "so encumbered with the military chain of command and with such a collectively closed mind that it could not fulfill its obligations to negotiate as required by the Order."

^{27/} In my view the mandatory wearing of uniforms and the use of military titles are matters affecting working conditions within the meaning of the Order much the same as any other plant or work rule. Such requirements impose obligations on the employee in the performance of his job

Regulation NGR 690-2 paragraph 2-5 has been interposed to support the Activity's actions herein. The regulation provides that technicians in the excepted service will wear the military uniform when performing technicians duties, but Adjutants General (the Chief of Staff herein) may authorize other appropriate attire when the uniform is deemed inappropriate for specific positions and functions. ^{28/} In an unrelated case, the Department of Defense in making a negotiability determination under Section 11(c)(3) of the Order, ^{29/} held on December 3, 1971, that:

"...negotiable matters are those within the scope of authority of the responsible management officials. The authority of Adjutants General who authorize exceptions to the requirement that technicians wear the uniform is limited by paragraph 2-5...to 'specific positions and functions' for which the uniform has been determined to be inappropriate. Adjutants General have no authority to agree to a general relaxation of the uniform requirement...."

Further, during the negotiating session of September 2, 1971, the Union brought to the Activity's attention a telegram of June 1971 from the National Guard Bureau to the Adjutant General of the Montana National Guard ^{30/} which indicated that while under NGR 690-2 the matter of exempting specific positions or functions may be negotiated, the regulation "precludes wearing of the uniform from being a negotiable item as an entity...."

Footnote continued:

and failure to follow either of these requirements could conceivably lead to disciplinary action.

^{28/} The Department of Defense determined, supra., that the wearing of the uniform and the use of military courtesy (rank or titles) are "inseparably related", and the regulation is equally applicable to both. The FLRC found this determination to be valid.

^{29/} Respondent Exhibit No. 2, attachment 1.

^{30/} Complainant Exhibit No. 9.

The Chief of Staff's authority under the regulation was further delineated in a letter of February 23, 1973, from the National Guard Bureau Chief to the "Adjutants General of all States, Puerto Rico and the District of Columbia"^{31/} In that letter ^{32/} the National Guard Bureau Chief states, inter alia:

"...the authority to deviate is for use in unusual circumstances where wearing of the uniform may be considered, by the Adjutant General, to be inappropriate for an individual or group of individuals. Such circumstances may (but not necessarily) include technicians employed at specific locations or in the proximity of disturbance areas, technicians in a travel status or attending courses of instruction at other than military installations, or technicians engaging in matters pertaining to labor/management such as negotiating agreements. It is emphasized that these examples are not an automatic exclusion from the requirement to wear the uniform. However, they do exemplify the types of circumstances which arise and for which consideration is necessary in the exercise or responsible management practices."

It is clear therefore that the Activity's obligation under the Order to meet and confer in good faith encompasses the scope of the Chief of Staff's authorization to grant exceptions to the general requirements of NGR 690-2 (i.e. when the uniform is deemed inappropriate for specific positions and functions). So while the Activity has an obligation under the Order to meet and confer in good faith, the obligation is not without limitation.

In addition to the above, the various circumstances surrounding the Activity's actions must also be considered when viewing this case. Thus, prior to the Activity's full enforcement of 690-2 the regulation had been in effect for a long period of time but the Activity did not enforce the regulation with regard to a substantial number of its technicians. Further, enforcement of the regulation occurred when the parties were negotiating the issue of exceptions. Moreover, the Activity's obligation to enforce its regulations is also a relevant consideration when assessing the relative rights and obligation of the parties to this proceeding.

^{31/} Respondent Exhibit No. 20.

^{32/} Perhaps occasioned in part by the controversy herein.

I am unaware of any case where the Assistant Secretary has treated the precise issues presented herein. However in one case ^{33/} the Assistant Secretary, relying on United Federation of College Teachers, Local 1460 and U. S. Merchant Marine Academy, FLRC No. 71A-15, held that an activity was not obligated to meet and confer with a union over the adoption of a regulation uniformly applicable to all similarly situated employees of an agency and the matters contained in the regulation were therefore removed from the scope of negotiations at the local level. However, that case is distinguishable from the instant case since the regulation herein provides that the Chief of Staff may allow exceptions, as set forth above.

2. The Use of Military Titles

The record reveals that in May 1971, when the Activity announced to the employees of the USP&FO and the 42nd Infantry Division that they were obliged to use military titles in communications, NGR 690-2 paragraph 2-5 was in effect but not strictly or uniformly enforced. At that time it was the policy at the USP&FO to allow technicians the discretionary use of titles in correspondence. That policy was promulgated in writing by an agent of the Activity by memorandum dated April 1, 1966, and was never specifically withdrawn or modified prior to May 1971. The practice followed by unit employees at the facilities in question with regard to the use of titles in oral communications varied widely and unit employees were not obliged to either wear the uniform or use titles in discussions. Indeed, this practice was Activity-wide and Respondent was well aware of it. Further, at the time of the May 1971 directives the wearing of uniforms and the use of military titles by unit employees was the subject of negotiations, both parties having submitted contract proposals on the subject but, by mutual consent, deferring discussion on the issues until a later time. Although the Activity had in the part notified the Union of forthcoming changes in policies before such changes were effectuated, no prior notification was given to the Union relative to the May 1971 announcements.

I find and conclude that under the circumstances herein, Respondent was not privileged to unilaterally change the terms and conditions of employment of USP&FO employees relative to the use of titles in both correspondence and discussions or unilaterally change the terms and conditions of employment of 42nd Infantry Division employees with regard to discussions without prior notice and consultation with the Union and accordingly Respondent has violated Section 19(a)(6) and (1) of the Order. Further, such unilateral actions had the effect of evidencing to employees that the Activity could act without regard to the employee's exclusive representative and undermined,

^{33/} Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, A/SIMR No. 322.

demeaned and disparaged the Union in the eyes of employees it represents, thereby violating Section 19(a)(1) of the Order. 34/

I reject the argument that NGR 690-2 paragraph 2-5 privileged Respondent to take the aforementioned unilateral actions with regard to the use of military rank. Assuming that rank is inherently and inseparably related to the wearing of uniforms and also assuming that the use of rank is normally traditional in the National Guard when the uniform is worn, 35/ nevertheless NGR 690-2 authorizes the Chief of Staff to make exceptions to the uniform requirement. It follows therefore that the authority to except technicians from the uniform requirement (as appropriate) 36/ would extend to the use of rank by technicians who were not in uniform. At the time of the May 1971 announcements, the regulation was not enforced so as to obligate technicians in the Army National Guard to wear the uniform 37/ and technicians at the USP&FO and 42nd Infantry Division were part of the Army National Guard. Accordingly, it is reasonable to infer that an exception to the regulation both as to the wearing of uniforms and the use of military titles was tacitly authorized, since from January 1, 1969, to May 1971, 38/ technicians at the USP&FO and the 42nd Infantry Division were, by practice, not obliged to wear uniforms or always use military rank in the performance of their technician duties and such was, at all times material herein, within the knowledge of responsible agents of the Activity. In any event, the Activity did not give the Union any prior notification or opportunity to consult with regard to the change which, in my view, is required by the Order.

34/ Cf. California National Guard, State Military Forces, Sacramento, California, A/SLMR No. 348; Anaheim Post Office, U. S. Postal Service, Anaheim, California, A/SLMR No. 324; Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

35/ Although certainly not uniformly followed within the Activity.

36/ I note that the Activity's oral proposal of March 23, 1972, supra, would have relieved technicians at the USP&FO (and others) from the obligation to wear uniforms.

37/ Indeed Army National Guard technicians were generally not wearing the uniform during this period.

38/ Throughout this period the relevant terms of the governing regulations remained the same.

3. The Wearing of Uniforms

As stated above, under past practice NGR 690-2 paragraph 2-5 was not enforced so as to require that the uniform would be worn by Army National Guard technicians. From the time of the earliest negotiating sessions in March 1971, the Activity sought, through negotiations, to have all technicians comply with the terms of the regulation. As negotiations progressed it became abundantly clear that the Activity's failure to enforce the regulation as to the group of approximately 900 Army National Guard technicians was contrary to the National Guard Bureau's interpretation of the regulation. Although exceptions to the uniform requirement were permitted under the regulation, during the negotiations the Activity would admit to no reason why all technicians should not be required to wear uniforms and accordingly took a "show me" stand. The Union wished to have as many technicians as possible free of the uniform requirement and "hard bargaining" on the issue followed.

In May 1972, after over one year of bargaining on the matter, the Activity informed the Union that on September 1 NGR 690-2 would be enforced and all technicians would be required to wear uniforms unless exceptions were agreed to by the parties. The Activity did not retreat from this position and by letter dated July 28, 1972, (Respondent Exhibit No. 19) the Activity wrote Chairman Tedesco to inform him that, "... no particular purpose is served by further delaying the implementing of the regulation..." On August 5, 1972, the Activity, relying on NGR 690-2, ordered all its technicians to wear the prescribed service uniforms while performing technician duties. 39/

39/ Chairman Tedesco testified that he did not receive the Activity's July 28 correspondence until after the pamphlet was released on August 5, since he was in active duty military training status at that time. By letter dated July 14, 1972, to Colonel McClure, Tedesco advised the Activity that George Porter would be Acting State Chairman from July 27 through August 13, 1972.

Colonel McClure testified that he did not receive Chairman Tedesco's letter when he sent his correspondence of July 28. He further testified that he assumed Tedesco made arrangements for receiving anything mailed to him during his absence.

Under the circumstances herein, I find that the Activity did not attempt to by-pass informing the Union of the pending issuance of the pamphlet. In any event the Union by this time had full knowledge that the regulation was going to be enforced as of September and at most it was merely the precise manner in which the notification would be conveyed to technicians that was not previously discussed.

The Activity through its designated officers is obligated to enforce applicable regulations issued by higher authority. NGR 690-2 is applicable to all National Guard technicians in New York State and the various other states as well. However in New York State the regulation from its inception in 1969 was not enforced with regard to Army National Guard technicians who compromised a substantial part of the total number of the State's technicians, and there developed a past practice of non-enforcement of a condition of employment. Therefore, this case presents a situation which involves the balancing of the Activity's obligation to see that regulations are enforced with the Activity's obligation under the Order to consult, confer and negotiate in good faith with the technician's collective bargaining representative.

In my view, in the circumstances of this case, the Activity's obligation under the Order were fulfilled by giving the Union proper notification of its intention to enforce the regulation and consulting with the Union on this matter. The fact that exceptions to the uniform requirement are permissible ^{40/} should not preclude the Activity from carrying out its obligation in seeing to it that technicians were in substantial compliance with the regulation. The Union was informed of the Activity's disposition to enforce the regulation and the reasons therefore for well over a year. At all times after May 22, 1972, the Union was aware that notwithstanding negotiations on exceptions, the Activity intended to enforce the regulation as of September and the Activity did nothing to lead the Union into believing that the regulation would not be put into effect as stated. Accordingly I conclude that Complainant has not established, by a preponderance of the evidence, that the Activity's enforcement of NGR 690-2 by issuance of the pamphlet on August 5, 1972, constituted a violation of the Order.

4. Other Allegations of Bad Faith Bargaining

The Union alleges that during contract negotiations the Activity failed to provide representatives who had sufficient authority to conclude an agreement on all relevant issues. This contention is unsupported by the evidence. Although at times the Activity's negotiators took the position that pursuant to regulation and higher authority interpretation thereof, broad and general exceptions to NGR 690-2 as proposed by the Union were not negotiable, the Order provides that such matters

^{40/} The Activity apparently recognized its continuing obligation under the Order to negotiate on exceptions to the uniform requirement and its conduct with regard to the August 5, 1972, pamphlet did not foreclose further bargaining on the subject.

should be resolved through the procedures set forth in Section 11(c) of the Order. With regard to the Activity's negotiators indicating at various times that they would have to discuss the Union's proposals on uniforms and titles with the Chief of Staff, considering the scope of the Union's proposals, I conclude that Activity's comments were in the nature of seeking time to evaluate and discuss the proposals and did not evidence a lack of authority to conclude an agreement on relevant issues. Thus, the broadness of the Union's proposals created substantial questions which went to the Activity's authority to agree under NGR 690-2.

Further, I do not conclude that the Activity's alleged "take-it-or-leave-it" proposal of May 22, 1972, contained inherent threats or amounted to duress violative of the Order. By its proposal the Activity notified the Union of its intent to enforce NGR 690-2 and suggested that further discussions on exceptions be conducted by a study group. Although the proposal provided that any agreement of the study group would have to be approved by the Chief of Staff, essentially the proposal conveyed that the Chief of Staff was not going to delegate to the study group his right to agree or disagree with whatever exceptions the study group suggested. In my view, the Chief of Staff was free to maintain this position without violating the Order. Moreover, the entire study group concept was merely a proposal which the Union was free to reject.

However, I find that the Activity did not fulfill its obligation to negotiate in good faith with the Union when it took the position that it would discuss exceptions to the uniform requirement only if based on the Activity's criteria that the technician's job could not be performed in uniform or that the uniform was detrimental to the health or safety of a technician. ^{41/} Thus, the meeting of June 2, 1972, was aborted by the Activity when the Union attempted to present their arguments outside of the Activity's criteria. Further the meeting of

^{41/} The Activity reinforced this position in its letter to Chairman Tedesco of July 28, 1972, when it stated: "While there is no objection to the idea of study groups, it is pointed out that the procedures for requesting exceptions have been thoroughly discussed in the past. The Chief of Staff to the Governor will consider any recommendations within the guidelines which have been previously stated." (Emphasis supplied.)

August 31, 1972, broke off, in part, because the Union wished to discuss the standards for exceptions but was prevented from doing so since the Activity would proceed with the discussion only if the discussion followed its own ground rules.

Essential to viable good faith negotiations is full and open discussion on the matter in issue. While in the instant case the Activity could ultimately refuse to accede to the Union's position on exceptions to the uniform requirement and the criteria therefor, and adhere to its own position on the matter, it could not unilaterally limit discussion to its own criteria for exceptions. Such conduct, I find, violates Section 19(a) (6) and (1) of the Order. 42/

Recommendations

In view of the entire foregoing, I make the following recommendations to the Assistant Secretary:

1. That Respondent's motions to dismiss be denied.
2. That Respondent be found to have engaged in conduct violative of Section 19(a) (1) and (6) of Executive Order 11491, as amended, and that an order, as hereinafter set forth which is designed to effectuate the policies of the Order, be adopted. 43/

42/ The Union also alleges that the Activity engaged in dilatory tactics during negotiations; never showed an intent to negotiate difficult matters; and acceded only to petty uncontroversial items. I conclude that Complainant has not met its burden of proof with regard to these allegations.

43/ I have found that Respondent violated the Order by unilaterally changing a condition of employment when it, by directive required certain of its technicians to use military titles. However I have also found that it has not been established that Respondent's enforcement of NGR 690-2, by issuance of the pamphlet on August 5, 1972, constituted a violation of the Order. Since it appears to me that the use of military titles and the wearing of uniforms are to be considered together and since no violation of the Order was established with regard to Respondent's requirement that all technicians must now wear uniforms, it follows that rank must also be used. Accordingly I will not recommend that the Activity withdraw its directives of May 1971, and reinstitute the practice which prevailed prior to their issuance.

3. That any alleged violations of the Order not specifically found herein be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the New York Army and Air National Guard shall:

1. Cease and desist from:

a. Unilaterally changing terms and conditions of employment by enforcing previously unenforced or only partially enforced regulations involving employees exclusively represented by New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, without notifying New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, and affording such representative the opportunity to meet and confer in good faith to the extent consonant with law and regulations.

b. Refusing to discuss with New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, exceptions to the requirement that uniforms will be worn by affected employees by limiting discussions to its unilaterally established criteria for such exceptions or in any like or related manner refusing to consult, confer or negotiate in good faith, to the extent consonant with law and regulations, with New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative.

c. Interfering with, restraining or coercing employees by unilaterally changing their terms and conditions of employment without meeting and conferring in good faith with their exclusive bargaining representative.

d. In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE


We hereby notify our employees that:

a. Notify New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, and afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, prior to changing terms and conditions of employment by enforcing previously unenforced or only partially enforced regulations involving employees exclusively represented by New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative.

b. Upon request, meet and confer in good faith, to the extent consonant with law and regulations, with New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, concerning exceptions to the requirement that uniforms will be worn by affected employees without limiting discussions to its unilaterally established criteria for such exceptions.

c. Post at its facilities, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chief of Staff to the Governor of New York State and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Chief of Staff to the Governor of New York State shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

d. Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

WE WILL NOT unilaterally change terms and conditions of employment by enforcing previously unenforced or only partially enforced regulations involving employees exclusively represented by New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, without notifying New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, and affording such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations.

WE WILL NOT refuse to discuss with New York State Council, Association of Civilian Technicians, Inc, or any other exclusive representative, exceptions to the requirement that uniforms will be worn by affected employees by limiting discussions to our own criteria for such exceptions or in any like or related manner refuse to consult, confer or negotiate in good faith, to the extent consonant with law and regulations, with New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative.

WE WILL NOT interfere with, restrain or coerce employees by unilaterally changing their terms and conditions of employment without meeting and conferring in good faith with New York State Council, Association of Civilian Technicians, Inc., our employees exclusive bargaining representative.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of rights assured by Executive Order 11491, as amended.

Dated: March 22, 1974
Washington, D. C.

WE WILL notify New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, and afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, prior to changing terms and conditions of employment by enforcing previously unenforced or only partially enforced regulations involving employees exclusively represented by New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative.

WE WILL upon request, meet and confer in good faith, to the extent consonant with law and regulations, with New York State Council, Association of Civilian Technicians, Inc., or any other exclusive representative, concerning exceptions to the requirement that uniforms will be worn by affected employees, without limiting discussions to our own established criteria for such exceptions.

(Agency or Activity)

Dated _____ By: _____
(Signature)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 3515, Federal Office Building, 1515 Broadway, New York, New York 10036.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION (PATCO-MEBA), INDIANAPOLIS,
INDIANA AIR ROUTE TRAFFIC CONTROL CENTER
A/SLMR No. 442

The instant complaint, filed by an individual, alleged that the Respondent labor organization violated Section 19(b)(1) of the Order by refusing the Complainant participation in a reduced air fare program, and by informing him that membership in the Respondent was a prerequisite for participation in the program.

In recommending that the complaint be dismissed, the Administrative Law Judge noted the distinction between an incident of membership and a condition of employment and the consequences which flow therefrom. Concluding that the evidence established that the Respondent's reduced air fare program, restricted to participation of union members and their families, was merely an incident of membership, the Administrative Law Judge found that no violation occurred when the Complainant, an employee in the bargaining unit, but not a member of the Respondent, was advised of the membership requirements for participation in the program. He noted additionally that there was nothing in the Order which prohibited the Respondent from seeking such arrangements or obtaining the employer's acknowledgment that it does not oppose these efforts.

In agreement with the Administrative Law Judge, the Assistant Secretary found that dismissal of the instant complaint was warranted based on the view that the evidence established merely that the reduced air fare program was an incident of membership in the Respondent labor organization. The Assistant Secretary noted in this regard that the evidence failed to establish that the Respondent acted inconsistent with its obligation under Section 10(e) of the Order to represent the interests of all employees in the unit without discrimination and without regard to labor organization membership inasmuch as it was not established by the Complainant that the Respondent had obtained, by agreement with the Federal Aviation Administration (FAA), a term and condition of employment applicable only to members of the Respondent and their immediate families. Rather, in the Assistant Secretary's view, the evidence revealed that the Respondent merely had obtained the FAA's acknowledgment that it would not oppose the former's efforts to obtain for its members a reduced or free air fare arrangement or consider the taking advantage of reduced air fares to be violative of its code of ethics. Accordingly, the Assistant Secretary, noting the absence of exceptions, adopted the Administrative Law Judge's findings, conclusions and recommendations and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION (PATCO-MEBA),
INDIANAPOLIS, INDIANA AIR ROUTE
TRAFFIC CONTROL CENTER

Respondent

and

Case No. 50-11021(CO)

JOSEPH CARSON RATTZ, SR.

Complainant

DECISION AND ORDER

On August 7, 1974, Administrative Law Judge Salvatore J. Arrigo issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings of the Administrative Law Judge are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation that the complaint herein be dismissed.

In agreement with the Administrative Law Judge, I find that dismissal of the instant complaint is warranted based on the view that the evidence herein establishes merely that the reduced air fare program was an incident of membership in the Respondent labor organization. Thus, in my view, the evidence fails to establish that the Respondent acted inconsistent with its obligation under Section 10(e) of the Order to represent the interests of all employees in the unit without discrimination and without regard to labor organization membership inasmuch as it was not established by the Complainant that, by virtue of Article XV of its negotiated agreement with the Federal Aviation Administration (FAA),


the Respondent obtained a term and condition of employment applicable only to members of the Respondent and their immediate families. Rather, as found by the Administrative Law Judge, the evidence adduced reveals that the Respondent merely obtained the FAA's acknowledgment that it would not oppose the former's efforts to obtain for its members a reduced or free air fare arrangement or consider the taking advantage of reduced air fares to be in violation of its code of ethics.

Under these circumstances, I conclude that the Complainant failed to sustain his burden of proof in establishing a violation of the Order and, accordingly, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-11021(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 22, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



REPORT AND RECOMMENDATION

Preliminary Statement

..... :
In the Matter of :
: PROFESSIONAL AIR TRAFFIC CONTROLLERS :
: ORGANIZATION (PATCO-MEBA), INDIANAPOLIS, :
: INDIANA AIR ROUTE TRAFFIC CONTROL CENTER :
: Respondent :
and : Case No. 50-11021(CO)
: JOSEPH CARSON RATTZ, Sr., An Individual :
: Complainant :
..... :

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Robert E. Meyer
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For the Respondent

Joseph C. Rattz, Sr.
4029 Olive Branch Road
Greenwood, Indiana

Pro Se

Before: SALVATORE J. ARRIGO
Administrative Law Judge

This proceeding heard in Indianapolis, Indiana on April 30, 1974, arises under Executive Order 11491, as amended (hereafter called the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations (hereafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on April 1, 1974, with reference to an alleged violation of Section 19(b)(1) of the Order. The complaint filed on November 7, 1973, alleges that "(o)n or about September 23, 1973, P.A.T.C.O. Indianapolis a local of the Professional Air Traffic Controllers Organization by its agent and representative Bill Spencer, P.A.T.C.O. Indianapolis President..."refused complainant participation in a reduced air fare program and informed him that membership in P.A.T.C.O. was a prerequisite for participation in the program. Complainant alleges that the foregoing coerced him, and other nonunion controllers, into joining the Union.

At the hearing Respondent, P.A.T.C.O., Indianapolis, was represented by counsel and Complainant represented himself. Both parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses, argue orally and file briefs.

Upon the entire record in this matter, from my reading of the briefs filed by both parties and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

P.A.T.C.O. (National) is the collective bargaining representative of various air traffic control specialists (controllers) employed by the Federal Aviation Administration (FAA) at numerous locations including Indianapolis, Indiana. P.A.T.C.O. (National) and FAA are parties to a collective bargaining agreement covering these employees, said agreement having an effective date of April 4, 1973 and in effect at all times material herein. The collective bargaining agreement contains the following provision: 1/

I/ Article 15, Section 1, entitled "Reduced Air Fares."

"Where applicable law and regulations permit, the Employer acknowledges that the Union may enter into agreement with any commercial passenger airline, whether international, domestic, interstate, or intrastate, to obtain reduced or free fares for its members and their immediate families. This also applies to any designated air taxi governed by local, state, or federal regulations."

Testimony adduced at the hearing establishes that while P.A.T.C.O. (National) has entered into reduced air fare agreements with certain "commuter" airlines which are unregulated by the Civil Aeronautics Board (CAB), it has not entered into any such agreements with any commercial passenger airlines regulated by CAB. A reduced air fare agreement with one of these latter carriers would require approval by the CAB before it would become effective. However, no CAB approval is required for a reduced air fare agreement with a "commuter" airline. In either case, no FAA endorsement, approval or action is required before entering into reduced air fare agreements.

On or about September 23, 1973, Joseph Carson Rattz, Sr., (hereafter sometimes called Complainant), a controller employed at the FAA's Indianapolis facility and a member of the collective bargaining unit, asked William E. Spencer, President of P.A.T.C.O. Indianapolis Local Union (P.A.T.C.O., Indianapolis) if he could participate in the reduced air fare program. Mr. Spencer informed Mr. Rattz that he could not. Mr. Rattz then asked what he would have to do to participate in the program and Mr. Spencer replied, "Join P.A.T.C.O." At no time material herein has Mr. Rattz been a member of P.A.T.C.O.

Positions of the Parties

Complainant contends that Article 15 of the agreement, recited above, must apply to all members of the collective bargaining unit and refusal to allow a member of the collective bargaining unit participation in the reduced air fare program because of nonmembership in the Union violates Section 19(b) (1) of the Order.

Respondent contends that the Complaint should be dismissed in that: "(1) The named Respondent is not culpable because it has nothing whatever to do with the reduced air fare

program and is not responsible therefore; and (2) the P.A.T.C.O. National reduced air fare program is not a condition of employment, rather it is an incident of membership, and is not prescribed or prohibited by Executive Order 11491, as amended."

Conclusions of Law

I reject Respondent's contention that P.A.T.C.O. Indianapolis is not a proper party to this proceeding. While the local union is not a signatory party to the collective bargaining agreement and reduced air fare arrangements are negotiated by P.A.T.C.O. (National), William Spencer, President of the Local Union, testified that the Local represents the controllers in the unit at the Indianapolis facility in dealing with local FAA management. President Spencer further testified: "... my position is to see that the contract is upheld..." I also note that the collective bargaining agreement provides, *inter alia*, for payroll deductions for payment of Local Union dues and all of P.A.T.C.O.'s local unions are requested to have separate constitutions, albeit standardized at the direction of the P.A.T.C.O. Executive Board.

Under all these circumstances I find P.A.T.C.O. Indianapolis Local Union to be a responsible party chargeable with the unfair labor practice alleged herein by virtue of its operation and overall role in the administration of the collective bargaining agreement, representation of unit employees and its relationship to the facility's unit employees. Accordingly the legal consequences of President Spencer's utterances are appropriate for consideration in this proceeding. 2/

However, I do not find that Respondent violated the Order through President Spencer's statement relative to excluding Mr. Rattz from participation in the reduced air fare program because of his lack of union membership. Respondent argues persuasively that the reduced air fare program for union members is an incident of membership and not a condition of employment and accordingly it is free to discriminate against nonmembers in such matters. Thus, in Article 15

2/ Respondent's counsel alleges that at the hearing Complainant stipulated that Mr. Spencer was acting as an agent of P.A.T.C.O. National when Complainant was refused participation in the program. The record reveals that while counsel for Respondent offered such a stipulation, Complainant expressed confusion over the legal consequences of the stipulation and never clearly agreed to enter into it. Under these circumstances I reject Respondent's contention.

of the collective bargaining agreement, the FAA merely "acknowledges" that P.A.T.C.O. may seek to obtain beneficial air fares for its members. The employer does not bestow or provide any benefit to union members or indirectly assist P.A.T.C.O. in this endeavor but essentially states in the article that it has no objection if P.A.T.C.O. wishes to seek such beneficial treatment from third parties. 3/ The benefit therefore, if obtained, is not in any sense derived from the employer. On the facts of the case herein I do not find that the reduced air fare program is a condition of employment nor do I find anything in the Order which prohibits P.A.T.C.O. from seeking such arrangements or obtaining the employer's "acknowledgement" that it does not oppose these efforts.

While this issue is one of first impression under the Order, similar issues arising in the private sector under the Labor-Management Relations Act have been decided based upon the distinction between an incident of membership and a condition of employment and the legal consequences that flow therefrom. In Amalgamated Local 286, International Union, United Automobile Workers America, AFL, 110 NLRB 371 (1955) the National Labor Relations Board while finding that certain insurance benefits in that case were a condition of employment, it nevertheless recognized that if the insurance benefits were an incident of membership and not a condition of employment, the union's threatened withdrawal of the benefits from members for disciplinary reasons would have been privileged. The U. S. Court of Appeals (7th Cir) 4/ in reversing the Board similarly recognized this distinction when it upheld the union's right to deny its insurance benefits

3/ Counsel for Respondent testified that he was the chief negotiator for P.A.T.C.O. in the negotiations which gave rise to Article 15. He testified that because of the role of controllers in performing their duties and being in a position to give preference to airlines, FAA at one time had a problem of whether it might constitute a conflict of interest for controllers to obtain reduced air fares from certain carriers. Therefore, the article was negotiated with FAA in order to preclude the possibility that FAA might charge union controllers taking advantage of reduced air fares obtained by P.A.T.C.O. with violation of its code of ethics.

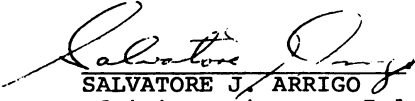
4/ NLRB v. Amalgamated Local 286, International Union, United Automobile Workers of America, AFL, 222 F.2d 95, 36 LRRM 2049.

to employees who failed to remain members of the union in good standing. The Court found that the facts of the case established that insurance coverage "...was a benefit incidental to union membership and not a condition of employment" and therefore the union's threat to withdraw said benefits was in full conformity with its right to regulate its internal affairs. Subsequent to this decision, in another case, the General Counsel of the National Labor Relations Board refused to issue a complaint against a union relative to the union's refusal to pay welfare benefits to certain delinquent members, such benefits having been determined to be incidents of membership rather than conditions of employment. 5/

Under all the circumstances, I conclude that the reduced air fare program constitutes an incident of membership in P.A.T.C.O. and accordingly I do not find that President Spencer violated the Order when he informed Complainant of the membership requirements for participation in the program.

Recommendation

Based upon the foregoing findings and conclusions, I recommend that the complaint herein be dismissed.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: August 7, 1974
Washington, D.C.

5/ Administrative Rulings of the NLRB General Counsel, Case No. SR-656 (1960).

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES AIR FORCE,
KINGSLEY FIELD,
KLAMATH FALLS, OREGON
A/SLMR No. 443

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 704, Independent (NFFE) alleging that the United States Air Force, Kingsley Field (Respondent) violated Section 19(a)(1) of the Order by instituting, without prior explanation or consultation, a new procedure whereby the NFFE local's President was required to maintain a permanent log of the time he was away from his duty station on authorized union business. It was contended that the institution of this procedure interfered with, coerced and otherwise restrained the President in the exercise of rights guaranteed to him under the Order and had a chilling effect upon other employees and members of the Complainant in their exercise of rights guaranteed to them under the Order.

The Administrative Law Judge recommended that the complaint be dismissed. Although concluding through credibility resolutions that, upon the implementation of the new procedure, the purpose of the log was not fully explained to the local President, the Administrative Law Judge found no evidence that the local President was singled out for the log-keeping assignment in order to harass him because of his status or activity on behalf of the Complainant. In this regard, the Administrative Law Judge accepted the Respondent's explanation that the procedure was experimental and was instituted as a result of a suggestion for a better cost accounting procedure. The Administrative Law Judge found, further, that although the log-keeping assignment represented a change in the President's working conditions, the Order did not require the Respondent to volunteer an explanation in the absence of a request or showing of interest by the Complainant.

While adopting the Administrative Law Judge's findings pertaining to the Respondent's motivation in instituting the log-keeping procedure and the lack of evidence that such change in the President's working conditions was made to harass him because of his union status, the Assistant Secretary disagreed with his conclusion that the Respondent's conduct herein was not violative of the Order. The Assistant Secretary noted that notwithstanding the terms of the parties' negotiated agreement, in which the Respondent agreed to consult with the Complainant prior to making any changes in personnel policies, practices and procedures that were applicable to employees in the unit, the Respondent unilaterally selected the local President of

the exclusive representative and imposed on him a new working condition different from that governing other employees. In his view, the natural and foreseeable consequence of such a policy would be to reflect to other unit employees a disparagement of an official of their exclusive representative and would tend to restrain bargaining unit employees from exercising their Section 1(a) rights under the Order. Additionally, he found that the Respondent's unilateral conduct had the improper effect of evidencing to unit employees that it could act unilaterally with respect to their terms and conditions of employment without regard to their exclusive representative.

Under these circumstances, the Assistant Secretary concluded that the Respondent's conduct herein violated Section 19(a)(1) of the Order and he, therefore, ordered the Respondent to cease and desist from such conduct and take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,
KINGSLEY FIELD,
KLAMATH FALLS, OREGON

Respondent

and

Case No. 71-2691

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES,
LOCAL 704, INDEPENDENT,
KLAMATH FALLS, OREGON

Complainant

DECISION AND ORDER

On May 28, 1974, Administrative Law Judge John H. Fenton issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practice and recommending that the complaint be dismissed. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendation and the Respondent filed an answering brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in this case, including the Complainant's exceptions and the Respondent's answering brief, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge, only to the extent consistent herewith.

The Complainant alleges, in essence, that the Respondent violated Section 19(a)(1) of the Order by instituting, without prior explanation or consultation, a new procedure whereby Mr. Lawrence E. Lewis, President of the National Federation of Federal Employees (NFFE), Local 704, 1/ was

1/ NFFE Local 704 is the exclusive representative of certain employees of the Respondent.

required to maintain a permanent log of the time he was away from his duty station on authorized union business. It is contended that the institution of this procedure interfered with, coerced and otherwise restrained Lewis in the exercise of rights guaranteed to him under the Order and had a chilling effect upon other employees and members of the Complainant in their exercise of rights guaranteed to them under the Order.

The essential facts are not in dispute and I shall repeat them only to the extent deemed necessary.

Lewis is an employee in the Vehicle Maintenance Section (VMS) of the Respondent's Directorate of Logistics. At all times material herein, Technical Sergeant Charles R. Seifner was Lewis' immediate supervisor and responsible to Captain Frederick A. Linville, Director of Logistics. The established procedure for all employees in the VMS who desired to leave their work area for any reason was that they would check with Seifner and sign out on a blackboard in Seifner's office area giving the time out and destination. The message was erased upon the employee's return. Blanket permission to leave was granted in the event Seifner was not in the work area. The record reveals that the only purpose of the procedure was to inform anyone who might be looking for the employee involved of the time he left the work area and his whereabouts.

The Directorate of Logistics and the Civil Engineering Department are the only components of the Respondent to utilize a man-hour accounting system. The record reveals that the log in question was instituted in the VMS of the Directorate of Logistics as a result of a suggestion submitted to the Aerospace Defense Command (ADC) by the Respondent's Civilian Personnel Officer (CPO) based upon what he considered to be a distortion in cost accounting figures resulting from the then existing system of reporting nonproductive time spent on authorized union activities under time codes also utilized for productive time. 2/

Seifner furnished Lewis with a log sheet captioned, "Log for time spent on union activities," and instructed him to enter the date, his time out, destination and time in whenever he handled union business outside of his Section. 3/ Seifner testified that he explained the purpose of the log to

2/ The head of the Civil Engineering Department was of the view that its present procedures were adequate and, therefore, it did not participate in the new log procedure.

3/ Following the filing of the charge in this matter, Seifner added the phrase, "For Back-up for Suggestion that Has Been Submitted," to the caption on the log.

Lewis. Lewis testified that he was offered no explanation other than that it was an order from Captain Linville, and although he had questions regarding the purpose of the log, he did not feel it wise to protest at that time. The log was in effect from April 10 through May 14, 1973. Eight entries in the log were made by Lewis, which required no more than a total of 30 minutes to prepare, and there was no change in the blanket permission in effect in the VMS regarding Lewis' conduct of union business.

Following consultation with NFFE headquarters, Lewis filed an unfair labor practice charge in this matter. Credited testimony reveals that Lewis first learned of the purpose of the log at a factfinding committee hearing on his charge upon which the instant complaint is based. The fact-finding committee was convened by the Respondent and determined that Lewis' rights under the Order had not been compromised.

Lewis testified that the requirement that he maintain a permanent log of his union business was highly unnecessary and annoying and contended that such action was harassment by Captain Linville because of the parties' disagreement with respect to another labor-management matter. Further, Lewis asserted that a member of the Complainant had asked him in jest whether it was still safe to belong to the Union, and that people waited until evening when he was at home to approach him about union affairs rather than call him or see him on duty. The record fails to reveal any evidence, apart from the foregoing testimony, that maintaining the log had any adverse effect on Lewis' performance of his union duties. Linville testified that in instituting the log procedure he had no intention of harassing Lewis and stated that he selected Lewis because he believed that time spent on union business by the President of the Complainant would be a significant portion of the total time spent on authorized Union business. Linville testified further that he explained fully the purpose of the log to Seifner and instructed him to so inform Lewis. The CPO testified that he did not consider the use of the log to be a change in personnel policy, but rather it was intended as a test to determine the feasibility of establishing on a permanent basis a cost accounting code for time spent on authorized union business.

The Administrative Law Judge found that although Seifner did not fully explain the purpose of the log to Lewis, ^{4/} there was no evidence that the latter was singled out for the log-keeping assignment in order to harass him because of his status or activity on behalf of the Complainant. In the Administrative Law Judge's view, the imposition of the logging requirement had neither the purpose nor the effect of interfering with Section 1 rights of employees. In this regard, he accepted the Respondent's explanation that the procedure was experimental, designed to

^{4/} In this respect, the Administrative Law Judge accepted as credible Lewis' testimony that Seifner did not, in fact, fully explain the purpose and intent of the log-keeping assignment.

elicit information about the feasibility of changing the cost accounting system, and limited to Lewis because he was the most active union official in the only department interested in testing the suggestion. It was noted that Lewis remained free at all times to attend to union business and, as in the past, he was never refused permission to do so. Thus, the Administrative Law Judge rejected the contention that the required use of the log interfered with Lewis' rights under Section 1 of the Order. The Administrative Law Judge found, further, that although the log-keeping assignment represented a change in Lewis' working conditions and clearly made him apprehensive, the Order did not require the Respondent to volunteer an explanation in the absence of a request or showing of interest by the Complainant. Accordingly, the Administrative Law Judge concluded that the Respondent did not engage in any conduct violative of Section 19(a)(1) of the Order.

While I adopt the Administrative Law Judge's findings pertaining to the Respondent's motivation in instituting the log-keeping procedure noting the lack of evidence that such change was made to harass Lewis because of his union status, I, nevertheless, disagree with his conclusion that the Respondent's conduct herein was not violative of the Order. Thus, notwithstanding the terms of the parties' negotiated agreement, in which the Respondent agreed to consult with the Complainant prior to making any changes in personnel policies, practices and procedures that were applicable to employees in the unit, ^{5/} the Respondent, through its agent, Sergeant Seifner, unilaterally selected the President of the exclusive representative and, without explanation, imposed a new working condition on him different from that governing other unit employees of the Respondent. In my view, under these circumstances, the natural and foreseeable consequence of such a policy aimed solely at the working conditions of the Complainant's President would be to reflect to other unit employees a disparagement of an official of their exclusive representative and would tend to restrain employees, such as President Lewis, from exercising their right to join and assist a labor organization by participating in or acting as a representative of that labor organization and presenting their views to management. ^{6/} In addition, I find that the Respondent's unilateral conduct

^{5/} Specifically, Article 2, Section 2.4 entitled, "Consultation," provided, in part: "The Employer agrees to consult with NFFE 704 prior to making any changes in personnel policies, practices and procedures that are applicable to employees in the unit except for emergency situations, and the Employer further agrees to furnish five (5) copies of any proposed changes in aforementioned personnel policies, practices and procedures to NFFE 704 for review and consultation as soon as possible prior to the proposed effective date...."

^{6/} Cf. U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242.

herein in implementing a change in working conditions without affording the exclusive representative notice and an opportunity to meet and confer thereon had the improper effect of evidencing to unit employees that it could act unilaterally with respect to their terms and conditions of employment without regard to their exclusive representative. 7/ Under all of these circumstances, I conclude that the Respondent's conduct herein violated Section 19(a)(1) of the Order. 8/

REMEDY

Having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order that the Respondent cease and desist therefrom and take certain specific affirmative actions, as set forth below, designed to effectuate the purposes and policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Air Force, Kingsley Field, Klamath Falls, Oregon, shall:

1. Cease and desist from:

(a) Instituting changes in the working conditions of officials of the exclusive representative, or any other unit employees represented by the National Federation of Federal Employees, Local 704, Independent, or any other exclusive representative, without notifying the National Federation of Federal Employees, Local 704, Independent, or any other exclusive representative, and affording such representative the opportunity to meet and confer on such matters.

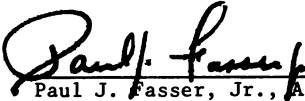
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured them by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Kingsley Field copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
October 22, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

7/ See Anaheim Post Office, U.S. Postal Service, Anaheim, California, A/SLMR No. 324. The fact that Lewis did not protest immediately or inquire about the purpose of the new log-keeping procedure was not considered to require a contrary result where, as here, the evidence establishes that the new procedure was instituted on the same day that notification was given to Lewis. Cf. National Labor Relations Board, A/SLMR No. 246.

8/ It was noted that the Complainant did not allege a violation of Section 19(a)(6) of the Order.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute changes in working conditions of officials of the exclusive representative, or any other unit employees represented by National Federation of Federal Employees, Local 704, Independent, or any other exclusive representative, without notifying National Federation of Federal Employees, Local 704, Independent, or any other exclusive representative, and affording such representative the opportunity to meet and confer on such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Executive Order.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.



In the Matter of	:	
	:	
	:	
UNITED STATES AIR FORCE,	:	CASE NO. 71-2691
KINGSLEY FIELD	:	
KLAMATH FALLS, OREGON	:	
Respondent	:	
	:	
and	:	
	:	
NATIONAL FEDERATION OF	:	
FEDERAL EMPLOYEES	:	
LOCAL 704, INDEPENDENT,	:	
KLAMATH FALLS, OREGON	:	
Complainant	:	
	:	

Bruce LeMar, Capt., U.S.A.F.
Office of the Command Judge Advocate
Headquarters, Aerospace Defense Command
Ent Air Force Base, Colorado
For the Respondent

George A. Gardis, Union Representative
4605 Shasta Way
Klamath Falls, Oregon

Lawrence E. Lewis, President
Local 704, NFFE
2449 Wantland Avenue
Klamath Falls, Oregon
For the Complainant

Before: JOHN H. FENTON
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This proceeding was initiated upon the filing of a complaint alleging a violation of §19(a)(1) of Executive Order 11491, as amended, (hereinafter referred to as the Order) by the National Federation of Federal Employees, Local 704, (hereinafter referred to as the Complainant or Union) against the U. S. Air Force, Kingsley Field, Klamath Falls, Oregon (hereinafter referred to as the Respondent or Activity) on June 28, 1973. The complaint charges that without consultation with the Union, Activity management instituted a new procedure whereby Mr. Lawrence E. Lewis, President of Local 704, was required to maintain a permanent log of the time he was away from his duty station at the Activity on authorized Union business. This practice, it is alleged, interfered with, coerced and otherwise restrained Mr. Lewis in the exercise of the rights guaranteed to him by §1 of the Order and likewise had a chilling affect upon other employees and members of the Union in their exercise of §1 rights.

A Notice of Hearing on the complaint was issued on October 1, 1973, by the Regional Administrator, Labor-Management Services Administration, San Francisco Region. Pursuant thereto, a hearing was held October 25, 1973, in Klamath Falls, Oregon. Both parties were present at the hearing and were afforded full opportunity to call and examine witnesses and adduce relevant evidence. Briefs filed by both parties have been carefully considered.

Upon the entire record in this matter and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations to the Assistant Secretary.

Findings of Fact

Complainant is the exclusive representative for all unit employees at the Activity. Mr. Lewis, the Union President, is an employee of the Activity assigned to

the Vehicle Maintenance Section of the Directorate of Logistics. A collective bargaining agreement in effect between the Union and the Activity governed labor-management relations at the facility at the time during which the alleged unfair labor practice occurred. 1/

Article 4 of this agreement provides, in part, that Union shop representatives will be allowed to leave their assigned work duties, without loss of leave or pay, to attend to certain listed categories of Union business. When wishing to leave his work area to engage in authorized Union business the shop representative is required to request the permission of his immediate supervisor. Article 4 provides that permission will be granted in the absence of "compelling circumstances preventing it."

On February 12, 1973, 2/ Robert E. Means, Civilian Personnel Officer at the Activity, submitted a suggestion to the Aerospace Defense Command (ADC) under procedures established in Air Force Manual (AFM) 900-4. The suggestion 3/ proposed the institution of a new time keeping code for use in work areas of the Activity employing a man-hour accounting system. This new code would be used to designate paid time spent on authorized Union business. Past practice had had this time accounted for under time codes for administration, overhead or indirect labor costs. Mr. Means was prompted to introduce his suggestion by what he considered to be the distortion in cost accounting figures resulting from the reporting of nonproductive time spent on authorized Union activities under time codes also utilized for productive time. The addition of the proposed time-code would, in Means' opinion, have provided supervisors and managers with the flexibility necessary to cost account for work orders or projects in a realistic way.

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- 1/ Complainant's Exhibit No. 5
 - 2/ All dates hereafter mentioned occurred in 1973.
 - 3/ Respondent's Exhibit No. 2.

On February 15, ADC returned the suggestion to Means and directed that he get a local evaluation of the proposal from either the Civil Engineering department or the Vehicle Maintenance Section of the Directorate of Logistics, the two work areas at the Activity which employed the man-hour accounting system. Approximately two Union officers and four stewards were employed in the two work areas. Means contacted Captain Thomas M. Hanson, head of Civil Engineering and Captain Fredrick A. Linville, Director of Logistics, to seek their evaluation of the suggestion. Captain Hanson submitted his comments by letter dated March 28 4/ wherein he indicated his belief that local procedures were adequate to account for time spent on Union activities. He later indicated that he had no interest in implementing the new time code in his section to test its effectiveness.

Captain Linville's response was more favorable. He agreed to evaluate the suggestion and met with Means to discuss possible methods to employ in gathering the necessary background data. Linville's apparent concern was to discover whether a significant amount of paid employee time was occupied by Union activities such that establishment of a new time code would be warranted. He therefore determined that some sort of time record would have to be kept. After meeting with Technical Sergeant Charles R. Seifner, Supervisor of the Vehicle Maintenance Section, Captain Linville decided to have Mr. Lewis keep a log of the time he spent away from the Section on Union representational business.

Linville chose Mr. Lewis to keep the log because he believed that as the Union President Lewis would spend more time on Union duties than other Union representatives in the Section, and that the time he so spent would be a significant portion of the total time spent by employees of the Section on authorized Union business.

Captain Linville thus instructed Sergeant Seifner to prepare a log in which Lewis would maintain a permanent

4/ Respondent's Exhibit No. 4.

record of the time he left the work area on Union business, his destination and the time of his return. Linville further ordered Sgt. Seifner to instruct Mr. Lewis to maintain the log and directed that the purpose of the assignment be made clear.

On April 10 Seifner called Mr. Lewis into his office and instructed him in the use of the log. Sergeant Seifner testified that pursuant to Captain Linville's order he explained to Mr. Lewis the reason for which he was being required to keep the permanent log. Lewis testified that Seifner offered no explanation for the maintenance of the log and that although he had questions regarding its purpose he did not feel it wise to protest. This testimony concerning the April 10 meeting in Seifner's office presents the only significant conflict of evidence in the record. After full review and consideration, however, I am persuaded by Mr. Lewis' testimony that Sergeant Seifner did not in fact fully explain the purpose and intent of the log keeping assignment and did not indicate its relationship to the earlier filed suggestion. On the other hand, Lewis did not protest or seek an explanation of the reasons for the new procedure.

Prior to April 10 it had been the practice for Mr. Lewis along with all other employees in the section to approach Supervisor Seifner when wishing to leave the work area for any reason. Upon explaining the purpose of the absence the employee would sign out on a black board and leave. The only purpose for this procedure was to inform anyone who might be looking for the employee of the time he left the work area and his whereabouts. The message would be erased upon the employee's return. 5/ In the event Sergeant Seifner was not present in the work area when Mr. Lewis wanted to leave on union business he had "blanket permission" to do so. All that was required was for him to sign out and, if Seifner was present on his return, inform him of the reason for his absence.

5/ Section employees used the sign-out board on the oral orders of Sergeant Seifner. The practice was not required under the collective bargaining agreement of published Activity regulations.

From April 10 until May 14, Lewis maintained the permanent log as Seifner had directed. During that time a total of eight entries were made. 6/ Lewis contended, in credited testimony, that he learned of the purpose of the log only after he filed an informal complaint with Colonel Nat B. King, Base Commander. 7/ In response to Lewis' charges Col. King convened a bilateral fact finding committee, which, after gathering evidence, issued a report on May 7, in which the purpose of the log keeping assignment and its relation to the Mean's suggestion was discussed and a finding made that Mr. Lewis' rights under the Order had not been compromised. 8/

The log was discontinued on May 15, after ADC had again reviewed the Means suggestion and preliminary reports from Civil Engineering and the Vehicle Maintenance Section and determined that institution of a new permanent time code for Union business was unnecessary.

In the time during which the log was kept there was no change in the blanket permission policy in effect in the Vehicle Maintenance Section regarding Lewis' conduct of Union business. Lewis spent no more than 30 minutes making entries in the log during the entire period he was required to do so. No evidence was adduced that this additional duty had any deleterious effect on Lewis' performance of his Union responsibilities, apart from Lewis' testimony that one Union member had asked him in jest whether it was still "safe" to belong to the Union, and that people would avoid calling him or coming to see him while on duty and would wait until evening when he was at home to approach him about Union affairs. Although

6/ Complainant's Exhibit No. 4.

7/ Complainant's Exhibit No. 3.

8/ At the hearing Respondent moved for dismissal of the Complaint on the ground that the allegations were in effect, claimed violations of contract, and that §19(d) of the Order required, in these circumstances, that a remedy be sought through the negotiated grievance procedures rather than under the Order. There is no evidence that Mr. Lewis elected to invoke the grievance machinery. On the contrary, he in fact filed an unfair labor practice charge, thus provoking the creation of the bilateral committee in an unsuccessful effort to secure an informal resolution of his charge. Accordingly, the motion is denied.

the log keeping assignment was made to Lewis shortly after a labor-management dispute in which both Lewis and Col. Linville were involved had arisen at the Activity, I find the instances unrelated.

Contentions of the Parties

The Union contends that by requiring Mr. Lewis alone among Union members to keep a log of his Union activities, Activity management interfered with his §1 rights and intimidated other Union members in the exercise of their protected rights. In addition the Union argues that in imposing upon Mr. Lewis the task of keeping a log of his Union activities without first consulting or conferring with the Union, Activity management further violated §19(a)(1) of the Order.

The Activity maintains that the log keeping requirement imposed on Mr. Lewis was a temporary, experimental measure; that it was a legitimate tool by which to gather evidence to evaluate Mr. Means' suggestion; that the selection of Mr. Lewis to keep a record of the time he spent on Union activities was a logical way to obtain the needed data and that no injury was worked against Lewis or other Union members thereby. The Activity further contends that it fully met any burden imposed by the Order to consult with the Union about the procedure.

Discussion and Conclusions

1. Did the requirement that Union President Lewis keep a log of time spent on Union matters interfere with, restrain, or coerce him in the exercise of rights secured by the Order, and did it have a chilling effect upon the exercise of such rights by other employees?

As indicated in the recitation of facts, I find no evidence that Respondent imposed this requirement on Mr. Lewis in order to harass him because of his status

or because of his discharge of his duties as Union president. Rather, I accept the Respondent's explanation that the procedure was experimental, designed to elicit information about the feasibility of changing the cost accounting system, and limited to Mr. Lewis because he was the most active Union official in the only department interested in testing the suggestion. Mr. Lewis remained free at all times to attend to Union business. As in the past, he was never refused permission to do so. The only difference between the new and the old procedure was that the new called for a permanent record of departure time, destination and return time, whereas the old required entry of the first two on a blackboard, and their erasure upon return. Thus, I conclude that imposition of the new requirement did not cause any undue delay or inconvenience to Mr. Lewis in the performance of his Union duties. At most, it caused a momentary delay. I therefore reject the contention that the required use of the log interfered with Mr. Lewis' rights under §1 of the Order. The additional burden upon him was at most, minimal, and it was temporary and experimental in nature. I otherwise reject the contention that Mr. Lewis was singled out for such treatment, thus manifesting management's capacity to harass him with impunity and in consequence discouraging other employees in the exercise of their Section 1 rights. Rather, the evidence strongly supports Respondent's explanation that a study of the feasibility of the suggestion was limited to the Vehicle Maintenance Section because Civil Engineering was not interested. Furthermore, as the study was designed to discover whether a sufficient amount of time was devoted to Union activities to warrant the establishment of a new time code, it made sense to center it on the individual who handled most (if not all) of the Union representational work in that Section. I find that Respondent was motivated by a legitimate desire to determine whether sufficient work-time was absorbed in Union activity to warrant a new coding system which would separate out such nonproductive time from other nonproductive time, and that its imposition of the logging requirement had neither the purpose nor the effect of interfering with the Section 1 rights of employees.

2. Did Respondent violate §19(a)(1) of the Order by failing to consult with the Union before imposing upon Mr. Lewis the requirement that he keep such a log?

As noted in the findings of fact, I accept Mr. Lewis' testimony that he was never given an explanation of the reasons behind the decision to require him to keep a log until after his April 15 letter of protest to the Base Commander. Mr. Lewis also testified that he did not, on April 10, protest to Sgt. Seifner, or request an explanation of him. Although the extra burden placed upon him was slight, it represented a change in his working conditions, and it was one which clearly made him apprehensive. Good labor relations might have dictated in the circumstances a rather full and careful explanation of the underlying purpose of the requirement. I conclude, however, that the Order does not require management to volunteer such an explanation in the absence of a request or show of interest by the Union. Here the change affected, and it was announced to, the Union President. He did not protest, nor did he inquire about its purpose. Rather, he waited, as his letter shows, to contact his headquarters before lodging a protest. He thereafter received an explanation. I conclude that it was incumbent upon Mr. Lewis to make a request for consultation before any obligation to consult could arise. I find, in view of his failure to seek consultation, that there is no merit to this allegation of the complaint.

I therefore conclude that this record fails to establish that the Activity engaged in any conduct violative of §19(a)(1) of the Order.

Recommendation

In view of these findings and conclusions, I recommend that the Assistant Secretary of Labor for Labor Management Relations dismiss the Complaint.

John H. Fenton
 John H. Fenton
 Administrative Law Judge

Dated: May 28, 1974
 Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
MEMPHIS SERVICE CENTER,
MEMPHIS, TENNESSEE
A/SLMR No. 444

INTERNAL REVENUE SERVICE,
MEMPHIS SERVICE CENTER,
MEMPHIS, TENNESSEE

Respondent

and

Case No. 41-3403(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NATIONAL TREASURY
EMPLOYEES UNION, LOCAL CHAPTER 098

Complainant

DECISION AND ORDER

This proceeding arose upon the filing by the National Treasury Employees Union and National Treasury Employees Union, Local Chapter 098 (Complainant) of an unfair labor practice complaint involving three separate instances in which the Internal Revenue Service, Memphis Service Center, Memphis, Tennessee (Respondent) allegedly violated the Order.

On May 23, 1974, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Report and Recommendations and the Respondent filed an answering brief.

In the first instance it was asserted, in substance, that the Respondent violated Section 19(a)(1), (2) and (4) of the Order by the alleged improper statement of a supervisor to an employee at a meeting between the two. The Administrative Law Judge recommended dismissal of this allegation. He based his recommendation primarily on his credibility resolution that the supervisor's version of the events of the meeting was the more credible recollection of the meeting involved.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, including the exceptions filed by the Complainant and the answering brief filed by the Respondent, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge.

In the second instance it was asserted, in substance, that the Respondent violated Section 19(a)(1), (2) and (4) of the Order by the alleged statements of a supervisor and a senior employee to an employee to the effect that the employee would receive a poor evaluation if she voluntarily furloughed herself other than during the prescribed furlough period and would continue to receive poor evaluations if she went to her exclusive representative and grieved. The senior employee who was present allegedly indicated that this was true as it had happened to her. The Administrative Law Judge recommended dismissal of this allegation based on his credibility resolutions.

1/ With respect to the adoption of the Administrative Law Judge's credibility findings, see Navy Exchange, U. S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180.

In the third instance the Complainant asserted, in substance, that the Respondent, through a supervisor, violated Section 19(a)(1), (2) and (6) by allegedly confronting an employee concerning the subject matter of a pending grievance while the employee was without representation. The Administrative Law Judge in recommending dismissal of the allegation against the Respondent noted the lack of any evidence as to what transpired at the alleged meeting between the supervisor and employee, much less whether it was a matter relating to the grievance which had been filed. In this regard, the Administrative Law Judge noted the fact that no one at the alleged meeting testified at the hearing.

Upon consideration of the Administrative Law Judge's Report and Recommendations, his credibility findings, and the entire record in this case, including the Complainant's exceptions and the Respondent's answering brief, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations that the complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-3403(CA) be, and it hereby is, dismissed.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



Dated, Washington, D. C.
October 22, 1974

Paul J. Fasser, Jr.
Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

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In the Matter of :

Internal Revenue Service :
Memphis Service Center :
Memphis, Tennessee, : Case No. 41-3403(CA)
Respondent :

and :

National Treasury Employees :
Union and National Treasury :
Employees Union, Local Chapter 098, :
Complainant :
.....

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For the Complainant

BEFORE: RHEA M. BURROW
Administrative Law Judge

B

On or about May 1, 1973, Respondent's supervisor, Norma Dennis and Senior Betty Shanly called employee Susan Higgenbotham from overtime duty to a canteen to discuss matters pertaining to Mrs. Higgenbotham's employment; Mrs. Higgenbotham was allegedly told she would receive a poor evaluation if she voluntarily furloughed herself and would continue to receive poor evaluations if she went to the Union and grieved; Betty Shanly, assured her this was true as it had happened to her. Such actions were considered an attempt to coerce and intimidate an employee into not filing a grievance and exercising her rights in violation of Section 19(a)(1), (2) and (4) of the Order.

C

On or about April 26, 1973, a grievance was filed on behalf of Kathy Cason and it named Andy Pchola, NAIRE, Local Chapter 098, President and Fred D'Orazio, NAIRE Field Representative as her official representatives; the grievance concerned a written reprimand and an oral ultimatum based thereon by Respondent's supervisor, Betty Miller that employee Kathy Cason would be terminated in two weeks if her work did not improve; the grievance was pending on May 10, 1973, when Betty Miller met with Kathy Cason and told her that she had one week within which to resign or her services would be terminated; since Kathy Cason was without representation when confronted by her supervisor about the subject matter of a pending grievance her actions were alleged to violate Sections 19(a)(1), (2) and (6) of the Order.

A hearing was held in the aforementioned matter on February 12 and 13, 1974, in Memphis, Tennessee. All parties were represented and through their counsel were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues herein and to make oral argument. Briefs have been submitted by counsel for the parties for consideration of the undersigned.

Upon the entire record herein, including my observation of the witnesses and their demeanor and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Facts and Events Relating to Part A of the Complaint

A
The Evidence

Mrs. Beverly Casper is a tax examiner in the Respondent's Adjustment Branch of the IRS, 3/ Memphis Service Center, Memphis, Tennessee. During August 1972, employees were being recruited or selected for training in a new unit in the Adjustments Branch of the Center called the First Read Organization. Some of those being sought were concerned about what their future would be in this new organization and Richard Stefanik, who was then Chief, Adjustments Branch, testified they were told that upon completion of training, if they were otherwise qualified, they would be promoted; about the time that training was completed there was a presidential freeze on all promotions in the federal service and this was not lifted until late February or March 1973; when the freeze was lifted some seventy or eighty people were promoted and discussions concerning promotions were being held with all employees at the center at the time. One of these employees was Beverly Casper. Mrs. Casper testified that her acting supervisor Hazel Howard told her she would get a promotion but about two weeks later on March 13, 1973, Mrs. Barbara Fant, her supervisor told her that she was not going to get the promotion she had expected. The reason for not granting the promotion was stated to have been low production. She admitted on cross-examination of becoming emotional and making abusive remarks to the supervisor. Documentary evidence refers to such remarks as: "If that's the way you feel you can take this damn job and stick it up your asses; I'm tired of trying to appease these damn people; I'm sick of this God-damn place;...this God-damn place is terrible."

The record reveals that Mrs. Casper did not report for work on March 14 and 15, 1973. On March 16, 1973, Mr. Stefanik called her into her office and explained to her that he had called the conference because he was concerned with her behavior on March 13, 1973, and why she felt that way. Mrs. Casper on direct examination to an inquiry as to what transpired at the meeting stated:

"Well he called me in there, and I had been upset the other day when I left the building and he asked my reason for my outburst, and I said, well it was because I was told I was getting a promotion,

3/ Internal Revenue Service.

and then I asked him who had stopped my promotion. He said he had stopped it because my production wasn't high enough. I said what is my production, I had never seen any figures. He said I don't have the figures right here now either, so this is what he called me in there for."

She also affirmed on cross-examination that the first thing Mr. Stefanik said at the meeting related to her conduct on March 13. During the course of the meeting on March 16, according to Mrs. Casper she informed Mr. Stefanik that she was thinking of filing a grievance and he replied you can file a grievance on this "but I've got more on you than you'll ever get on me, and if you do file a grievance, no other part of the service center will want you." Mrs. Casper also related that a short while before the March 13, 1973 incident she had been asked by the Chief of the Microfilm Research Section if she would like to come on the night shift and get a promotion to Grade 6; she declined at the time because she had been told she would receive her promotion in the adjustments section; when she reconsidered and went back to apply for the position in the Microfilm Section after March 16, 1973, it had already been filled. She further testified that a few days after the March 16 incident she filed a grievance on her lack of promotion; that when she learned of the production requirements, she increased hers and was promoted in July 1973. The testimony reveals that neither she nor her Union representative even checked to determine whether there were any detrimental remarks in her personnel folder.

Mr. Stefanik stated that a unit supervisor had reported that Mrs. Casper had become upset and used profane language to her on March 13; he called the conference on March 16 because she was absent on the 14th and 15th and he was concerned with her behavior; when he asked her to explain she became belligerent and told me she didn't feel it was my duty or responsibility to talk to her about her behavior because she felt she had been mistreated by having been denied her promotion; we discussed some of the facts in her evaluation including production and she insisted that she was entitled to it since it had been promised by her supervisor; I told her I could not deny that because I didn't know whether it was true or not but that she was not performing adequately to be promoted at that time; at that point she mentioned filing a grievance and I told her, "Beverly I think that is your privilege and your right to do so, you can do this. However, I don't really think you have been mistreated, you had been treated fairly; you had been ranked with all the other employees in the branch, doing like work, and there was really no basis for a grievance." Mr. Stefanik also stated that

the question of transfer to the Research Branch came up in the discussion and he told her that if she was serious about it to write a letter and he would take it up with the appropriate Branch Chief and see if we can get your job back. I told her that I felt that she would not get a good evaluation because of her behavior and low productivity at this time.

There were no witnesses at the March 16, 1973 meeting between Mr. Stefanik and Mrs. Casper. Linda Reinersman testified that she had been a tax examiner in the adjustments unit at the Memphis Service Center since July 1972; when Mrs. Casper came out of Mr. Stefanik's office on March 16, 1973, she stopped by Fern Stokley's desk for a moment and then came over to see me; Beverly stated that Mr. Stefanik had told her: "I've got more on you than you've got on me and go ahead and file a grievance, that he would put something in her personnel folder so that no other area in the Service Center would want her." 4/

(B)

Incidents Cited to Impeach the Credibility Of
Richard Stefanik's Testimony

(1) Mrs. Casper and Linda Reinersman testified that Mr. Stefanik promised in August 1972 to promote them when they completed a training program. Linda Reinersman did not get her promotion until about April 1973 and Mrs. Casper in July 1973.

(2) Complainant through various witnesses including Union Chief Representative Andrew Pchola, presented testimony that Richard Stefanik should not be believed because he had told employees they would have to work on the day of President Johnson's funeral and it later developed that they did not have to do so. In this connection Pchola testified that a union official was told that Stefanik's position was correct that the government could require an employee or group of employees to appear for work on a day of mourning but the union in this matter got him overruled.

(3) The Tarwell Incident. Union Representative Pchola testified that sometime in 1972 Mr. Stefanik had seen him talking to Judy Tarwell that he wanted to talk with him and he proceeded to explain why Judy had been transferred to another area; he wanted to know whether a grievance was contemplated and when told that it was he stated that if you are

4/ In a written statement reported to have been made shortly after the incident Linda Reinersman referred to Beverly as having stated: "He said that if she filed a grievance that he would put something in her personnel folder so that no other area would take her." (Complainant Exhibit No. 3).

successful in getting her back in this branch, I'll make things so bad for her, that you know, she'll wish that she hadn't filed that grievance and then brought back in this branch.

Richard Stefanik testified that Judy Tarwell was one of the applicants that was not selected for the New Read Organization and she was concerned about this and Andrew Pchola came in to discuss the matter. The substance of the conversation was that we were not going to select Judy. At that time, Pchola indicated that he had heard Judy's story and just wanted to hear my side of it. Stefanik stated that he didn't recall anything about a grievance being filed and did not state that if Judy came back he would make things bad for her.

(4). The Election Incident. Andrew Pchola testified that a week prior to the union gaining exclusive recognition at the center Mr. Stefanik called him, Mark Dolphman and Justine Ulsh into his office and wanted to know how we knew that we would be monitors for the union in the election; we told him we had volunteered for the job and spoke to a NAIRE representative and would take our own leave; he said okay, that he just wanted to get things straight because employees sometimes get hurt in these dealings between the union and management.

II

Findings and Conclusions Relating to Part A of the Complaint

(1) I find that the purpose of the March 16, 1973 meeting between Beverly Casper, employee and Richard Stefanik, Chief Adjustment Branch at the Memphis Service Center was to discuss her conduct on March 13, 1973, and not her promotion as erroneously alleged in the complaint. The record clearly demonstrates that Mrs. Casper knew and had ample reason to know by her past conduct that this was the subject to be discussed when she was called into conference with Mr. Stefanik on March 16, 1973, and her testimony at the hearing affirms this.

(2) Mrs. Casper's disappointment in not receiving a promotion that she was anticipating was a subject she brought into the picture at the conference on March 16, 1973, to explain or mitigate the circumstances relating to her conduct with her supervisor on March 13, 1973. Mr. Stefanik discussed her evaluation with her in an attempt to explain why a promotion was not considered warranted at that time.

(3) Mrs. Casper advanced the subject of a transfer to Microfilm Research Section and was told that if she was serious about a transfer to write a letter to that effect and an attempt would be made to secure a transfer for her; it was also explained to her; that in view of her recent behavior and low production she might not get a good evaluation at this time. No request for transfer is subsequently shown to have been received nor was this part of Mr. Stefanik's testimony disputed.

(4) Upon consideration of the testimony relating to the facts and circumstances and my observation of the witnesses and their demeanor, I find that the testimony of Richard Stefanik reflects substantially what occurred at the March 16, 1973 conference and that he did not state to Mrs. Casper that if she filed a grievance no one would want her after he finished with her personnel folder.

(5) The incidents relating to the promotion freeze and the Johnson funeral do not impeach or discredit Mr. Stefanik's testimony and I discredit the testimony of Andrew Pchola regarding the implication of this and the Tarwell incident. The election incident is not material or related in time to the issue herein and in any event does not discredit the testimony of Stefanik regarding the March 16, 1973 conference or the violation alleged in Charge A of the complaint.

(6) The offer of proof regarding William Glanker's purported testimony that he had seen a notation on a promotion register in Microfilm Research Section alongside Mrs. Casper's name that she had filed an unfair labor practice covered an event over which no timely charge or allegation in the complaint had been filed; further, the notation along without further evidence as to time and circumstances would not relate the remarks to the March 16, 1973 conference; when this motion was made no satisfactory explanation was given as to why the information from Mr. Glanker was not previously available and when renewed, it did not appear that it would change the result even assuming it to be true.

III

Discussion and Evaluations as to Charge A of the Complaint

(A) The Requirements of the Order. Section 19(a) of the Order provides that agency management shall not: "(1) interfere with, restrain or coerce an employee in the exercise of the rights assured by this Order; (2) encourage or discourage membership in a labor organization by discrimination in regard

to hiring, tenure, promotion, or other conditions of employment; ...

"(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order."

Section 1(a) of the Order enunciates policy and provides in part that:

"Each employee of the Executive Branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right...."

In this case, the Complainant predicated its charge on the basis that Mrs. Casper was called into conference on March 16, 1973, to discuss the promotion she had been recently denied rather than her behavior on March 13 which was the real reason for the meeting. The record does not disclose that other than reports he may have received from her supervisors as to her conduct, Mr. Stefanik's had any previous contacts, at least of a detrimental nature, with her before the March 16, 1973 conference. She gives no reason for the remarks she attributes to him that if she filed a grievance he would have more on her than she had on him and no one would want her after he finished with her personnel folder. Such remark, I find is not in context with the credible evidence of record, and is predicated on various statements taken out of context with the explanation offered in connection with the denial of her promotion. Moreover, the wage price freeze incident which delayed promotions of the unit personnel and the Johnson funeral incident certainly did not impeach the credibility of Richard Stefanik.

As to the offer of proof regarding what Mr. Glanker purportedly told Mrs. Casper it related to a matter on which there was no timely charge or complaint. The relation of a statute of limitations to proof at a hearing was addressed by the Supreme Court when they interpreted Section 10(b) of the National Labor Relations Act which is a six month statute of limitations for the Act. In Local Lodge 1424 v. NLRB, 362 U.S. 411, 45 LRRM 3212 (1960) at 3214-3215, the Court held:

It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b)

requires that two different kinds of situations be distinguished. The first is one where occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matter occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary", since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

In National Labor Relations Board, Region 17 and National Labor Relations Board A/SLMR, No. 295 the Assistant Secretary held that:

"while a complaint must be filed with a certain specified time period...events occurring outside such periods may properly be introduced to provide background information and to shed light on events occurring within the time period...."

In Veterans Administration, Veterans Administration Hospital A/SLMR, No. 301, it was held that the Assistant Secretary would only view acts outside the statutory period as background information and would base no violation on such acts.

The Complainant misstated in its charge the primary reason for the October 16, 1973 conference and from that point has attempted to utilize unrelated events, circumstances and isolated bits and pieces of evidence to pyramid and bolster its allegation of unfair labor practice. Its patchwork efforts made no meaningful pattern. Even if I were to conclude that one or two questionable incidents occurred, I should have to consider them haphazard and isolated.

Western Division of Naval Facilities Engineering Command, San Bruno, California, A/SLMR, No. 264, was cited by the

Complainant as supporting its position. In that case the Complainant specifically alleged that the Respondent had interfered with, restrained, or coerced its employees by the actions of its supervisor in inserting in an appraisal form of employee Joseph Gorgane the remark "active in the union". There was no such charge in the complaint in this case nor did the evidence substantiate that the alleged threats in the complaint were made.

The applicability of the decision is differentiated on a factual basis. Also persuasive, is the fact that the promotion certificate register in April 1973 was submitted and shows Mrs. Casper listed thereon as eligible for promotion without any notations, 5/ and she was promoted in July 1973 when her production increased. The certificate bears the signature of Henry Duchemin, Jr., whom Mrs. Casper testified was Chief of the Microfilm Section where she expressed a desire to transfer.

IV

Conclusion

In view of the foregoing and the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated Section 19(a) (1), (2) and (4) of the Order and will recommend that the violations alleged in Part A of the complaint be dismissed.

5/ Respondent's Exhibit No. 9.

V

Events Relating to Part B of the Complaint

Susan Higgenbotham was employed as a tax examiner at the Memphis Service Center from January 1973 until the month of June 1973. The Service Center has many employees and every year the work load peaks and falls because of the tax filing season. Because of the seasonal nature of the work load there is a furlough procedure utilized after the tax filing season. Under the procedure all of those who voluntarily requested to be relieved from duty were permitted to leave and the remainder were evaluated on the basis of quantity and quality of work and dependability; these established standards were incorporated in Article 26 of the multi-center agreement executed April 13, 1973; the agreement, however, did not become effective until July 1, 1973. Those employees not expected to remain during the summer or until their next recall were encouraged to furlough themselves so that those desiring permanent work would not be deprived of employment. They had been informed that they could furlough themselves on May 9, 1973, but those who did not do so would be expected to remain until August 1973.

Norma Dennis, a unit manager and supervisor at the center testified that she had heard rumors that Susan Higgenbotham intended to get a doctor's certificate and furlough herself sometime after the May 9 furlough date but before August 1973 and she wanted to verify whether or not this was so. On May 1, 1973, she asked Susan to accompany her to a break room and she also called Betty Shanly, a senior tax examiner to accompany her as a witness. Mrs. Higgenbotham testified in response to an inquiry by Miss Dennis as to her furlough plans that:

"I planned to work to August, but I didn't know for sure what would occur between now and August. You know, I have children. If my babysitter quit and I couldn't find another one I would have to furlough and she told me that if I furloughed myself after May 9 and before August it would be held against me as far as my evaluation went. And I asked her--I thought that, you know, I thought that we were evaluated on production basis, and she said yes, but there are other things that they can evaluate you on like dependability and other things like that outside of the production."

Mrs. Dennis stated that Susan denied the rumor concerning the furlough but admitted that she was having baby-sitting problems and wanted to discuss with her husband as to whether he wanted her to take a furlough and she would let me know the following day. Susan also mentioned having been to the Union and that if she did furlough herself there was nothing we could do about it. I told her that going to the Union was her business and I had no comment about it; she asked me how it would affect her evaluation and I told her it wouldn't and that was it on evaluations. When I finished talking to Susan, Betty Shanly then started talking to her but I can't relate their conversation because when I heard the word NAIRE I cut it off; they proceeded to talk about evaluations and I chose not to comment.

While Mrs. Higgenbotham had indicated she did not intend to furlough herself she later did so when she was unable to replace her baby sitter and subsequently was asked to return to work for the current tax filing season.

Betty Shanly stated that she was a senior tax examiner in May 1973 and had worked for the IRS Center for eight years; that Mrs. Dennis asked her to attend and be a witness at the May 1, 1973 meeting with Susan Higgenbotham concerning Susan's furlough plans for the summer; after the three-way conversation was over, it was just Susan and I, and I told her I would not go to the Union or whatever with petty things because all it does is irritate management and she said, "Well, what can they do about it?" On cross-examination Shanly testified as follows:

"Q...At anytime during the conversation did Norma Dennis tell Susan if she furloughed herself she would get a bad evaluation.

"A. No.

"Q...Did Norma tell Susan that if Susan furloughed herself there wouldn't be any consequences?

"A. As far as I know, she did like I said, this happened a long time ago and it was hard to recall you know, everything that was said.

"Q. Okay, when you made the statement to Susan Higgenbotham regarding where you stated the fact that she shouldn't go the Union with petty things, you testified that Norma Dennis was not present, is that correct?

"A. Yes.

"Q. You were walking back to your unit, you testified.

"A. Yes.

"Q. Had you said anything in Norma Dennis' presence with regard to whether or not Susan should go to the Union?

"A. Not that I recall. I only recall making one statement at the meeting. I was a witness and I shouldn't have made a statement at all. The only thing I recall saying was that if she was going to furlough herself very shortly that perhaps there were other people that needed to work badly that would have been furloughed and it was something to think about.

"Q. That's all you said while the three of you were together?

"A. That's the only thing that I recall that I said.

"Q. Okay. Are you a member of the Union?

"A. Yes, I am."

She testified that she was presently on dues and it was stipulated that supervisors were not entitled to dues with holidays, that her conversation with Susan was as a friend and not as her senior and no member of management had ever told her to say any of the things mentioned to Susan nor did she observe or recall Norma nodding her head or saying that's right to anything she had said.

VI

The Alleged Violation Relating to Part B of the Complaint

The Complainant urges that Section 1(a) of the Order 7/ grants each employee of the Federal Government the unfettered right to freely engage in union activity 8/ and that Section 10(e) grants an employee the right to have the exclusive representative represent his interests. The consequences of Mrs. Shanly's statement infringed upon her protected rights.

The complaint charged that Mrs. Higgenbotham was told she would receive a poor evaluation if she voluntarily furloughed herself and would continue to receive poor evaluations if she went to the Union and grieved.

I find that the remark was not made during the May 1, 1973 session between Mrs. Dennis, Shanly and Higgenbotham wherein Mrs. Dennis sought to ascertain whether Higgenbotham planned to furlough herself during the summer months and after the May 9 furlough procedure date; rather it was Mrs. Shanly who made the remark to Mrs. Higgenbotham not to take petty matters to the Union after the meeting had ended and the two were returning to their desks. It does not appear from the record that Complainant contends that Shanly was a supervisor, and even if so, I find the evidence to the contra. 9/

7/ Section 1(a) of the Order provides that:

"Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right...."

8/ Western Division of Naval Facilities Engineering Command, San Bruno, California, A/SLMR, No. 264.

9/ See U. S. Air Force, Tyndall Air Force Base Florida, A/SLMR, No. 266, 926th Tactical Airlift Group, U.S. Air Force Reserve, Naval Air Station, Belle Chasse, Louisiana, A/SLMR No. 221; Army and Air Force Exchange Service, Richards-Gebour Consolidated Exchange, Richards Gebour Air Force Base, Missouri, A/SLMR No. 219, U.S. Customs Service, Region IX, Chicago, Illinois, A/SLMR, No. 219; U.S. Department of Interior, Bureau of Reclamation, Region IX, Weber Basin Job Corps, Civilian Conservation Center, Ogden, Utah, A/SLMR No. 204.

Mrs. Shanly as a ranking senior tax examiner in the unit would appear to be the person who would be expected to witness a meeting of this type and her union membership had not affected her selection; she testified in a frank and forthright manner and I credit her testimony as supporting that of Norma Dennis as to what transpired at and after the May 1 meeting. Mrs. Higgenbotham was obviously confused as to the sequence of events, with whom they occurred and the content of what transpired; her manner, demeanor, and testimony did not impress me that her account of what transpired was a complete and accurate assessment of the facts and circumstances that occurred. I discredit her testimony as to the remarks attributed to Mrs. Dennis.

Section 10(e) of the Order confers a right on the exclusive bargaining representative to be present at formal discussions regarding grievances, personnel policies and practices or matters affecting general working conditions of employees, and a concomitant right flow to employees in the unit. See U.S. Department of the Army, Transportation Motor Pool, Fort Wainright, Alaska A/SLMR No. 279. The right is thus restricted so as not to exist with respect to formal meetings or sessions between an employee and a supervisor. In the recent case of Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, "counselling" sessions took place with an employee to discuss his use of abusive language as well as his failure, to follow a uniform requirement on the job. The Assistant Secretary concluded these were discussions concerning an employee's shortcomings and were peculiar to that individual. As such, those sessions did not pertain to general working conditions and were not deemed to be formal in nature. Hence, no violation of Section 19(a)(1) was found by viture of a denial of representation thereat.

In the case at bar the discussion between Higgenbotham and Dennis and Shanly on May 1, 1973, involved the matter of ascertaining whether Higgenbotham as a seasonal employee expected to utilize the furlough procedure at the center for the summer months. Information was vital to determine the number of employees that would be furloughed. It is apparent that the session was never intended to be formal but designed to obtain information necessary to effect established personnel furlough procedure now incorporated in Article 26 of the Collectively Bargaining Agreement. There was no punishment shown to have been intended and the purpose of the meeting was to obtain necessary information for coordinating established

furlough procedure. To this extent I find the discussion was similar to the counselling session called in Texas Air National Guard case, supra. I conclude that the meeting and discussion on May 1, 1973, was informal in nature and a denial of representation thereat even had such been requested, would not sustain a violation of Section 19(a)(1) based on Section 10(e) of the Order. I further conclude that Mrs. Shanly was not an agent of management and the remarks that she made to Mrs. Higgenbotham concerning carrying petty grievances to the Union after Mrs. Dennis terminated the May 1 discussion was an expression of opinion between rank and file employees and in no way were they sought or sanctioned by agency management.

(2)

The Complainant has also alleged that Section 19(a)(2) of the Order providing that agency management shall not

"encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment,"

was violated in that Mrs. Higgenbotham was held up to ridicule and harrassed because of her union activity.

Assuming arguendo that Mrs. Dennis told Mrs. Higgenbotham that her evaluation would not be based only on production but other factors including dependability as claimed this would not constitute a violation of Section 19(a)(2). Quantity, quality and dependability were all established elements of evaluation for consideration regarding employees subject to furlough; these elements had been incorporated in the collective bargaining agreement on April 13, 1973, but the effective date of the agreement was set for July 1; nevertheless, these elements had been utilized even before signing of the agreement and it is not a threat to divulge correct information. I do not find that Higgenbotham was misled or threatened at the May 1, 1973 discussion regarding remarks made relating to evaluation.

The Complainant at the hearing, sought to picture one occasion when Higgenbotham had filed a grievance to establish the attitude of employees regarding the filing of grievances and show that supervisor Dennis and Senior Shanly were responsible for spreading a false rumor that the grievance had been filed on behalf of all employees. The incident had no relationship to the May 1, 1973 meeting; it was admitted

into evidence as background information; Higgenbotham was at a meeting held after the grievance incident and was the only person who complained; to attribute the reaction she received following the incident to Supervisor Dennis and Shanley, was most speculative and unwarranted. In any event it is not shown to be material or relevant to the alleged violation in the complaint. Other incidents mentioned are, likewise found to be without merit. Background information is not a substitute for proof of an unfair labor practice charge and in the instant case the purpose for which it was admitted was not substantiated nor was the alleged violation of Section 19(a)(2) established. I conclude that the Respondent did not encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

(3)

It is also contended that Supervisor Dennis' action in informing the unit that Mrs. Higgenbotham filed an unfair labor practice charge, resulted in her being held up to scorn, thus violating Section 19(a)(2) and (4) of the Order. The allegation in the first place is an overstatement of the facts. On cross-examination Mrs. Dennis testified:

"Q. Did you discuss with anyone the fact that Susan Higgenbotham had filed an unfair labor practice?"

"A. Yes.

"Q. Do you recall if you spoke to--did you tell this to other employees in your unit?"

"A. Yes, I mentioned it.

"Q. Did you tell it to Betty Shanly?"

"A. Yes, I did."

No employee other than Shanly was identified or mentioned as to having been told of the unfair labor practice complaint. Mrs. Dennis denied mentioning anything about the grievance that Higgenbotham had previously filed about the telephone incident. It is evident that the Complainant sought to substitute incidents admitted for background information for proof of the allegations made in its complaint. The background information was not documentary and in many instances amounted to expressions of opinion and hearsay. I find that

the Complainant has not sustained its burden of proof and conclude that there was no violation of Section 19(a) (2) of the Order nor did the Respondent discipline or otherwise discriminate against an employee because she filed a complaint or gave testimony under the Order in violation of Section 19(a) (4) of the Order.

VII

The Alleged Violations Relating to Part C of the Complaint

(1)

Kathy Cason, a probationary employee at the IRS Memphis Service Center, filed a grievance against the Respondent on April 26, 1973, alleging that a written reprimand had been placed in her personnel folder that preceeding day which concerned her working ability and she requested that it be withdrawn because of its unfairness. According to the grievance 10/ reference was made to a written reprimand but at the hearing it was urged that she allegedly had been orally informed that her services would be terminated in two weeks unless her performance improved. She named Andrew Pchola and Fred D'Orazio as her NAIRE representatives. The Informal Grievance Record Report 11/ dated May 17, 1973, shows that the supervisor's determination was that the matter was not grievable since no written reprimand had been placed in Kathy A. Cason's folder. Mr. Pchola was advised on June 12, 1973, that the memorandum of discussion between Cason and her supervisor Betty Miller would not be pursued to completion because she was no longer an employee of the service.

The unfair labor practice complaint filed by Complainant union, charges that while the grievance was pending on May 10, 1973, supervisor Betty Miller met with Kathy Cason and informed her that she had one week within which to resign or her services would be terminated. It is stated that Miss Cason was without representation when confronted by her supervisor concerning the subject matter of a pending grievance. Neither the agency supervisor Betty Miller or employee Kathy Cason testified at the hearing.

10/ Complainant's Exhibit No. 6.
11/ Respondent's Exhibit No. 7.

The Witnesses

Barry L. Parr, Labor Relations Specialist for the Respondent was called by Complainant as a witness and testified that Betty Miller reminded him on May 10, 1973, that it had been two weeks since the prior counseling session concerning Miss Cason's work performance and it was time to talk to her again since her performance had not improved. She asked me what to talk about and I told her to talk about production, to explain to her what she had done wrong and answer any questions; she asked whether a union representative should be present and I responded no, he should not; the reason given for not having a representative was that it pertained to actions that had happened subsequent to the filing of the grievance and a meeting to discuss termination or resignation of a probationary employee was considered a counseling session. Mr. Parr also testified on cross-examination that a meeting to discuss the termination of a probationary employee was not considered a disciplinary or adverse action nor was the termination of a probationary grievant one of the agency grievance procedures. Also, he testified that he did not attend any meeting on May 10, 1973, concerning Kathy Cason.

Andrew Pchola testified that Kathy Cason had informed him of what transpired at a meeting on May 10, 1973, and that Barry Parr had also stated what had happened. On direct examination Mr. Pchola was quite positive in his testimony but after lengthy cross-examination admitted that Barry Parr had told him he was not at the meeting and that the subject matter at the May 10 meeting related to practices occurring after the filing of the grievance and none which was the subject of the grievance; he was not sure whether he had initially gotten information from Mr. Parr concerning the meeting over the phone on May 10, 1973, or by talking to him later in his office, but he believed he had talked to him on May 10. Pchola admitted being present at each step concerning Kathy Cason's grievance action, specifically on May 15 and 29, and June 7, 1973; following each meeting he received an answer from the agency as to the content and results of each meeting.

(3)

Positions of the Parties

The Complainant maintains that a meeting was held on May 10, 1973, which concerned the same issues that were present in the grievance in which D'Orazio and Pchola were designated as representatives of Kathy Cason and since they were not present at the scheduled meeting on May 10, this violated Sections 13(a) and 10(e) of the Executive Order regardless of whether Cason had requested a meeting in her grievance. It is not deemed necessary to pass on this contention because I do not find that the Complainant established by any substantial evidence that there was in fact a meeting held on May 10, 1973, at which the grievance filed by Kathy Cason was a subject of discussion.

The Respondent moved to dismiss the complaint at close of Complainant's proof on the basis: (1) the Complainant failed to establish its case by a preponderance of the evidence; (2) the record is devoid of probative and even a scintilla of substantive evidence to support the charge relating to Part C of the complaint; (3) since the evidence is entirely hearsay the Respondent is denied the right to cross-examine the witnesses responsible for charging it with having violated the Order; (4) the meeting scheduled for May 10 was not a formal one under Section 10(e) of the Order but a counseling session with the purview of Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR, No. 336, (5) the meeting was not an adverse action type as contended by the union entitling it to be present but was in fact a scheduled meeting concerning the termination of a probationary employee and Civil Service and Agency regulations have never afforded such rights.

The argument is made by Complainant that because Kathy Cason was not actually terminated from her employment as an probationary employee the action herein was not a separation procedure.

5 CFR 752.103 (a)(5) which is incorporated in the Federal Personnel Manual provides that an employee currently serving a probation period is excluded from applicability as to Part 752 concerning adverse actions by government agencies.

(4)

Findings and Conclusions

I find: (1) that on April 26, 1973, that Kathy Cason was notified that her performance was not satisfactory and that she would be terminated at the expiration of her probationary period unless her performance improved; (2) that this warning was the commencement of her separation procedure for termination of her probationary employment; (3) the meeting scheduled on May 10, 1973, related to a follow-up on the procedure commenced April 26, 1973, regarding circumstances as to her performance subsequent to that date; (4) Cason was a probationary employee whose impending separation was not an adverse action within the purview of 5 CFR 752.103(a)(5); no one who attended the May 10, 1973 meeting testified at the hearing in February 1974 and apart from hearsay, there was no substantial evidence presented for consideration; and (6) Betty Miller who was Cason's supervisor, was not shown to be unavailable to Complainant as a witness to testify as to whether in fact there was a meeting on May 10, 1973, and if so, what transpired at such meeting.

Assuming arguendo that a meeting was held on May 10, 1973, as alleged, there is not a scintilla of substantial evidence as to what transpired thereat or that it was a matter relating to the grievance which had been filed. Only two witnesses, Andrew Pchola, Local Union 098 President and Representative, and Barry Parr, Labor Relations Specialist, testified and neither had attended a meeting on May 10, 1973, concerning Kathy Cason.

The Assistant Secretary is not bound by cases decided in the private sector; such may be considered as guidelines when not in conflict with the Order and regulations. From the evidence presented in the instant case, I conclude as a matter of law that there must be some substantial evidence of record, apart from hearsay, upon which to predicate a decision.

Supporting the conclusion, I find in Camero v. U.S. (1965), 345 F. 2d 798, 170 Ct. Cl. 490, that:

"Substantial evidence to support discharge of classified civil service employee must be more than a scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, but mere uncorroborated hearsay or rumor does not constitute substantial evidence."

In Williapoint Oysters v. Ewing, C.A. 9, 1949, 174 F. 2d 676, cert. denied 70 S. Ct. 101; 338 U.S. 860, 94 L. Ed. 527, rehearing denied 70 S. Ct. 793, 339 U.S. 945, 94 L. Ed. 1360, it was held that:

"Requirement of this section that administrative finding accord with substantial evidence does not forbid administrative utilization of probative hearsay evidence although findings, to be valid, cannot be based upon hearsay alone, or upon hearsay corroborated by mere scintilla; and test whether evidence is substantial is whether there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

In First Citizens Bank and Trust Co. v. Camp, D.C. N. C. 1968, 281 F. Supp. 786, affirmed 409 F. 2d. 1086, the court held:

"Substantial evidence in administrative law is evidence sufficient to justify, if trial were to a jury, a refusal to direct verdict when conclusion sought to be drawn from it is one of fact for jury."

I further conclude that the Respondent did not refuse to consult, confer or negotiate in good faith under Section 19(a) (6) of the Order nor did it engage in conduct violative of Section 19(a) (1) of the Order by interfering with, restraining or coercing employees of the Complainant in the exercise of rights assured by this Order, 12/ nor did it engage in conduct violative of Section 19(a) (2) of the Order by encouraging or discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

Based on the entire record, I conclude that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated Sections 19(a) (1) (2) and (6) of the Order.

12/ See footnote 7, supra.

Recommendation

Upon the basis of the findings, conclusions and the entire record relating to Parts A, B and C of the complaint, I recommend that the Assistant Secretary dismiss each of the complaints in the three separate unrelated cases against the Respondent in their entirety. 13/



Rhea M. Burrow
Administrative Law Judge

Dated: May 23, 1974

Washington, D.C.

13/ Includes Complainant's Motion to Dismiss Part C of complaint made at close of its proof since no witnesses were called by the Respondent.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF THE NAVY,
 PORTSMOUTH NAVAL SHIPYARD
 A/SLMR No. 445

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE NAVY,
 PORTSMOUTH NAVAL SHIPYARD

Respondent

and

Case No. 31-7559(CA)

DANIEL F. MILLETT

Complainant

DECISION AND ORDER

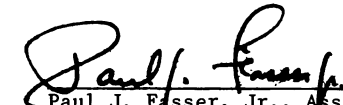
On August 19, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-7559(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
 October 22, 1974


 Paul J. Fasser, Jr., Assistant Secretary of
 Labor for Labor-Management Relations

This unfair labor practice proceeding involved a complaint filed by an individual, Daniel F. Millett (Complainant), alleging that the U.S. Department of the Navy, Portsmouth Naval Shipyard (Respondent) violated Section 19(a)(1) and (2) of the Order by virtue of its action in issuing a letter of reprimand to the Complainant, which action was allegedly designed to discourage both union activity and membership.

The evidence disclosed that the Complainant, a crane operator, was the current president of a local of the International Union of Operating Engineers at the Portsmouth Naval Shipyard and, as chief steward for that local, had been engaged in grievance representation and other union activities. On October 4, 1973, the Complainant, who previously had been given an oral reprimand in December 1972, for backing a crane into a parked car, "boomed" his crane down into the carrier cab causing damage to both the crane and the cab. Following discussions concerning the accident with his immediate supervisor, the Complainant was given a written reprimand charging him with a "Section 10 offense" under the Standard Schedule of Disciplinary Offenses and Penalties, i.e., careless workmanship. The prescribed penalty for a first infraction of Section 10 extends from a written reprimand to a five-day suspension.

The Complainant contended that the penalty accorded him was more severe than normally accorded to other employees for similar infractions. In support of his position, the Complainant cited three other employees who had allegedly damaged Government equipment without receiving "written reprimands."

The Administrative Law Judge concluded that the Complainant had failed to sustain the burden of proof in support of his allegations in the complaint. In this regard, he found that while the Complainant's uncontroverted testimony established the existence of other similar accidents, it did not disclose any information as to the circumstances surrounding the accidents, the specific penalties imposed against the employees, or whether or not the accidents were the first for the employees involved. Thus, and noting that the written reprimand given the Complainant was the least of all possible penalties suggested on the disciplinary schedule, the Administrative Law Judge found that the record did not establish that the penalty accorded the Complainant for damaging Government equipment constituted disparate treatment and that the Complainant had failed to establish any union animus or that the penalty imposed upon him was in any way related to his union activities in violation of Sections 19(a)(1) and (2) of the Order.

The Assistant Secretary, noting the absence of exceptions, adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.



REPORT AND RECOMMENDATIONS

Statement of the Case

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In the Matter of :
 :
U.S. DEPARTMENT OF THE NAVY :
PORTSMOUTH NAVAL SHIPYARD :
 :
Respondent :
 :
and :
 :
DANIEL F. MILLETT :
 :
Complainant :
.....

Case No. 31-7559 (CA)

A. Gene Niro, Esquire
U.S. Navy Department
Regional Office of Civilian
Manpower Management
495 Summer Street
Boston, Massachusetts
For the Respondent

Mr. Daniel F. Millett
Middle Road
Amesbury, Massachusetts

Mr. Charles Paluska
Representative
International Union of Operating
Engineers
1125 17th Street, N.W.
Washington, D.C.
For the Complainant

BEFORE: BURTON S. STERNBURG
Administrative Law Judge

Pursuant to an amended complaint first filed on January 23, 1974, under Executive Order 11491, as amended, by Daniel F. Millett, an individual, against the U.S. Department of the Navy, Portsmouth Naval Shipyard, hereinafter called the Respondent or Agency, a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the New York Region on June 11, 1974.

The complaint alleges, in substance, that Respondent violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its action in issuing a letter of reprimand to Millett, the complainant herein, since such action was designed to discourage both union activity and membership.

A hearing was held in the captioned matter on July 23, 1974, in Portsmouth, New Hampshire. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The Metal Trades Council, which consists of the International Union of Operating Engineers and fifteen other craft unions, has been the bargaining representative for approximately ninety percent of the employees of the Portsmouth Naval Shipyard since about 1963. 1/ Each of the sixteen affiliated craft union locals comprising the Metal Trades Council have their own duly elected presidents who usually serve as the "chief stewards" for the Metal Trades Council. Additionally, the local presidents also serve on the Council's executive board. In addition to the chief stewards there are approximately forty to fifty shop stewards.

1/ The Portsmouth Naval Shipyard has also granted exclusive recognition to four other labor organizations which apparently represent the remaining ten percent of the shipyard's personnel.

Millett, a crane operator and the complainant herein, is currently president of the International Operating Engineers local at the Portsmouth Naval Shipyard and a chief steward. The record indicates that he achieved such position sometime in 1971. 2/ As chief steward, Millett participated in the filing of a number of grievances as the representative of various employees and had constant contact with management over the resolution of such grievances.

On October 4, 1973, Millett, who had been given an oral reprimand back in December 1972, for backing a crane into a parked car, "boomed" his crane down into the carrier cab causing damage to both the crane and cab in the amount of \$481.50. Thereafter, on October 12, 1973, following discussions with John Knowlton, Crane Operator Foreman, Millett was given a written reprimand by Knowlton. Knowlton, applying the Standard Schedule of Disciplinary Offenses and Penalties issued by the Commander of the Portsmouth Naval Shipyard, charged Millett with a Section 10 offense, i.e. careless workmanship. The prescribed penalty for the first infraction of Section 10 extends from a reprimand to a five day suspension. Further, according to the Schedule of Disciplinary Offenses, Millett could have been charged with a Section 13 offense, damage to Government property. The suggested penalty for a first infraction of Section 13 extends from a reprimand to a ten day suspension.

Millett, who was the sole witness for complainant, contends that the penalty accorded him, i.e. written reprimand, was more severe than normally accorded to other employees for similar infractions. In support of his position in this regard, he cited three other employees who had allegedly damaged Government equipment without receiving "written reprimands". When questioned as to the source of his information with regard to the penalties meted out to the three cited employees, Millett attributed his information to the absence of any notice from the Respondent to the Metal Trades Council with respect to disciplinary action taken against the three employees. According to Millett, whose testimony in this regard stands undisputed, the Metal Trades Council is to receive a copy of any disciplinary action that takes place in the shipyard. However, Millett further acknowledged that on occasion the Metal Trades Council does not receive copies of disciplinary actions because of mail

2/ Millett's predecessors in such position, Jim Spillane and Irwin Pike, left the position in 1971 and 1968, respectively, upon being promoted to foremen.

or other difficulties, and that he did not know the supervisor involved in the incidents or whether the infractions were the first for the employees involved. Lastly, Millett acknowledged that reports of oral reprimands would not be sent to the Council.

Millett, who further contended that the disparate treatment accorded him was motivated by discriminatory considerations, offered no evidence indicating union animus on the part of Respondent's representatives.

DISCUSSION AND CONCLUSIONS

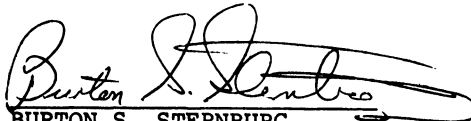
Section 203.14 of the Regulations imposes upon the complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. Millett, the complainant herein, has failed to sustain this burden.

As noted above, Millett contends that the penalty accorded him, i.e. written reprimand, constitutes disparate treatment since such penalty was more severe than that given to three other employees for similar accidents. While his uncontroverted testimony established the existence of the other accidents, it does not, however, disclose the circumstances surrounding the accidents, the specific penalties imposed against the employees,^{3/} nor whether or not the accidents were the first for the respective employees involved. In view of the absence of such evidence, and noting that the written reprimand given Millett, by a newly appointed supervisor, was the least of all possible penalties suggested on the disciplinary schedule, I find that the record as a whole does not establish that the penalty accorded Millett for damaging Government equipment constitutes disparate treatment. Moreover, even assuming a contrary conclusion, I find that Millett has failed to establish that the penalty imposed upon him was in any way related to his union activities in violation of Sections 19(a)(1) and (2) of the Order. In reaching this latter conclusion, I note the absence of any evidence of union animus and the fact that Millett's predecessors as chief stewards left such positions upon being rewarded with promotions to supervisory positions.

3/ Although Millett contends that the penalties imposed were less than a written reprimand since otherwise the Union would have been informed, he acknowledges that, despite the obligation imposed upon Respondent, the Union does not always receive copies of all disciplinary actions.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(a)(1) and (2) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

Dated August 19, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF NAVY,
NAVAL AIR REWORK FACILITY,
JACKSONVILLE, FLORIDA
A/SLMR No. 446

This case involved an unfair labor practice complaint filed by the National Association of Government Employees (Complainant) against United States Department of Navy, Naval Air Rework Facility, Jacksonville, Florida, (Respondent) alleging that the Respondent had violated Section 19(a)(1) and (2) of the Order by temporarily assigning an employee who was employed in the Electronic Installations Shop to a less desirable job in the Packaging Shop because he filed a grievance and sought union representation. The complaint also alleged that the Respondent's conduct constituted a violation of Section 19(a)(4) and that such Section was further violated on the basis that the employee's temporary assignment to the Packaging Shop was extended because he filed a pre-complaint charge.

Based on the evidence which established that the Respondent had a policy of temporarily assigning employees employed in those of its shops where their services were not needed to shops where there existed a need for such employees and that the temporary assignment involved herein to the Packaging Shop was in accord with such policy, and in the absence of any evidence that the assignment herein was based on either the employee's having filed a grievance and sought union representation, or his having filed a pre-complaint charge, the Administrative Law Judge concluded that the allegations in the complaint were without merit. Because it was clear that the employee's assignment was based solely on economic considerations, the Administrative Law Judge found it unnecessary to determine whether in processing an agency grievance the employee was engaged in activity protected by the Order, or whether the protection afforded by Section 19(a)(4) extends either to giving testimony during the processing of a grievance or to the filing of a pre-complaint charge under the Order. Under these circumstances, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Upon consideration of the Administrative Law Judge's Report and Recommendations in this case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge. Accordingly, he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF NAVY,
NAVAL AIR REWORK FACILITY,
JACKSONVILLE, FLORIDA

Respondant

and

Case No. 42-2359(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Complainant

DECISION AND ORDER

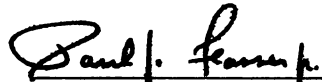
On July 25, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 42-2359(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 22, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



In the Matter of

UNITED STATES DEPARTMENT OF NAVY
NAVAL AIR REWORK FACILITY
JACKSONVILLE, FLORIDA

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Complainant

Case No. 42-2359 (CA)

Stuart M. Foss
Labor Relations Advisor
Office of Civilian Manpower Management
Department of the Navy
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E. C. Newton
Labor Relations Advisor
Department of the Navy
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Jacksonville, FA 32212

For the Respondent

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National Association of Government Employees
1341 G Street, N.W., Suite 512
Washington, DC 20005

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to a Complainant filed on August 20, 1973, and amended on September 24, 1973, under Executive Order 11491, as amended (herein called the Order) by National Association of Government Employees (hereafter called the Complainant or the Union) against United States Department of Navy, Naval Air Rework Facility, Jacksonville, Florida, (hereinafter called the Activity or Respondent) a Notice of Hearing on Complaint was issued by the Acting Assistant Regional Director for Labor-Management Services for the Atlanta Region on November 21, 1973.

A hearing was held in this matter before the undersigned on February 5 and 6, 1973, in Jacksonville, Florida. All parties were represented and afforded a full opportunity to be heard and to present witnesses and to introduce other relevant evidence on the issues involved. Upon the conclusion of the taking of testimony, both parties were given an opportunity to present oral arguments and both parties filed briefs on March 15, 1974.

Upon the entire record herein, including the relevant evidence adduced at the hearing and my observation of the witnesses and their demeanor, I make the following findings, conclusions, and recommendations.

Findings of Fact

A. Background:

The Activity is located in the Naval Air Station, Jacksonville, Florida, 1/ where it is engaged in performing rework 2/ on fleet aircraft. At all times material herein 3/ and for the purposes of this proceeding the Activity was engaged in performing rework on two specific types of aircraft, the A-4 and the A-7.

The Activity is divided into a number of several departments. The department relevant herein is the Production Department which is in turn divided into a number of divisions

1/ It also has employees assigned to Cecil Field, which is also located in the Jacksonville area.

2/ "Rework" describes work in the nature of overhaul or maintenance of the aircraft. The precise nature and extent of the rework in question varies according to the particular program or system used at any precise time and the aircraft involved. The nature of the "rework" involved herein will be described where appropriate and necessary.

3/ Unless otherwise noted all dates herein refer to 1973.

including the Weapons Division (No. 95000). The Weapons Division is then divided into a number of branches including the Aircraft Rework Branch (A-7) (No. 95600). The Aircraft Branch (No. 95600) is divided into various Sections, one of which is the Avionics Section (No. 95680) which contains a number of shops including the Electronics Installation Shop (No. 95685). 4/ At the times material herein Shop No. 95685 worked on the "B" shift, 3:30 p.m. to 12:00 midnight; 5/ its corresponding shop on the "A" shift, 7:00 a.m. to 3:30 p.m., was Shop No. 95675. 6/ These shops rotate between "A" and "B" shifts every 6 weeks. The Weapons Division is apparently responsible for performing the basic rework mission of the Activity. At all times material herein the Weapons Division was headed by Production Superintendent Donald T. Rohweller. Mr. Rohweller was responsible for supervising the operation of the Weapons Division and its 600 employees divided into four branches, eight sections and approximately 50 shops.

The aircraft being reworked was worked upon by each of the aircraft trades in their turn. Usually the airframe and metal work was done first and the electronics was usually among the work done last. Some electrical work 7/ would be performed at various stages of work.

The amount of time spent by each trade on a particular aircraft depends on the type of rework program involved. There were three basic rework programs being carried on during the period material herein. The "progressive aircraft rework program" (herein called PAR) involves the most extensive rework and the greatest amount of employee time because it consists of scheduled periodic maintenance on the entire aircraft in order to keep it operational for a specific period

4/ The Electronics Shops are composed of Electronics Mechanics, Electronics Workers and Electronics Helpers. At times material herein there were no helpers in Shop No. 95685. Each shop is duplicated by another shop comprised of employees of the same trade doing the same work, only on a different shift.

5/ There was also a small overlapping "C" shift, which was organizationally part of the "B" shift.

6/ Shop Number 95685 was part of Section No. 95670. Section No. 95670 contains the same trade and craft shops as Section No. 95680, only it works on the alternate shift.

7/ "Electrical work" is distinguished from "electronic work." Electrical work is done in electric installation shops and normally involves replacement of the regular electrical parts of the aircraft (e.g., cables, wires, electrical instruments,

of time. The "aircraft condition evaluation program" (herein called ACE) involves the performance of necessary maintenance work on the aircraft as revealed by an inspection of the plane when it comes into the facility. "Change 252" (herein called PRIDE) actually consists of certain electronic modification of an aircraft rather than a rework program.

The Union was the recognized collective bargaining representative for a unit of certain of the Activity's civilian employees. Mr. John H. Runton, the alleged discriminatee herein, was employed in Shop No. 95685 as an Electronics Worker. Because he had a cryptography clearance, Mr. Runton was not included in the collective bargaining unit, until on or about May 31, 1973, at which time he became part of the collective bargaining unit represented by the Union.

B. Activity's Workload and the Loan System:

During April, May, and June 1973 Aircraft Rework Branch, No. 95600 was in the process of changing from the PAR system to the ACE System and at that time the PRIDE system was also being introduced.^{8/} By May and June the weight of the probative evidence in the record establishes that there was a decreasing workload in Shop No. 95685, as well as in the other electronic and electrical shops. The record establishes that the number of aircraft undergoing the rework systems being utilized during May and June 1973 required fewer employee work hours in the electronics trades. The Complainant did not produce evidence to attack the accuracy or probative value of the various production and flow charts and records submitted at the hearing upon which the foregoing findings were, to a large part, based. Rather it submitted a few witnesses who either generally testified that there seemed to be work available in Shop No. 95685 or that they recollected rather vaguely the number of planes undergoing rework during May and June. However, even Complainant's witnesses admitted that only one or two aircraft were receiving PRIDE changes during May and June. ^{9/} Mr. Runton himself admitted their was

^{7/} Continued
lighting etc.). Electronic work concerns the aircrafts' weapons, weapons support and mission systems (e.g. radar, cryptography systems, etc.).

^{8/} The Activity was also dispatching employees to Cecil Field to do rework at that cite.

^{9/} Of twelve aircraft initially scheduled for PRIDE changes, seven had already been totally completed (i.e. work of all trades completed).

a declining workload. The Activity's witnesses testified as to the substantial decrease in the workload during May and June and they were supported and corroborated by the records and production charts which were placed in evidence.

The record establishes that the Activity had a normal and customary practice that when a lack of work is anticipated in a particular shop, its supervisor would declare the appropriate number of employees as "excess," thereby making them available for "loan" to other shops that are in need of employees, until such time as the workload in the parent shop necessitates their recall. A "loan" in this situation is a temporary transfer of an employee from one division to another. ^{10/} Shifting of an employee from one shop to another within the same branch is not considered a loan and is handled more informally.

Article XX of the collective bargaining agreement provides in part, that "all employees will be given fair and equitable treatment with regard to loans outside their division..." This "loan" system was for the purpose of providing the Activity with flexibility so that if a particular shop had excess employees at a given time, the shop was not required either to provide "make work" for the employees or to resort to a reduction in force, but rather the employees could be loaned elsewhere so that they could perform productive and meaningful work, making the Activity's operation more efficient.

Under the loan system, when the supervisor of a particular shop determines or anticipates a decreasing load so that at some time in the fairly near future he will not have sufficient work to keep all the employees in the shop productively occupied, he would declare certain employees excess and provide a written list of names of these excess employees ^{11/} to the Section Supervisor. The Section Supervisor would attempt to place them in other shops in the section or branch. If he is unsuccessful in placing these excess employees, he transmits their names to the branch supervisor, who attempts to place them within the branch or

^{10/} If the "loan" exceeds 30 days a form SF-52 must be completed.

^{11/} In the Weapons Division employees declared excess, and therefore eligible for loan, are chosen from an alphabetical roster, by shop, rate and shift. It should be noted shift and shop often refer to the same entity. This is the normal system in the Weapons Division, but it can be departed from for overriding reasons. Other divisions may utilize slightly different systems for declaring employees excess.

in other branches in the division. If the branch supervisor is unsuccessful, he will pass their names to the Weapons Division Superintendent who, if he is unable to place them within the Weapons Division, notifies the Production Departmental Office. If the departmental superintendent is unable to find productive work for these employees in any of the other divisions in his department, they are made available for loans to other divisions. 12/

During April and May, Artis H. Hall was the substitute foreman for Shop No. 95685. 13/ Mr. Hall projected, based on the work at hand, the work soon to be completed, and the work scheduled to come in, that he would not have, in the near future, sufficient work to keep all the employees in Shop No. 96585 productively employed. Therefore, on or about May 29, Mr. Hall determined and declared Mr. John H. Runton and three other Electronics Workers, Vasco Collins, Ronald Gottshalk and Glen Helfrick, 14/ to be excess. 15/ He

12/ Within this framework of attempting to find productive work for all its employees, every attempt is made to place employees in shops where their work would be as closely related as possible to their trade skills.

13/ Mr. Hall was normally the supervisor of the Electronics System Repair Shop, No. 94242. The regular foreman of Shop No. 95685 was Charles H. Carse. For training purposes Mr. Hall and Mr. Carse had traded supervisory duties and shops. This training tour ended and both Carse and Hall returned to their respective shops on June 4.

14/ Other foremen in the Weapons Division were also affected by the decreasing workload and a number of Aircraft Electricians and Aircraft Electrical Workers were made available for loan at this time.

15/ Mr. Hall admittedly knew, at this time that Mr. Runton had filed a grievance.

did not declare any Electronics Mechanics 16/ excess. The four Electronics Workers declared excess comprised all the Electronic Workers in Shop No. 95685. 17/ Although Mr. Runton had some extra experience in the PRIDE changes, this would hardly have justified not declaring him excess since other employees had worked on the PRIDE changes that had already been completed; the amount of PRIDE work was at a minimum; and the Electronics Mechanics left had the skill required to perform this work. Mr. Hall sent a memorandum declaring the four Electronics Workers, including Mr. Runton, excess to Mr. Jack Freeman, the Section Chief and at that time, Mr. Hall's immediate supervisor. This memorandum was forwarded by Mr. Freeman to Mr. William H. Gentry who prepared a memorandum dated May 29 directed to Mr. Donald T. Rohweller Production Superintendent of the Weapons Division, advising him that the four Electrical Workers in Shop No. 95685, including Mr. Runton, were excess. 18/ Mr. Rohweller prepared a memorandum dated May 29 directed to "Production Department Manpower," that Mr. Runton and the other three Electronics Workers were excess and available for loan for about three weeks. 19/ This was done so the Production Department could find a place to productively utilize these four employees. On June 4 Electronics Workers Gottschalk and Helfrick, who

16/ Electronics Mechanics were apparently higher graded and more skilled than Electronics Workers.

17/ Two other Electrical Workers, Mr. Garlington and Mr. Vaughn were permanently assigned to Shop No. 95365 (A-4 aircraft) which although normally supervised by Mr. Carse, was separate from Shop No. 95685. These two employees during the time in question might have done the same work in Shop No. 95685. Further, however, they too were declared excess on June 6.

18/ By memorandum directed to the Weapons Division Superintendent, dated May 30, and by an addition to the Memorandum dated June 1, a number of aircraft electrical workers and aircraft electricians were declared to be excess by Mr. Gentry.

19/ Mr. Rohweller prepared a memorandum dated June 1 advising the Production Department that five Electrical Workers and two Electricians were excess and available for loan for three weeks. On June 7 the acting head of the Weapons Division, Mr. G.E. Ham, stated that two more Electrical Workers were excess.

were declared excess by Mr. Hall in the same memorandum with Mr. Runton, were loaned to the Disassembly Shop (Shop No. 96221) of the Power Plant Division (No. 96000) and they remained on temporary detail there until November 12.

On June 6 Mr. Runton and Mr. Collins, the remaining two declared excess by Mr. Hall, were loaned to the Packaging Shop (No. 93154) of the Process and Manufacturing Division (No. 93000) along with five other employees of the Activity. 20/ Mr. Runton, and the other employees, were assigned to packing and unpacking various equipment and material. It is undisputed, and the record establishes, that while Mr. Runton was working in the Packaging Shop there was plenty of work there and although, the employees regularly assigned to the packaging shop were in a lower pay grade than Mr. Runton, his rating was not changed and he lost no pay. Mr. Runton contends that the work at the Packaging Shop was less desirable than the work he performed in Shop No. 95685, because it apparently involved more manual labor and less skill than the Electronics Worker's position. Mr. Runton's contention is supported by the record. Mr. Runton was loaned to the Packaging Shop for six weeks and returned to Shop No. 95685 on July 18. 21/ During the period of time that Mr. Runton was temporary assigned to the Packaging Shop no employees were loaned to or temporarily transferred to Shop No. 95685. An Aircraft Electrician, Mr. James Clark, who had worked previously in Shop No. 95685, 22/ was borrowed during this period to correct previously done work of the type done by electricians; (e.g. rewiring, etc.). Such assignments were relatively few and did not last more than two shifts.

20/ Although Mr. Runton had worked in Shop No. 95685 for more than four years and had been declared excess before, he had never been loaned out of his division or trade during this period.

21/ Mr. Collins was loaned for a period of a terminated one. Two other employees who had been "loaned" to the packaging shop, Mr. Jennings and Mr. Spencer, also had their "loan" terminated on July 18 also a week earlier.

22/ Mr. Clark had apparently been temporarily assigned to Shop No. 95685 on Shift "C" until about June 12, when he returned to his home shop.

Although at that time some of the other shops in the Weapons Division, which might do some work in the electrical field and in trades related to Mr. Runton's, appeared from some of the records and workload projections to need additional employees in the near future, most of these shops in question rarely utilized Electronics Workers and in fact the projected increase in their workload never materialized.

On June 4, Mr. Carse returned to Shop No. 95685 as the foreman and became aware that four employees had been declared excess. Although Mr. Carse agreed that the workload in the shop had justified Mr. Hall's determination that the four employees were excess, he felt that, with the projected workload, he could keep these employees productively employed. He therefore sent a memorandum dated June 4 asking Branch Supervisor Gentry to, in effect, withdraw Mr. Collins' and Mr. Runton's 23/ names from the list of employees determined to be excess. Mr. Gentry advised Mr. Carse, by memorandum that he would recall the employees as needed when the work in the shop justified it; he further advised him that the shop did not need the employees at that time. Mr. Carse testified and the record establishes that the increased workload that he anticipated never materialized, 24/ and the staff he had could adequately perform the work that needed to be done.

C. Mr. Runton's Grievance:

On or about April 20, 1974, Mr. Runton approached Mr. Desmond V. Hatcher, an instrument worker 25/ and the Union's Chief Steward, and asked Mr. Hatcher if he would represent him in an action attempting to get his position upgraded. Mr. Hatcher consented. On May 23 Mr. Runton and Mr. Hatcher presented the grievance to Mr. Hall. The grievance was to be processed under the Respondent's administrative grievance procedure. On May 31 the parties met in an attempt to resolve the grievance. On June 4 Mr. Runton and Mr. Hatcher met with Mr. Rohweller, the

23/ The other two employees, Mr. Gottschalk and Mr. Helfrick, who had been declared excess by Mr. Hall had already been loaned to another shop.

24/ The record fails to establish that Mr. Carse thereafter ever requested that Mr. Runton be returned to Shop No. 95685 because of an actual increase in workload.

25/ Mr. Hatcher was assigned to Shop No. 94114.

Weapons Division Production Superintendent. After a brief discussion it was determined to adjourn the meeting so that both parties could present witnesses. On June 11 a second meeting was held at which time both sides produced some witnesses. By memorandum dated June 14 Mr. Runton's Grievance was denied at this still informal stage. By memorandum dated June 18 signed by Mr. Runton and Mr. Hatcher 26/ a formal grievance under the Activity's grievance procedure was filed. There is apparently some question raised as to whether Mr. Hatcher was representing Mr. Runton in Mr. Hatcher's capacity as Union Chief Steward or as an individual. From the facts here present, noting particularly that Mr. Hatcher was the Union's Chief Steward when Mr. Runton approached him, no evidence was submitted that Mr. Runton specifically stated he wanted Mr. Hatcher as an individual, and he designated him as the Union Chief Steward in the June 14 memorandum, it must be found that Mr. Hatcher was appearing in his Union capacity and that the Activity would so conclude. 27/ The Activity advised Mr. Runton that since he had become a part of the collective bargaining unit on June 1 the grievance should be processed under the negotiated procedure. 28/ The record does not establish and the Complainant does not allege that the processing of this grievance was in any way affected by the fact that Mr. Runton was declared excess and loaned out of the division.

Contentions of the Parties

The Union contends that the Activity interfered with Mr. Runton's protected rights in violation of Section 19(a)(1) of the Order by declaring him excess and transferring him to the Packaging Shop because Mr. Runton had filed a grievance and sought Union representation, which are contended to be rights protected by the Order.

26/ The first paragraph of this memorandum states:
 "I have designated Mr. Desmond V. Hatcher, Chief Steward for National Association of Government Employees as my legal representative in this Grievance action."

27/ The fact that Mr. Runton was not in the Unit when the grievance first arose does not indicate he would not seek Union assistance. Further the testimony of the Union president, who was not a party to Mr. Runton's conversation with Mr. Hatcher is not persuasive. He merely seemed to draw conclusions from the fact that Mr. Runton did not somehow formally request the Union to represent him. It is found that by going to the Union Chief Steward Mr. Runton was reasonably following the course of seeking Union assistance that any employee might follow.

28/ The grievance was presented to the Assistant Secretary for a grievability/arbitrarily determination (Case No. 42-2451).

The Union contends further that the foregoing conduct constituted unlawful discrimination against Mr. Runton because it had the effect of discouraging Union membership and therefore violated Section 19(a)(2) of the Order.

Finally the Union contends that the alleged discrimination against Mr. Runton because he filed a grievance constituted a violation of Section 19(a)(4) of the Act and also that this Section was further violated because his temporary transfer was extended because he filed the subject unfair labor practice charge.

The Activity denies that Mr. Runton was declared excess or temporarily transferred because he had filed a grievance and sought Union assistance; rather, it contends he was declared excess and temporarily transferred because of a declining workload and as part of the Activity's normal procedures. Also the Activity contends that the Order does not protect the right of an employee to process a grievance under the Agency's own administration procedure. Finally the Activity contends that Section 19(a)(4) of the Order applies only to discrimination because of testimony given in post charge proceedings and does not extend to testimony given in a grievance procedure.

Conclusions of Law

The record fails to establish that Mr. Runton was declared excess, and temporarily transferred to the Packaging Shop for a period of six weeks because he filed a grievance and requested the Union to represent him. Rather the record has established that Mr. Runton was declared excess in Shop No. 95685 and temporarily transferred to the Packaging Shop for six weeks in order to use him productively because the workload in Shop No. 95685 was decreasing and the increased workload in the Packaging Shop was such as to require that additional employees be assigned to that Shop. In this regard it is particularly noted that there was a declining workload in the Shop No. 95685; all Electronics Workers regularly assigned to that shop were declared excess and temporarily loaned to other shops; 29/ and the packaging

29/ As were electronic and electrical employees from other shops.

shop was in need of additional employees and a number, including Mr. Runton were temporarily assigned to it. It is further noted that two of the Electrical Workers from Shop No. 95685 were temporarily transferred for periods of time longer than was Mr. Runton; during this period no employees were temporarily transferred into Shop No. 95685; and no increase in the workload of Shop No. 95685 materialized to justify Mr. Runton's early return to his parent shop from the packaging shop. Finally the weight of the evidence adequately establishes the procedures followed with respect to Mr. Runton were the normal and standard loan procedures utilized by the Activity when fluctuating workloads required it.

A. Section 19(a)(2)

Section 19(a)(2) of the Order states:

"Sec. 19. Unfair labor practices. (a) Agency management shall not --
(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other condition of employment;"

In order to violate Section 19(a)(2) of the Order the Complainant must establish that the employee was treated improperly because the employer was motivated by a desire to encourage or discourage Union activity. 30/ In order, therefore to establish a violation of Section 19(a)(2) of the Order it must be established that the alleged discriminatee was engaging in conduct which is protected by the Order, that the Activity knew that the employee was engaged in this protected conduct and discriminated against him with respect to "hiring tenure, promotion and other conditions of employment..." because he engaged in the protected Activity. The Activity must be found to have engaged in the above described discrimination for the purpose of encouraging or discouraging Union membership.

In the instant case, it need not be determined whether Mr. Runton, in processing his grievance was engaged in protected Activity because it is clear that Mr. Runton was not declared excess and temporarily transferred to the

30/ C.f. Department of Transportation, Federal Aviation Administration, Houston Area Office, A/SLMR No. 126; Veterans Administration, A/SLMR No. 296. Although not binding the rationale expressed by the Supreme Court in Radio Officer's Union v. NLRB, 347 U.S. 17(1954). is persuasive.

Packaging Shop from June 6 to July 18 because he engaged in this alleged protected activity. Rather the record here establishes that he was declared excess and temporarily transferred until July 18 solely because of a fluctuating workload and other valid business and management considerations and that the loan procedures followed were perfectly consistent with the Activity's normal and customary practices that were also followed with respect to many of Mr. Runton's coworkers.

In the subject case the sole consideration and motivation for the alleged discrimination, the declaring Mr. Runton excess and his temporary transfer until July 18, was not based on union or other protected activities, but rather was based on the valid business consideration of attempting to use employees productively. It is concluded that the Activity did not engage in conduct violative of Section 19(a)(2) of the Order.

B. Section 19(a)(1)

Section 19(a)(1) of the Order states:

"Sec. 19. Unfair labor practices. (a) Agency management shall not
(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;"

Section 19(a)(1) does not require the alleged unlawful conduct encourage or discourage membership in a labor organization as does Section 19(a)(2), but merely requires that it interfere with rights assured by the Order. Therefore although, perhaps, an Activity need not intend to interfere with protected rights, if it however engages in conduct which would foreseeably have that effect, and there is no overriding economic necessity for such conduct, it might constitute a violation of Section 19(a)(1) of the Order.

As has been discussed above the workload and other valid business reasons where the considerations which lead to Mr. Runton being declared excess and temporarily transferred to the Packaging Shop, using the Agency's procedures which were normally and automatically utilized in such situations. Other employees were also declared excess during the time in question and were loaned to other shops using these very same procedures. It cannot be concluded that treating Mr. Runton in the same manner that the other employees, similarly situated, were being treated, according to existing procedures, and because of a fluctuating workload,

would foreseeably tend to interfere with the employees exercising their rights assured by the Order. In fact quite the contrary might have been true; had the Activity treated Mr. Runton differently than the other employees and not in accordance with the normal procedures, because he had filed a grievance and sought Union assistance, that might have constituted interference with the employees exercising rights protected by the Order, in violation of Section 19(a) (1) of the Order.

In light of the foregoing, therefore, it is concluded that the Activity did not engage in conduct which constituted a violation of Section 19(a) (1) of the Order.

c. Section 19(a) (4)

Section 19(a) (4) states:

"Sec. 19. Unfair labor practices. (a) Agency management shall not -- (4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order;"

As discussed above Complainant alleges that Mr. Runton was temporarily transferred because he filed a grievance and that his temporary transfer to the Packaging Shop was extended to July 18 because of the unfair labor practice charge filed in this case on June 19 or 20, 1973. 31/ The Complainant contends that the protection which Section 19(a) (4) affords to filing a complaint or giving testimony under the Order extends to filing a "grievance" and testifying during that grievance procedure and further that it extends to the filing of a charge under the Order. 32/

It is unnecessary to decide whether the protection afforded by Section 19(a) (4) is as broad as the Union contends because, as found above, Mr. Runton was declared excess and temporarily transferred to the Packaging Shop not because of the filing of the grievance or the filing of the charge but rather because of the fluctuating workload. Further the record fails to establish that his transfer was extended because he filed a charge; rather it establishes that he was

31/ The parties met informally to discuss the unfair labor practice charge on July 9, 1973.

32/ The Union apparently relies on the reasoning of the Supreme Court in NLRB v Scrivener, 405 U.S. 117.

needed and assigned to the Packaging Shop until July 18 because of its workload. 33/

In these circumstances therefore it is concluded that the Activity did not engage in conduct which violated Section 19(a) (4) of the Order.

Recommendation

In view of the findings and conclusions made above, it is recommended that the Assistant Secretary for Labor-Management Relations dismiss the complaint.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: July 25, 1974
Washington, D.C.

33/ In this regard it is noted two Electronics Workers from Shop No. 95685 were transferred to different shops before Mr. Runton and their temporary transfers did not terminate until November 1973, well after Mr. Runton's.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES ARMY TANK AUTOMOTIVE
 COMMAND, WARREN, MICHIGAN
 A/SLMR No. 447

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY TANK AUTOMOTIVE
 COMMAND, WARREN, MICHIGAN

Respondent

and

Case No. 52-4956

LOCAL 1658, AMERICAN FEDERATION OF
 GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by Local 1658, American Federation of Government Employees, AFL-CIO, (Complainant) against United States Army Tank Automotive Command, Warren, Michigan (Respondent). The complaint alleged that the Respondent violated Section 19(a)(1) and (2) of the Executive Order by placing an employee member of the Complainant in an authorized GS-13 position while keeping him at the GS-12 level, and by failing to fulfill its promise to promote him after serving as Team Chief, thereby discouraging membership in the Complainant.

The Administrative Law Judge, in recommending dismissal of the complaint, concluded that the issue of job content raised by the complaint, that is, whether the employee involved was performing GS-13 work while being paid at the GS-12 level, could properly be raised under the Respondent's Job Evaluation Complaint and Appeals Procedure and, therefore, Section 19(d) of the Order would constitute a bar to the proceeding.

In making this determination, the Administrative Law Judge noted that a statement made to the employee by his supervisor that so long as he was active in the Union, he would never be promoted to GS-13, (which was not alleged as an independent violation of Section 19(a)(1)), had been fully explained and brought into proper context by subsequent testimony at the hearing. Thus, in his view, the motivation for such statement was based upon the supervisor's belief that the employee's union business took up so much time that he was prevented from fully developing his potential.

The Assistant Secretary found, under the circumstances of this case, that if the above statement by the employee's supervisor had been properly alleged in the complaint as an independent violation of Section 19(a)(1) of the Order, rather than alleged as evidence of discriminatory motivation in the denial of a promotion, he would find that it improperly interfered with, restrained, or coerced the employee in the exercise of his rights assured under the Order. He noted that to adopt the Administrative Law Judge's rationale that such statement was properly explained by the Respondent would result in improperly penalizing employees who, as union representatives, are exercising rights assured under the Order and contained in negotiated agreements.

Under the circumstances, the Assistant Secretary, noting that no exceptions were filed, adopted the Administrative Law Judge's recommendation that the instant complaint be dismissed based on Section 19(d) of the Order.

On July 29, 1974, Administrative Law Judge Thomas W. Kennedy issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the Administrative Law Judge's recommendation that the instant complaint be dismissed.

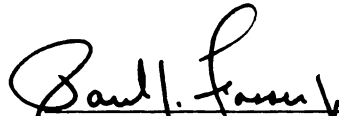
In his Report and Recommendation, the Administrative Law Judge referred to a statement made by employee Porter's supervisor that so long as Porter was active in the Union he would never be promoted to GS-13, and concluded that such statement (which was not alleged to constitute an independent violation of Section 19(a)(1) but, rather, was alleged to constitute evidence of discriminatory motivation in the denial of a promotion) was fully explained and brought into proper context by subsequent testimony. In this regard, the Administrative Law Judge noted that at the time the statement was made Porter was spending somewhere around 70 percent of his time on union matters while the negotiated agreement in effect at the time provided union officials employed by the Respondent with only a "reasonable" time for engaging in such activity. Thus, in the Administrative Law Judge's view, the motivation for such statement was based upon the supervisor's belief that Porter's union business took up so much of his time that he was prevented from fully developing his potential.

Under the circumstances of this case, if properly alleged in the complaint as an independent violation of Section 19(a)(1), I would find that the above statement by Porter's supervisor improperly interfered with, restrained, or coerced Porter in the exercise of his rights assured under Section 1(a) of the Order. To adopt the Administrative Law Judge's rationale that such statement was properly explained by the Respondent based on the latter's belief that Porter's union business prevented him from fully developing his potential would, in my view, result in improperly penalizing employees who, as union representatives, are exercising rights assured under the Order and contained in negotiated agreements. However, noting that the supervisor's statement herein was not alleged as a violation of the Order and the absence of exceptions, I find that further proceedings in this regard under Section 19(a)(1) are unwarranted. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 52-4956 be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 31, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

1/ With respect to the reference on Porter's appraisal form made by Supervisor Bilyk concerning Porter's union activity, it was concluded that further proceedings in this regard are unwarranted in view of the fact that such reference subsequently was deleted. Nor was this matter alleged to constitute a violation of Section 19(a)(1) of the Order. Compare Western Division of Naval Facilities Engineering Command, San Bruno, California, A/SLMR No. 264.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



In the Matter of

UNITED STATES ARMY TANK AUTOMOTIVE
COMMAND,
WARREN, MICHIGAN

Respondent

and

LOCAL 1658, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

Case No. 52-4956

Clyde W. McKenzie, Esquire
United States Army Tank
Automotive Command
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For the Complainant

BEFORE: THOMAS W. KENNEDY
Administrative Law Judge

REPORT AND RECOMMENDATION

I. Statement of the Case

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on October 4, 1973, by the Regional Administrator for Labor-Management Service Administration, Chicago Region, based on a complaint filed on April 17, 1973, by Local 1658, American Federation of Government Employees, AFL-CIO (herein called Complainant or Union). The complaint was filed against United States Army Tank Automotive Command, Warren, Michigan (herein called Respondent) and alleges violations of Section 19, subsections (a)(1) and (a)(2) of the Order, in that Respondent discriminated against two Union members, Ralph I. Porter and Albert E. Beaufore, by placing them in authorized GS-13 positions while keeping them at the GS-12 level. 1/ The complaint goes on to state that the two Union members were promised promotions after serving as Team Chiefs but that after so serving they were not promoted and that such discrimination discouraged membership in the Union.

A hearing was held before the undersigned duly designated Administrative Law Judge on December 4, 1973, and April 24 and 25, 1974, in Detroit, Michigan. 2/ All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Opportunity was also afforded the parties to argue orally and to file briefs. Complainant, by its President, filed a brief, and Respondent filed Motion to Dismiss, which documents have been duly considered by the undersigned.

1/ At the time of the hearing herein Beaufore had been promoted to GS-13. Complainant, in its brief submitted by Porter, seeks remedy only as to Porter.

2/ Hearing opened on December 4, 1973, but was adjourned sine die when the parties advised that the case had been settled and that the settlement agreement was being forwarded to the Assistant Regional Director for approval. On February 7, 1974, the Acting Assistant Regional Director advised that the settlement agreement was disapproved, and on April 2, 1974, the Assistant Regional Director issued "Order Scheduling Continued Hearing", which hearing resumed on April 24, 1974, and was concluded on the following day.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

II. Findings

A. The Failure to Promote

Ralph I. Porter has been employed by Respondent for approximately eleven years. During the time material herein he was classified as Cost Accountant, GS-12. He was also during times material herein the president of Local 1658, American Federation of Government Employees, the Complainant in this case.

Among Respondent's operations is the Cost Economic Information Office, referred to as CEI, under the supervision of Walter S. Bilyk. The mission of that office, which involves management control systems in the acquisition process, was first assigned to Respondent in 1968, but the office was not staffed until the end of 1969, following a Reduction in Force (RIF) and the consequent reorganization of Respondent's Office of Procurement and Production. In early July 1970, as a result of another RIF, the CEI Office was reconstituted, at which time Ralph Porter, whose position had been abolished in the RIF, was assigned to CEI as a Cost Accountant, GS-12. Albert Beaufore, classified as Economist, was already a part of CEI, having been in that Office since it became operational in January of 1970. The gravamen of the complaint is that Respondent assigned Porter and Beaufore, two Union members, to GS-13 positions but retained them at the GS-12 pay level. 3/

Apparently Porter's performance was more than satisfactory, for in his Career Appraisal executed in October 1971, Chief Bilyk described Porter's skills and characteristics in glowing terms and assigned a rating of "Outstanding" or "Above average" in all delineated categories. That Appraisal form, which is in evidence as Complainant's Exhibit 16, also contained the following comment by Supervisor Bilyk:

Mr. Porter's position as President of AFGE Union is increasingly demanding more of his time. This results in a less than desirable

3/ As noted in footnote 2 supra, Beaufore was promoted to GS-13 before the hearing in this matter opened.

work situation for productivity and development in office mission responsibility. He has acquired the specialized training established for the office mission and has the potential for handling greater mission responsibility. This was demonstrated by his excellent performance as a team member for management systems analysis of LTV on the LANCE Missile.

Around April of 1972 Porter filed a grievance over the failure of Respondent to promote him. After proceeding through the first two steps with negative results, Porter, on June 16, 1972, wrote to Respondent's Commanding General Pielik, requesting that the grievance be further processed. In that letter Porter stated:

The exact nature of my grievance is:

(a) There are five GS-13 positions in the Division. During the past two years I have filled one of the positions as a GS-12. At various times three of the other positions have been filled by GS-13's; one is still filled at the GS-13 level; yet we have all been doing the same level work.

(b) The corrective action requested is that I be promoted (non-competively) (sic) to a GS-13 position retroactive to the date I started work in the CEI office. This action would be in consonance with the Commanding General's statement that an "Equal day's pay be given for an equal day's work." 4/

On July 20, 1972, Civilian Personnel Officer Blakeslee wrote to Porter, advising that the U.S. Army Civilian Appellate Review Agency (USACARA), the final authority in the grievance

4/ Although the letter, in evidence as Respondent's Exhibit 2, did not ascribe to Respondent any anti-union motive as a basis for its failure to promote, it was written on Complainant's stationery and signed by Porter in his capacity of Union President, and copies were sent to National Union Officers.

procedure, had denied the grievance. The letter, in evidence as Respondent's Exhibit 1, stated that Porter's grievance was rejected "because it pertained solely to position and pay management matters. A grievance arising from a position classification determination not involving an adverse personnel action is specifically excluded from processing under the grievance procedure..." The letter went on to state:

In the process of rejecting your grievance, USACARA determined that the Job Evaluation Complaint and Appeal Procedure is the appropriate procedure for you to use in seeking a satisfactory resolution of your complaint. In this respect, your attention is particularly directed to Section 11B, Paragraph 9 of the inclosed Report of Findings and Recommendations.

Job Evaluation Complaint and Appeal Procedure is contained in Chapter 26, Supervisor's Personnel Management Manual. Miss Trudy Bach of the Position and Pay Management Branch, extension 31304, is available to answer any questions you might have concerning the procedure to be followed.

Porter did not pursue the matter through the classification appeals procedure. At the hearing he testified that the reason he did not follow such course was that his experience with the agency appeals procedure while representing employees was such that he had no faith that he could prevail by taking such course of action. In fact, in June 1972 Porter wrote to two U.S. Congressmen to complain, among other things, that "(t)he Army does not provide grievance procedures that afford any appreciable relief to grieving employees." 5/

In September 1972 Respondent made a commitment to Porter and Beaufore to consider them for promotion to GS-13 if they demonstrated their ability to serve in the capacity of Team Chief and conduct a Contract Demonstration Review, a complicated task involving the coordination of many phases of a management system

5/ Complainant's Exhibit 17.

analysis, culminating in the preparation and dissemination of a written report. Apparently pursuant to this commitment, Respondent on October 19, 1972, issued Special Orders appointing members to a Demonstration Review Team and naming Porter as Team Chief and Beaufore as Asst. Team Chief. The team performed its task and issued its Demonstration Review Report in March 1973. There is no contention that Porter's performance as Team Chief was other than creditable.

While performing as Team Chief, Porter, in February 1973, wrote to Respondent to remind the Chief of Staff of the commitment made 6/ and on March 1, 1973, wrote to Respondent's Commanding General, charging an unfair labor practice by assigning him to a GS-13 position while retaining him in the GS-12 pay grade. 7/ There were two separate reactions to this letter. On March 29, 1973, Colonel Rice, Procurement & Production Director, wrote to the Civilian Personnel Officer, praising the work of Porter as Team Chief, making reference to the commitment to consider for promotion, and recommending that Porter "be considered for promotion to GS-510-13." 8/ On the following day, March 30, the Civilian Personnel Officer wrote to Porter, acknowledging his March 1 letter and advising that a determination had been made that his performance warranted consideration for promotion to GS-13, but that any such promotion would have to be accomplished through competitive promotion procedures. The letter concluded with the statement that "(a)ny management action will be deferred until the current realignment actions are finalized and a determination made by the Comptroller that there is a continuing requirement for a GS-510-13 position." 9/ Promotion did not

6/ Complainant's Exhibit 2.

7/ Asst. Secretary's Exhibit 1-A.

8/ Complainant's Exhibit 5. Although making no reference to Porter's March 1 letter, the memo labels the subject as "Unfair Labor Practice Complaint."

9/ Complainant's Exhibit 6. The phrase "current realignment actions" apparently is a reference to a Reduction-in-Force which took place in the CEI Office in March 1973, resulting in the abolition of jobs and reassignment of personnel. Porter was one of those whose jobs were abolished, and in August 1973 he was reassigned in grade to a different job in the same accountant series.

materialize, and Porter, on April 11, 1973, filed the complaint herein.

B. Motivation

There is testimony by Porter that Respondent engaged in harassing tactics directed toward him because he zealously performed his union duties. This testimony is vague and general at best and, other than the failure to promote him, refers mostly to the requirement that he document his telephone calls and account for his time. But even as to that, Porter conceded that such tactics had ceased. There is, however, one statement attributed to Respondent, which, standing alone, offers strong support to the allegation that the failure to promote Porter was related to his union activity. Thus, Porter testified that his supervisor, Chief Bilyk, had stated that as long as Porter was as active as he was in the Union, he would never be promoted to GS-13. Bilyk did not testify, nor did Respondent offer any explanation for not calling him to testify. Consequently, the statement attributed to Bilyk is undenied, and I find that it was made by him. That statement, interestingly enough, was brought out in cross-examination of Porter, but through further cross-examination it was brought into proper context and fully explained. Porter testified that at the time the statement was made he was spending somewhere around 70% of his time on union business and that later he spent 100% of his time on union matters. The contract in effect at the time provided "reasonable" time for union business by union officials employed by Respondent. The statement, then, takes on new meaning when we consider that the supervisor who made it is the same one who included in an appraisal form a statement praising Porter's ability, performance and potential, but lamenting the fact that Porter's union business took up so much of his time that he was prevented from fully developing his potential. 10/ Nothing else was adduced to attribute an illegal motive to the failure to promote Porter to GS-13. Indeed, he was given a special assignment to aid in qualifying for promotion and was praised for his performance and recommended for consideration for promotion.

10/ The statement, from Complainant's Exhibit 16, is quoted verbatim, supra.

III. Conclusions

Porter sought to be reclassified to grade GS-13 because he claimed he was performing GS-13 work. This was the sole basis set out in the grievance he filed. That grievance was denied at the final stage of the agency grievance procedure.

Section 19(d) of the Order states in part:

...Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. (Emphasis supplied).

Here Porter chose to seek his remedy via the grievance route, and the above-quoted provision of Section 19(d) appears to be clearly applicable. But the grievance was denied, not on the merits, but on the ground that the matter involved the pay rate for the work performed and that any remedy must be processed through the agency's appeal procedure or filed directly with the Civil Service Commission (5 CFR 511.603 et seq.). It could be argued, then, that since a grievance could not be filed to remedy Porter's situation, the rejection of the grievance at the final stage constituted nullification, and Porter should not be charged with having utilized the grievance procedure. Stated another way, since the issue could not "be raised under a grievance procedure," then the above-quoted provision of Section 19(d) should not apply. But then there must come into play the first sentence of Section 19(d):

Issues which can properly be raised under an appeals procedure may not be raised under this section...


While it is not clear whether the issue of motivation; that is, whether Respondent was motivated by union considerations, could be raised under the classification appeal procedure, it is clear that the issue of job content; that is, whether Porter was performing GS-13 work while being paid GS-12 salary, could "properly be raised" under Respondent's Job Evaluation Complaint and Appeal Procedure. Indeed, in my view, the classification appeal process is the only means of determining whether Porter was properly classified. Therefore, Section 19(d) of the Order would constitute a bar to this proceeding, whether we consider Porter as having utilized the grievance procedure or as having failed to utilize an available appeals procedure.

Porter asserts as the reason for his not utilizing the appeals procedure his lack of confidence in that process, the feeling that he would not get a "fair shake." But such an evaluation of the available procedure, even if well founded, will not render the explicit provisions of Section 19(d) inapplicable. I conclude, therefore, that the Assistant Secretary is without jurisdiction in this matter and will recommend that the complaint be dismissed. (United States Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272. See also Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334.)

I am not unmindful of the argument that since the grievance filed in this matter did not mention Porter's union activity as the underlying reason for Respondent's failure to reclassify him to GS-13, the provisions of Section 19(d) of the Order would not apply, since the unfair labor practice issue could not "properly be raised". I do not find this argument convincing, particularly in light of the cases cited above and the history of the development of Section 19(d) of the Order, but if such were the holding, then, of course, the Assistant Secretary would have jurisdiction. But even in that event I would be constrained to make the same recommendation, for, as stated above, the one statement attributed to Respondent which could support a finding of illegal motive was properly explained. I conclude, therefore, that there is insufficient evidence to warrant a finding that Respondent failed or refused to promote Porter because of his union activity and that there is insufficient evidence to warrant a finding that Respondent violated the provisions of the Order as alleged in the complaint.

IV. Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against Respondent be dismissed in its entirety.


THOMAS W. KENNEDY
Administrative Law Judge

Dated July 29, 1974
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
 SOUTHEAST SERVICE CENTER,
 CHAMBLEE, GEORGIA
 A/SLMR No. 448

This proceeding arose upon the filing of an unfair labor practice complaint by the National Treasury Employees Union, and Chapter 070, National Treasury Employees Union (Complainants). The Complainants alleged that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by holding a formal meeting with employees in the unit represented by the Complainants without the presence of a representative of the Complainants and by its supervisors meeting with individual grievants to persuade them to withdraw their grievances without notifying or allowing to be present representatives of the Complainants designated by said grievants.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. The Assistant Secretary found, in agreement with the Administrative Law Judge, that the absence of the designated substitute representative of the exclusive representative at a regularly scheduled employee meeting, due to a conflict in work schedules, did not result in a violation of the Order. The Administrative Law Judge based his finding on the fact that the regular attending representative knew well in advance that there was a conflict in dates which would keep her from attending the previously scheduled meeting but did not advise the Respondent until late in the day before the meeting. While the representative's alternate could not be released from duty due to work schedules, the Administrative Law Judge found that the Respondent had made sincere efforts to assure that the exclusively recognized labor organization was represented at the meeting and that a substitute representative, in fact, attended and participated in the meeting.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's failure to notify the exclusive representative of the employees concerning formal discussions between supervisors and grievants with respect to employee grievances constituted a violation of the Order. In this connection, the grievances were filed by some 33 employees under the Agency grievance procedure concerning the charge of four hours of annual leave because of the absence of these employees after the facility had reopened following a severe ice storm in the Atlanta, Georgia, area. The Administrative Law Judge found that although the Complainants argue that they never alleged an unfair labor practice in the grievances, the statements contained in a letter from a National Field Representative to the Agency grievance examiner reflected that there was a complaint about the failure to have the designated representatives present at the supervisory interviews. Thus, he concluded that the provisions of Section 19(d) of the Order were applicable because, in his view, the Complainants had pursued the alleged unfair labor practice

through the established grievance procedure. The Assistant Secretary found that the issue raised under the grievance procedure by virtue of the National Field Representative's letter was not the same issue as that raised in the instant unfair labor practice complaint. Thus, the issue involved in the grievances concerned essentially the rights of individual employees under the Agency procedure to receive relief from disciplinary action, which rights were covered in the Agency grievance procedure cited by the Administrative Law Judge, whereas the rights involved in the complaint were those of an exclusive representative under Section 10(e) of the Order. The Assistant Secretary concluded, therefore, that Section 19(d) of the Order was inapplicable insofar as the complaint alleges violation of rights assured to an exclusive representative. In his view, the issue presented was whether the Respondent's failure to notify the exclusive representative of such meetings was contrary to the requirements of Section 10(e) of the Order and, therefore, violative of Section 19(a)(6). Noting particularly that the meetings related to the processing of previously filed grievances, the Assistant Secretary found that under Section 10(e) an exclusive representative must be given the opportunity to be represented at formal discussions concerning grievances. Under the circumstances of the case, he found that the failure to inform the exclusive representative of the meetings which he found were formal discussions of grievances, and afford it an opportunity to be represented, constituted a violation of Section 19(a)(6) of the Order. The Assistant Secretary concluded also that this improper conduct necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order in violation of Section 19(a)(1).

Accordingly, the Assistant Secretary issued a remedial order with respect to the conduct found violative of the Order and he dismissed the complaint in all other respects.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
SOUTHEAST SERVICE CENTER,
CHAMBLEE, GEORGIA

Respondent

and

Case No. 40-4927(CA)

NATIONAL TREASURY EMPLOYEES
UNION, AND CHAPTER 070,
NATIONAL TREASURY EMPLOYEES
UNION

Complainants

DECISION AND ORDER

On June 27, 1974, Administrative Law Judge Thomas W. Kennedy issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainants filed exceptions with respect to the Administrative Law Judge's Report and Recommendation together with a supporting brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the Complainants' exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, only to the extent consistent herewith.

The complaint herein alleged, among other things, that the Respondent violated Section 19(a)(1), (2) and (6) of the Executive Order 11491, as amended, by its supervisors meeting with individual grievants to persuade them to withdraw their grievances without notifying, or allowing to be present, representatives of the Complainants' designated by said grievants.

The essential facts in the case are set forth in detail in the Administrative Law Judge's Report and Recommendation, and I shall repeat them only to the extent necessary.

Chapter 070 of the National Treasury Employees Union is the exclusively recognized representative of the employees involved in this proceeding. However, no negotiated agreement was in effect at the time

of the events herein. On January 7, 1973, there occurred a severe ice storm in the Atlanta, Georgia, area, which resulted in power failures and hazardous driving conditions throughout the area. The Respondent facility was without power which forced a shutdown of operations from the night shift on Sunday, January 7, until Tuesday, noon, January 9. Administrative leave for that period was granted to all employees. Some employees, for various reasons related to the storm, did not report to work until January 10. These employees were charged with annual leave. On January 24, 1973, approximately 33 of these employees, who objected to the loss of annual leave, filed grievances which designated the Complainant Local's President and its attorney as their representatives. On January 29, 1973, supervisors, acting under instructions from their superiors, called the grievants to their desks to interview them with respect to their grievances. The designated representatives were neither notified of, nor were they present at, the interviews. As a result of the interviews some of the grievances were withdrawn, but other employees indicated that they wanted their grievances processed, even though, according to testimony, there was a suggestion that they withdraw the grievances.

On February 9, 1973, the Complainants filed unfair labor practice charges with the Respondent, and on June 22, 1973, the complaint in the instant case was filed. ^{1/} In June 1973, pursuant to the Agency's grievance procedure, a grievance examiner was appointed who conducted an investigation and issued a report discussing each case separately. In this connection, on July 12, 1973, a National Field Representative of the National Treasury Employees Union sent a letter to the grievance examiner which, among other things, stated:

...The record should indicate that in each instance the employee was approached by his or her supervisor and a discussion regarding the subject matter of the grievance ensued. The official union representatives were not informed nor given a chance to be present at these meetings...

As you know, unfair labor practice charges stemming from this grievance are currently pending before the Department of Labor. The record in this grievance is vital to the fair and just disposition of those charges. I hereby formally request a copy of the grievance file and any other information you have on this matter.

In his report, the grievance examiner concluded that the failure to afford the representatives of the affected employees notice of the meetings involved was a "procedural error" but was not "fatal."

The Administrative Law Judge found that although the Complainants argue that they never alleged an unfair labor practice in the grievances, the statements contained in the July 12, 1973, letter to the grievance

^{1/} The complaint was amended on August 15 and August 27, 1973.

examiner reflect that there was, in fact, a complaint to the grievance examiner about the failure to have the designated representatives present at the supervisory interviews. He concluded, therefore, that the provisions of Section 19(d) of the Order were applicable because, in his view, the Complainants had pursued the alleged unfair labor practice through the established grievance procedure. Accordingly, he recommended that this aspect of the complaint be dismissed on the basis that the matter could not be processed through the unfair labor practice procedure afforded in the Order. I do not agree.

In my view, the issue raised under the grievance procedure by virtue of the National Field Representative's letter of July 12, 1973, to the grievance examiner was not the same issue as is raised by the instant unfair labor practice complaint. Thus, the issue involved in the grievances concerned essentially the rights of individual employees under the agency procedure to receive relief resulting from an agency disciplinary action, while the rights involved in the instant unfair labor practice complaint are those of an exclusive representative under Section 10(e) of the Order. ^{2/} In this regard, Section 113 of the agency grievance procedure, cited by the Administrative Law Judge, required the incorporation in a grievance of certain unfair labor practice allegations involving alleged violation of individual rights assured under Order, but does not require the inclusion of unfair labor practice allegations relating to the obligation of an agency to meet and confer with an exclusive representative, which is the gravamen of the instant complaint in this regard. Accordingly, I find that the agency grievance procedure herein did not cover or resolve all of the matters raised by the instant unfair labor practice complaint and that, therefore, Section 19(d) of the Order is inapplicable insofar as the instant complaint alleges a violation of rights assured to an exclusive representative.

Thus, the issue presented is whether the Respondent's failure to notify the employees' exclusive representative of the interview meetings with the grievants was contrary to the requirements of Section 10(e) of the Order and, therefore, violative of Section 19(a)(6). In this regard, it was noted particularly that the meetings with the individual supervisors, acting under instructions from their superiors, related to the processing of previously filed grievances under the Agency grievance procedure. ^{3/}

^{2/} Section 10(e) provides, in part, that an exclusive bargaining representative "---shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

^{3/} In my view, it is immaterial for the purposes of Section 10(e) whether such grievances were at an "informal" or "formal" stage under an agency grievance procedure. It was noted in this regard that the Federal Labor Relations Council in Mare Island Naval Shipyard, Vallejo, California, FLRC No. 72A-12, in another context, stated that the term "grievance," as used in Section 2(c) of the Order, "includes both formal and informal grievances."

As indicated above, Section 10(e) of the Order specifically provides that an exclusive representative must be given the opportunity to be represented at formal discussions between management and employees or employee representatives which concern grievances. Under these circumstances, I find that the failure to inform exclusive representative of the meetings involved and afford it an opportunity to be represented at such meetings, which I find were formal discussions of grievances within the meaning of Section 10(e), constituted a violation of Section 19(a)(6) of the Order. ^{4/}

Moreover, I find that the Respondent's improper conduct in this regard necessarily had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Order. Accordingly, I conclude that the Respondent's conduct herein also violated Section 19(a)(1) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Chapter 070, National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Interfering with, restraining, or coercing its employees by failing to provide Chapter 070, National Treasury Employees Union, the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order.

(a) Notify Chapter 070, National Treasury Employees Union of, and give it the opportunity to be represented at, formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(b) Post at its facility at Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, copies of the attached notice marked

^{4/} Cf. Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving Chapter 070, National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Section 1(a) of Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature)

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.

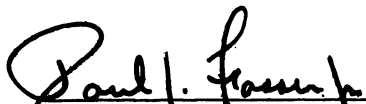
If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 300, 1371 Peachtree St., N.E., Atlanta, Georgia 30309.

"Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(1), (2) and (6) be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 31, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations



REPORT AND RECOMMENDATION

I. Statement of the Case

.....
 In the Matter of :
 :
 Internal Revenue Service, :
 Southeast Service Center, :
 Chamblee, Georgia :
 Respondent :
 : Case No. 40-4927 (CA)
 and :
 :
 National Treasury Employees Union, :
 and Chapter 070, National Treasury :
 Employees Union :
 Complainants 1/ :

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For the Respondent

Thomas Angelo, Esq.
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Washington, D. C. 20006

For the Complainants

Before: THOMAS W. KENNEDY
Administrative Law Judge

This is a proceeding under Executive Order 11491 (herein called the Order). A Notice of Hearing thereunder was issued on October 25, 1973, by the Acting Regional Administrator for Labor-Management Services Administration, Atlanta Region, based on a Second Amended Complaint filed on August 27, 1973, by National Association of Internal Revenue Employees and Chapter 070, National Association of Internal Revenue Employees. (After the filing of the complaint herein, the parent labor organization changed its name to National Treasury Employees Union. That labor organization and its Local 070 are referred to herein jointly as the Union or Complainants.) The complaint was filed against Internal Revenue Service, Southeast Service Center, Chamblee, Georgia (herein called Respondent) and alleges violations of Section 19, subsections (a)(1), (a)(2), and (a)(6) of the Order, in that Respondent; (1) held a formal meeting with employees in the unit represented by the Union without the presence of a representative of the Union; (2) conducted a formal meeting with an employee to discuss her application for retirement without notifying and allowing to be present the Union representative designated by said employee; and (3) met with individual grievants to persuade them to withdraw their grievances without notifying or allowing to be present Union representatives designated by said grievants. 2/

A hearing was held before the undersigned duly designated Administrative Law Judge on January 15 and 16, 1974, in Atlanta, Georgia. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Opportunity was also afforded the parties to argue orally and to file briefs. Complainants and Respondent filed briefs, which have been duly considered by the undersigned.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all the testimony

1/ Complainants' names are shown as amended at the hearing.

2/ At the hearing herein Complainants withdrew allegation No. 2. (Tr. 89-91)

and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

II. Findings

A. Background

In Chamblee, Georgia, a suburb of Atlanta, the Internal Revenue Service operates its Southeast Service Center. Structured in the usual governmental fashion with Divisions, Branches and Sections, there is, among other things, a Computer Branch, under the direction of Branch Chief William H. Millecan. Sections within that Branch include Computer Operations under Section Chief Robert Smith and Branch Training under Section Chief James H. Duke. The work of the Computer Branch includes the operation of Honeywell and General Electric computers and involves around-the-clock programs utilizing three shifts of employees. The day shift, during the times material herein, was under the control of Shift Manager Marvin Michael, who supervised the work of several Computer Operators. Also involved in the operations of the installation is a program known as Integrated Data Retrieval System (IDRS) manned by IDRS Examiners, one of whom was Mrs. Jean Whitener, who was also the President of Local 070, one of the Complainants herein.

The representative status of Complainants is not in issue. Respondents recognized the Union as the exclusive representative of its employees in a unit appropriate for the purposes of collective bargaining, although there was not in effect at any time material herein a valid collective bargaining agreement between the Union and Respondent.

B. The alleged Unfair Labor Practices

With one element withdrawn, there remain for resolution two allegations in the complaint. One of these involves a meeting held by Respondent with a group of employees, referred to as a "Diagonal Slice Meeting," and the issue is whether or not Respondent denied the Union representation at that meeting. The other allegation involves individual meetings between supervisors and employees who had filed grievances after being

charged annual leave for absence during a severe ice storm, and again the issue involves the denial of representation at these meetings.

1. The "Diagonal Slice" Meeting

For some time prior to the occurrences herein Respondent met on the first Wednesday of each month with a group of employees for the purpose of discussing the mission and problems involved in Respondent's operations and problems or other items of interest involving the employees and their assignments and working conditions. Usually in attendance at these meetings were the Director of the installation, the Chief of the Personnel Branch, the Labor Relations Officer, and a group of employees randomly selected by Respondent so as to be representative. While selecting employees in random fashion, Respondent made certain that the various branches and sections were represented as well as the various grade levels, in order that the group would constitute a cross-section of the employee force; hence the name "Diagonal Slice." Respondent recognized the right of the Union to have a representative in attendance, and to participate as such, in these monthly meetings, and in most instances, at least for several months prior to the events herein, that representative was Jean Whitener, President of Chapter 070 of the Union.

The first Wednesday in 1973 was January 3, and pursuant to standard practice, notice of a "Diagonal Slice" meeting was distributed to all concerned during the latter part of December 1972, setting forth the details for the meeting scheduled for January 3. Among the recipients of that notice was President Jean Whitener of the Union. It so happened that around the same time Respondent's Branch Training Coordinator, James H. Duke, was scheduling one of his periodic training classes relating to the Individual Master File Program (called IMF Training Classes). Jean Whitener, in her capacity as an IDRS Examiner was selected to attend the upcoming IMF Training Class, which was scheduled to begin on Wednesday morning, January 3, 1973. The conflict apparently went unnoticed by all concerned, for it was not until the afternoon of Tuesday, January 2, that Jean Whitener in flipping through her calendar concluded that on the following morning she was to be in two places at the same time. Desirous of attending the IMF Training

Class and at the same time conscious of her Union responsibility, she telephoned the Labor Relations Officer, Claude Burns, and told him of the conflict, advising that she would like to have Alonzo Allen, a Computer Operator who was also Special Assistant to the Union Chapter President, attend the "Diagonal Slice" meeting in her place the following morning. Burns indicated acquiescence in this arrangement, but upon checking with Shift Manager Michael, he learned that the scheduled work for the Computer Branch may be such that Allen could not be spared. This conversation took place near the end of the shift, and Michael told Burns he would be more certain of the problem the following morning.

The following morning, January 3, Jean Whitener, believing that the substitute arrangements were complete, began her training class at 7:30. On that same morning Michael confirmed his evaluation concerning the feasibility of releasing Alonzo Allen to attend the "Diagonal Slice" meeting. According to Michael, they were short-handed in the Computer Branch. There were important programs scheduled for the Honeywell and General Electric Computers, it was the first week after the close of the tax year, and a crash program was initiated to transfer many accounts or returns to the Memphis installation. Allen was one of a few experienced computer operators, and since one of the other few was just returning from leave on that very day, it was concluded that Allen could not be spared. Burns agreed to try to get another substitute and telephoned Whitener, getting her out of her training class to advise her of the problem. Whitener said she would check into the matter. She immediately contacted Allen and, after discussing the matter with him and other employees, concluded that the problem was not such that Allen could not be spared. She called Burns and advised him that she was insisting that Allen attend the meeting, threatening to "go higher" if Allen was not allowed to attend. By this time it was beyond the scheduled starting time for the meeting, and Burns presented the problem to the Director, who noticed that the roster contained the name of Ed Dyer among those randomly selected for attendance. Dyer was known to hold some office in the Union 3/, so the Director suggested that Burns talk again with

3/ Dyer was the elected Historian of Chapter 070 and also was the Shop Steward in the Section where he worked.

Whitener with the idea in mind that she accept Dyer as a substitute, since he was to be at the meeting anyway. Once again Burns called Whitener, getting her out of her training class to discuss the suggested solution, namely using Dyer as the Union representative at the meeting. According to Burns' recollection of that conversation, it ended with the understanding that Dyer would be the representative of the Union at the meeting. While having the "impression" that there was agreement concerning the substitute arrangement, Burns conceded that Whitener was not happy with it. Whitener's version indicates resignation rather than agreement. Having concluded that management was not going to retreat from its position that Allen could not be spared, Whitener, when hearing the suggestion that Dyer be utilized as the Union's representative, indicated her frustration and resignation by retorting, "Do I have any choice?" as her final remark before terminating the conversation. Burns reported to the Director that Dyer could be the Union's representative, and the "Diagonal Slice" meeting thereupon got underway and was concluded with Dyer actively participating as the representative of the Union.

2. The "Ice Storm" Grievances

On Sunday evening, January 7, 1973, a severe ice storm struck the Atlanta area, knocking down power lines and forming ice coatings on the highways, resulting in hazardous driving conditions. Respondent cancelled its night shift Sunday and all operations at the Chamblee center for Monday, January 8. Established notification procedures were put into effect, and full operations were resumed at noon on Tuesday, January 9. Some employees, for various reasons related to the storm, did not return to work until Wednesday, January 10. Those employees learned at that time that they were to be charged 4 hours annual leave for the afternoon of Tuesday, January 9, administrative leave having been granted from Sunday night to noon Tuesday. Many employees who were charged annual leave for Tuesday afternoon objected, claiming that for various reasons related to the storm they could not get to work on that day. Some 33 employees filed grievances. Some filed on a round-robin type petition, others on the official grievance form, and some did both. The grieving employees in all instances named Jean Whitener, President of the Union's Local 070 and Roy Buckholz, Union attorney, as

their representative. They protested the decision not to grant administrative leave for the afternoon of Tuesday, January 9.

Supervisors, acting under instructions from their superiors, interviewed those who had grieved, and as a result of those interviews some withdrew their grievances, some refiled on the grievance form, and others stated that they wanted their grievances processed, even though, according to some testimony, there was strong suggestion that they withdraw. Neither of the designated representatives was present at any of these individual interviews.

The grievances were processed under the procedures set out in Respondent's Interim Handbook of Employee Adverse Action and Grievance Appeals (Resp. Exh. 1). This was the only procedure available, since there was no negotiated agreement with the Union. Under the established procedures a grievance examiner was appointed and, after conducting an investigation, he issued his report, discussing each case separately and finding in some cases that Respondent was warranted in charging annual leave, while in other cases condemning such action. This report, which is in evidence as Respondent's Exhibit 2, is not under attack by the Complainants, nor is there an attempt to retry the grievances in this proceeding. Rather, Complainants allege simply that the failure to accord the grievants representation of their choice at the individual conferences held by the supervisors constituted unfair labor practices under the Order.

III. CONCLUSIONS

Complainants allege that Respondent's failure or refusal to allow Alonzo Allen to attend the "Diagonal Slice" meeting constituted violations of Section 19(a) (1) and (2) of the Order. 4/ Respondent concedes that Allen was not allowed to

4/ The Complaint Against Agency (Asst. Secy's Exh. 1-A) alleges violations of Section 19(a) (1) (2) and (6) of the Order, but each of the three incidents described in the Complaint makes reference to an attached letter from the National President of the Union which alleges separate violations for each incident. With reference to the "Diagonal Slice" meeting, the letter mentions "Alonzo Bell". I find this to be an inadvertence and that it should read "Alonzo Allen". That same letter attached to the Complaint alleges violations of Section 19(a) (1) and (2).

attend the meeting and concedes also that the Union had the right to have a representative present. It argues, however, that such right is not absolute and further that the Union was actually represented at the meeting.

We need not here decide the application of Section 10 (e) of the Order, for Respondent concedes that the Union had a right to have a representative present at the "Diagonal Slice" meetings. Indeed, that right was always recognized and the Union was always notified and was always represented. The problem with the January 3 meeting was that Jean Whitener had a conflict and wanted to name a substitute for the meeting. In Respondent's judgment that substitute could not be spared. In the absence of any evidence of illegal motive I accept that judgment, and further conclude that it is immaterial whether later developments proved that judgment to be correct or faulty. The training program which Jean Whitener wanted to attend and which was the cause of the conflict was to be repeated at a later date. While no one apparently suggested it to her, she undoubtedly could have elected to attend a later session and attended the meeting of January 3, just as she had attended several such meetings in the past. Instead, however, she insisted on the eve of the scheduled meeting, that Alonzo Allen be allowed to attend in her stead. There was no preemptory refusal; there was, in my opinion, a sincere effort to accommodate to the situation. Here the rule of reason must prevail, and while there was not "agreement", in the true sense of the word, in the utilization of Ed Dyer as the Union representative at the meeting, there was some acquiescence, albeit born of resignation and frustration, in the solution proposed by Respondent. I do not view the right of a labor organization to "be given the opportunity to be represented at formal discussions between management and employees" to be so absolute as to compel management to adjust to last minute substitutions regardless of problems relating to the mission of the Agency. Finally, and not the least important, is the motivation involved. In the instant

4/ cont'd. This may be another inadvertence in failing to mention subsection (6). While it is difficult to see the application of subsection (2), it is noted that Complainants' brief states that the issues concerning the meeting in question relate to Sections 19(a) (1) (2) and (6) and in one place in the brief (probably inadvertently) mentions subsection (a) (3) as being in issue. I have treated the pleadings in the broadest aspect and have considered the matter as if every section or subsection mentioned had been properly pleaded.

case there is no evidence whatsoever of any anti-union animus on the part of Respondent. On the contrary, all evidence points to harmonious relations based on a complete recognition of the Union's rights and management's obligations. In short, I conclude that there is insufficient evidence to warrant a conclusion that Respondent violated any provisions of the Order in its actions and conduct surrounding the "Diagonal Slice" meeting.

Turning now to the "Ice Storm Grievances", we face the situation where the only grievance procedure was the one promulgated by Respondent. There necessarily come into play the provisions of Section 19(d) of the Order:

Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures....

Complainants argue that they are not selecting another forum; that the grievances have been heard and the decision has issued. The issue, they assert, does not relate to the grievances but only to the procedure in the early stage of the grievances, specifically, to the failure to allow a designated representative to be present during the initial interviews.

As pointed out above, the only grievance procedure available to employees was that promulgated by Respondent in its Handbook of Employee Adverse Action and Grievance Appeals (Resp. Exh. 1). Section 113 of that document reads as follows:

113. Allegations of Unfair Labor Practices

(1) An Allegation of an unfair labor practice made in connection with an appeal or grievance shall be incorporated in the appeal or grievance and processed under these procedures when the allegation constitutes a complaint that agency management has:

- (a) interfered with, restrained, or coerced an employee in the exercise of the rights assured by Executive Order 11491;

- (b) encouraged or discouraged membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other condition of employment; or
- (c) disciplined or otherwise discriminated against an employee because he filed a complaint or gave testimony under Executive Order 11491.

While Complainants argue that they never alleged an unfair labor practice in the grievances, it is clear that they complained to the grievance examiner about Respondent's supervisors having conducted interviews without allowing designated representatives to be present. Thus, in a letter to the grievance examiner from a National Field Representative of the Union there is this statement:

.... The record should indicate that in each instance the employee was approached by his or her supervisor and a discussion regarding the subject matter of the grievance ensued. The official union representatives were not informed nor given a chance to be present at these meetings.... (Resp. Exh. 3)

And the grievance examiner spoke to this issue. On Page 1 of his report he states:

.... A review of the actions taken indicated that the Service Center failed to comply with two procedural requirements of the Civil Service Commission and Service regulations in the informal stages of these grievances. All the grievants were not afforded an opportunity to discuss their dissatisfaction with their immediate supervisors. The representatives of those employees who were counselled by their immediate supervisors were not given notice of the meetings. Neither of these procedural errors proved fatal. Therefore, the grievance examiner went into the formal stages of the grievance procedure.... (Resp. Exh. 2)

I conclude that the provisions of Section 19(d) of the Order are clearly applicable to the situation presented here.

Complainants pursued the matter through the established grievance procedure and cannot now process their complaint through the unfair labor practice procedure afforded in the Order. To hold otherwise would do violence to the provisions of Section 19(d).

The situation here is not unlike that in Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, which was recently affirmed in pertinent part by the Federal Labor Relations Council (FLRC No. 74 A-3). There the Assistant Secretary stated:

... [W]here, as here, the grievance procedure which allegedly has been violated by the agency involved, is a procedure established by the agency itself rather than through the process of bilateral negotiations, I find that different considerations apply. Thus, an agency grievance procedure does not result from any rights accorded to individual employees or to labor organizations under the Order. Moreover, such a procedure is applicable to all employees of an agency not covered by a negotiated procedure, regardless of whether or not they are included in exclusively recognized bargaining units. Under these circumstances, I find that, even assuming that an agency improperly fails to apply the provisions of its own grievance procedure, such a failure, standing alone, cannot be said to interfere with rights assured under the Order and thereby be violative of Section 19(a)(1)

.... And, in the absence of evidence of discriminatory motivation or disparity of treatment based on union membership, considerations, I find that the Respondent's conduct herein was not violative of Section 19(a)(2) of the Order


The rationale and conclusions quoted above with respect to the utilization of a unilaterally established agency grievance procedure are equally applicable to the facts presented herein, and in the absence of any probative evidence indicating that the denial of representation to the grievants was discriminatorily motivated or constituted disparate treatment based on union considerations, I conclude that there is

insufficient basis for finding any violation of the Order.

In summary, considering all the evidence in this case, I find and conclude that the record does not support a finding that Respondent violated the Executive Order as alleged in the complaint.

IV. Recommendation

Upon the basis of the foregoing findings and conclusions, the undersigned recommends that the complaint herein against Respondent be dismissed in its entirety.


THOMAS W. KENNEDY
Administrative Law Judge

DATED: June 27, 1974
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
 WADSWORTH HOSPITAL CENTER,
 LOS ANGELES, CALIFORNIA
 A/SLMR No. 449

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1061, AFL-CIO (Complainant), alleging that the Respondent Activity violated Section 19(a)(1), (2) and (6) of the Order by causing the arrest of the local President and another official of the Complainant on March 21, 1973; by causing the arrest of the same local official on April 3, 1973; and by refusing to consult with the Complainant regarding the arrest of two unit employees on March 20, 1973. The Respondent contends that it had nothing to do with the arrests of the Complainant's officials which resulted from a complaint filed by one of its criminal investigators alleging that the officials obstructed the arrest of two unit employees who had been indicted by a Federal grand jury for bookmaking. Further, the Respondent contends that it never refused to consult regarding the arrest of the two unit employees.

The Administrative Law Judge found no indication that the Respondent had anything to do with any of the arrests, or that there was any intimation that any of the incidents were motivated by anti-union animus. Thus, he determined that the complaint, which resulted in the arrest of the Complainant's officials, was filed by the criminal investigator on his own initiative, and there was no indication that any of the Respondent's police, involved in the arrests, acted other than in accordance with what they believed to be their duty. In addition, the Administrative Law Judge found that the Complainant's officials in assisting the unit employees, who were being arrested for a crime unrelated to their employment, were not exercising rights assured by the Order, nor were they fulfilling the obligation imposed by Section 10(e) of the Order on the exclusive representative to represent employees. Therefore, the Administrative Law Judge concluded that there was no violation of Section 19(a)(1). Moreover, he found no evidence of discrimination with respect to any condition of employment and, therefore, no violation of Section 19(a)(2). Finally, he found no evidence that the Respondent ever refused to consult or confer regarding the arrest of the two unit employees for bookmaking, or was ever asked to do so.

Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in the case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
 WADSWORTH HOSPITAL CENTER,
 LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 72-4268

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, LOCAL 1061, AFL-CIO

Complainant

DECISION AND ORDER

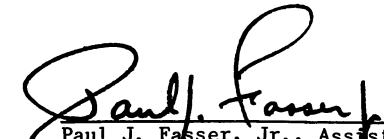
On September 4, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-4268 be, and it hereby is, dismissed.

Dated, Washington, D.C.
 October 31, 1974


 Paul J. Fasser, Jr., Assistant Secretary of
 Labor for Labor-Management Relations



Statement of the Case

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 Veterans Administration :
 Wadsworth Hospital Center :
 Los Angeles, California :

 Respondent : CASE NO. 72-4268

 and :

 American Federation of :
 Government Employees :
 Local 1061 Complainant :

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BEFORE: MILTON KRAMER
 Administrative Law Judge

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated May 20, 1973 and filed May 23, 1973. The complaint alleges violations by the Respondent of Sections 19(a)(1), (2), and (6) of the Executive Order. The violations were alleged to consist in part of causing the President and another official of Local 1061 to be arrested on March 21, 1973, thereby interfering with those officials in the exercise of rights assured by the Executive Order, discouraging membership in a labor organization, and subjecting the officials to ridicule and one of them to harassment and forcible manhandling to the point of physical disability. The violation was alleged to consist further of again arresting one of the officials on April 3, 1973, thereby holding Local 1061 up to ridicule. The violations were alleged to consist also of refusing to consult or confer with the Complainant concerning the rights of two other members of the Complainant concerning their arrest on March 20, 1973.

On June 15, 1973 the Respondent filed an Answer to the Complaint denying any violations of the Executive Order.

The Area Administrator investigated the Complaint and reported to the Assistant Regional Director. Pursuant to a Notice of Hearing issued by the Assistant Regional Director on April 13, 1974 and an Order Rescheduling Hearing dated April 18, 1974, hearings were held on May 30 and 31, 1974 in Los Angeles, California. Both parties were represented by counsel.

At the conclusion of the hearing the time for filing briefs was extended to July 5, 1974. The Respondent filed a brief on July 3, 1974. The Complainant did not file a brief.

REPORT AND RECOMMENDATION

- 3 -

Facts

The Complainant is and at all relevant times was the exclusive representative of the Respondent's non-supervisory, non-managerial, and non-professional employees, including guards and police officers. The police officers have authority to make arrests on the premises of the Respondent including the authority to make arrests, upon request of the United States Attorney or one of his Assistants, of employees of the Respondent for whose arrest a warrant has been issued.

On March 20, 1973, Andrew E. Evans, an employee of the Respondent with police functions, was called by the United States Attorney who told him that a Federal Grand Jury had returned an indictment for bookmaking on Federal premises against Stella Ferguson and Corrine Mitchell, employees of the Respondent. The U. S. Attorney told Evans that a warrant had been issued for the arrest of Ferguson and Mitchell and requested that they be arrested and brought to the office of the United States Marshal. Ferguson and Mitchell were employed in the Canteen of the Respondent, and were members of the Complainant. Evans called the Canteen manager and told him he was coming to arrest Ferguson and Mitchell. They called Rhea Butler, the President of Local 1061, and excitedly told her they were being arrested. She called John A. Zduniak, an officer of the Local whose office was closer to the Canteen than Butler's, and told him to go to the Canteen to assist two union members who were being arrested, and that she would meet him there.

It was the practice of Respondent's police, when arresting a female, to have a female police officer present. Evans asked Lois J. Coppage, a police officer, to assist him in the arrest of Ferguson and Mitchell. They went to the Canteen office where they met Ferguson and Mitchell. Zduniak came in and asked Evans to wait for Butler's arrival.

Butler arrived within a few minutes and asked what was going on. Evans told her and Zduniak it was a criminal matter, not a union matter. Butler asked to see the warrants for the arrest of Ferguson and Mitchell. Evans told her he did not have them in his possession, and Butler said he could not arrest Ferguson and Mitchell without the warrants. She told them not to go with Evans and Coppage because they did not have warrants and had no authority without the warrants.

Evans called Henry C. LePage, the Chief of the Protective Services (including the police) and told him that Butler and Zduniak were interfering with the arrest and asked for advice. LePage suggested that Evans call the Assistant U. S. Attorney and have him speak to Mrs. Butler. Evans tried to call the Assistant U. S. Attorney but was unable to reach him and called the United States Marshal and told him the problem. The Marshal spoke to Butler with Zduniak listening on an extension and told them that Evans could perform an arrest without a warrant so long as there was a warrant and there was a warrant for this arrest. Butler then terminated her objection to the arrests and Evans and Coppage took Ferguson and Mitchell to the Marshal's office. Because of the conduct of Zduniak and Butler the arrests were delayed about forty minutes. Butler and Zduniak were given administrative leave for the time spent in this matter.

After delivering Ferguson and Mitchell to the United States Marshal, Evans spoke to Assistant U. S. Attorney Handzlik and told him what had happened at the arrest. Handzlik told him a complaint could be issued upon Evan's affidavit and a warrant obtained for the arrest of Butler and Zduniak for interfering in the arrest of Ferguson and Mitchell. That was done and the warrant was issued about 3:00 p.m. Evans then called LePage, the Chief of his Section, and told him about the warrant he had obtained. LePage told Evans not to make the arrests that afternoon but to bring the complaint to his office at 8:00 a.m. the next morning. It was the policy of the Respondent's police to try to avoid making arrests late in the afternoon because an arraigning magistrate might not be available and the arrested person might have to spend the night in jail.

Evans went to LePage's office at 8:00 a.m. the next morning with the complaint. Mr. Maynard Enos, a Regional Protective Specialist of the Veterans Administration, was present on a routine visit. LePage told Evans to get John W. Cirincione, a Senior Criminal Investigator and police officer, to accompany him in the arrest of Zduniak and to get Lois Coppage to accompany him in the arrest of Mrs. Butler.

The arrest of Zduniak on March 21 was uneventful and he was taken to the police office to wait. Evans and Cirincione then asked policewoman Lois Coppage to accompany them for the arrest of Butler. LePage and Enos also went to observe the arresting technique in the arrest of Butler. This was at the suggestion of Enos who was on a routine inspection trip. He had been told by LePage that Butler was a person with whom it was difficult to get along; when she disapproved of something the police had done she would come to their office and shout and pound the table and give them a "hard time".

Evans, Cirincione, and Coppage went to the building where Butler's office was located and entered her office. They met LePage and Enos in the hall, and LePage and Enos watched the arrest from just outside the door of the office.

Evans showed Butler the complaint and told her it was a complaint for her arrest. He placed it on her desk in front of her and read it to her, but she did not look at it. She hit her fist on her desk and said she was not going "any God damn place" with them and that if the United States Marshal wanted her he could come and get her himself. Cirincione tried to calm Butler and to persuade her to come along peacefully, but was unsuccessful. Cirincione, after about ten minutes, came to LePage and asked him what to do. LePage suggested that the only thing left was to take Butler physically. Cirincione went back and told her they were going to handcuff her and take her. She said they would not. Evans then placed a handcuff on one of her wrists and Cirincione held her other arm. She was seated at the time. She had an expensive and attractive bracelet on the wrist that was handcuffed. She arose and said the handcuff was damaging her bracelet

and wanted the handcuff removed. Cirincione told her that if she would come peacefully the handcuff would come off. She said she would go peacefully, the handcuff was removed, and the arrest was completed with no further significant or unusual incidents.

Butler testified that Evans and Cirincione each placed a handcuff on her and twisted her arms up behind her back, causing lacerations on her back from the handcuffs and contusions and abrasions of the ribcage and chest. Evans, Cirincione, Coppage, and LePage testified that only one handcuff was placed on her and that there was no twisting of arms or other violence except Cirincione placing one handcuff on one wrist while she was seated and Evans holding her other arm. On March 6, 1974 the Department of Labor, Employment Standards Administration, Office of Federal Employees' Compensation awarded Mrs. Butler compensation for an injury sustained on March 21, 1973 consisting of sprained arms, contusion of the chest, and low back sprain. She was given compensation for the period claimed, April 9, 1973 through July 20, 1973 and medical bills aggregating \$405.50 were paid. There is no evidence that the injury allowed by the Department occurred during her arrest, and in the light of all the testimony I do not believe it did. But in light of the conclusion I reach, it is irrelevant whether it did or not.

On April 3, 1973, shortly before 8:00 a.m., Respondent's police depatcher Hines received a telephone call which he had difficulty understanding. He gave the call to Lieutenant Elgin D. Campbell. The caller said he was Assistant U. S. Attorney Edwards and wanted someone re-arrested, but Campbell could not hear clearly the name of the person to be re-arrested. Campbell's shift was about to end and he gave the call to Verlin R. Werth, the Assistant Chief of Protective Services, who had arrived early for his shift as was his custom. Campbell told Werth it was Assistant U. S. Attorney Edwards calling. There was an Assistant U. S. Attorney named Edwards and Werth recognized the name. The caller told Werth that Butler and Zduniak were to be re-arrested, that a U. S. Marshal would pick up Butler

at her home (she had not worked since March 21, the day she was arrested), and the Respondent's police were asked to re-arrest Zduniak. Werth told the caller it was Evans' case and he would give the information to Evans, and he did so.

When Evans received the information that "Edwards" had asked for the re-arrest of Zduniak, he tried to verify the information. He called the U. S. Attorney's Office and then the U. S. Marshal's office, but neither answered because it was only 8:15 a.m., before their opening time. Evans and Cirincione then re-arrested Zduniak and brought him to the Marshal's office. There they learned that there was no warrant outstanding for Zduniak's re-arrest. Evans then went to Edwards' office but he was out. When he came back he told Evans he had not made the call. Evans and Cirincione then released Zduniak and took him back to the hospital about noon. Zduniak was given administrative leave for the time spent in this incident.

The Federal Bureau of Investigation was requested to make and did make an investigation to try to learn who had impersonated an Assistant U. S. Attorney in the telephone call of April 3. To the time of the hearing in this case the identity of the caller was still not ascertained.

Ferguson and Mitchell pleaded guilty to the charge of bookmaking, were given a suspended sentence, and placed on probation. They are still employed by the Respondent. Zduniak was acquitted of the charge against him. He is still employed by the Respondent. Butler was convicted on one count of the indictment against her but on motion the District Judge set aside the verdict because he thought that while Butler should have acted less aggressively her conduct did not warrant the "full force of Federal criminal proceedings." Butler is still an employee of the Respondent but has not worked since March 21, 1973 because of physical disability.

Discussion and Conclusions

There is no indication that the management of the Respondent had anything to do with any of the arrests. The arrest of union members Ferguson and Mitchell are not even alleged to have been improper. They pleaded guilty. The record is clear that Evans obtained the warrants for the arrests of Butler and Zduniak on his own initiative. The Chief of his section did not even know about them until Evans told him about the arrest warrants after he obtained them. There is no indication that Evans or any of the other police officers acted other than in accordance with what they honestly believed to be their duty as police officers. That fact is not diminished by the facts that Zduniak was acquitted by the jury of the charge against him and that the Judge set aside the jury's conviction of Butler because he thought her conduct, while improper, did not justify a Federal criminal prosecution. There is no intimation that any of the incidents was motivated in any part by anti-union animus or that any such animus existed.

When Butler and Zduniak, the union officials involved, tried to assist Ferguson and Mitchell when they were being arrested for a crime unrelated to their employment, the union officials were not exercising rights assured by the Executive Order or fulfilling the obligation imposed on unions by Section 10(e) of the Executive Order to represent the interests of all employees in the unit. That obligation is to represent employees with respect to their employment and does not include the obligation to represent them with respect to crimes unrelated to their employment. To be sure, there is nothing improper in a union trying to assist members being arrested for a crime unrelated to their employment. But the right or obligation of a union or its officers to do so is not a right or obligation assured or imposed by the Order. I conclude there was no violation of Section 19(a)(1).

There is no evidence that anything that happened was discriminatory with respect to any condition of employment. I conclude there was no violation of Section 19(a)(2).

The complaint alleges a violation of Section 19(a)(6) in refusing to consult or confer "in the matter of the rights of Stella Ferguson and Corrine Mitchell regarding their arrest on 3-20-73." There is no evidence that the Respondent ever refused to consult or confer on that matter or was ever asked to do so. I conclude there was no violation of Section 19(a)(6).

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
BILOXI VETERANS ADMINISTRATION CENTER,
BILOXI, MISSISSIPPI
A/SLMR No. 450

Recommendation

I recommend that the complaint be dismissed.



MILTON KRAMER
Administrative Law Judge

DATED: September 4, 1974
Washington, D. C.

This unfair labor practice proceeding involved a complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2208 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of Executive Order 11491 by its actions in discharging a probationary employee for participating in the filing of a grievance.

The Administrative Law Judge recommended dismissal of the complaint based on the conclusion that any connection between the filing of the grievance (which, according to the record, was filed under the negotiated grievance procedure) and the probationary employee's separation was a mere coincidence. In this regard, the Administrative Law Judge found that: (1) it is the general policy of the Respondent to review all probationary employees approximately 10 months after their initial employment; (2) as to the probationary employee in question, the disenchantment of her supervisor regarding her attitude towards performing certain duties pre-dated the filing of the grievance; (3) of the six employees who signed the grievance, two other probationary employees achieved permanent status without difficulty and one permanent employee was successful in being reemployed after a voluntary separation; and (4) the probationary employee in question played no more of an active role in the presentation or discussion of the grievance than the other signers of the grievance.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation that the complaint be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
BILOXI VETERANS ADMINISTRATION CENTER,
BILOXI, MISSISSIPPI

Respondent

and

Case No. 4I-3562(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2208

Complainant

DECISION AND ORDER

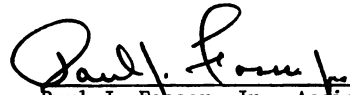
On July 25, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-3562(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 31, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

.....
In the Matter of: :
: :
VETERANS ADMINISTRATION :
BILOXI VETERANS ADMINISTRATION CENTER :
BILOXI, MISSISSIPPI :
: :
Respondent : Case No. 41-3562(CA)
and :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO, LOCAL 2208 :
.....

Richard J. Jones, Esquire
Office of General Counsel
Veterans Administration
Waco, Texas

R. W. Upchurch, Esquire
Office of General Counsel
Veterans Administration
Jackson, Mississippi

Mr. Charles Stenslie
Labor Relations, V. A.
Central Office
Washington, D. C.
For the Respondent

Mr. Glen J. Peterson
P. O. Box BB
Boerne, Texas

Mr. Alphonso Garcia
5911 Dwyer Road
New Orleans, Louisiana

Mr. Roy Entrekin
Route 1, Box 231
Ocean Springs, Mississippi
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to an amended complaint first filed on December 10, 1973, under Executive Order 11491, as amended, by Local 2208, American Federation of Government Employees (AFL-CIO), (hereinafter called the Union), against the Veterans Administration, Biloxi Veterans Administration Center, Biloxi, Mississippi, (hereinafter called the Agency or Respondent), a Notice of Hearing on Complaint was issued on April 15, 1974, by the Regional Director for the Atlanta, Georgia, Region.

The complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its actions in discharging Emma Jean Dombrowski for instigating and filing a grievance.

A hearing was held in the captioned matter on June 11, 1974, in Biloxi, Mississippi. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record^{1/}, including my observation of the witnesses and their demeanor, and the relevant evidence adduced at the hearing I make the following conclusions and recommendations:

Findings of Fact

Emma Jean Dombrowski was hired by the Respondent on November 6, 1972, as a GS-3 telephone operator and worked at such position until on or about September 1, 1973, at which time she was separated pursuant to notice duly served upon her by the Respondent on or about August 20, 1974. Inasmuch as the Civil Service regulations provide that the first year of her three year appointment was to be probationary she was not entitled to any right of appeal from the notice of separation.

During her period of employment with the Respondent, Mrs. Dombrowski, as well as the other approximately seven other telephone operators employed by the Respondent in the Gulfport - Biloxi area, was under the immediate supervision of Lucille Ladnier and Jacqueline Newman, Chief and Assistant Chief of Office Operations, respectively.

^{1/} Respondent's motion to correct errors in the transcript is granted in the following respects: page 38, line 10, the spelling of the witness' surname is changed to "Cannedy"; page 42, line 24, "no" is changed to "not"; page 48, line 22, "and" is changed to "that".

Although classified as a telephone operator, Mrs. Dombrowski, as well as the other telephone operators, according to her own admission, the job description for a GS-3 operator, and the credited testimony of Mrs. Ladnier, was expected to perform a number of related clerical duties, including revising directories, preparing telephone orders, preparing receipts for lost and found, maintaining custody of lost and found items, operating the paging system and preparing trouble logs with regard to trouble on the switchboard, all of which entail some degree of typing.

In April 1973, Mrs. Ladnier held a discussion with Mrs. Dombrowski wherein her job performance was reviewed. During the course of the review Mrs. Ladnier pointed out Mrs. Dombrowski's deficiencies as well as her attributes, stressing among other things, that Mrs. Dombrowski made no effort to work at the additional duties assigned to the operators when they were not actually operating the switchboard.

On or about April 30, 1973, Mrs. Ladnier was called upon to mediate a dispute between Mrs. Dombrowski and Mildred Hinson with respect to the lost and found duties assigned to the operators. Mrs. Ladnier concluded that the difficulty stemmed from Mrs. Dombrowski's attitude and reluctance to participate in the clerical duties.

On June 25, 1973, the eight telephone operators were engaged in a revision of the telephone directory. Upon being assigned a two page retyping assignment Mrs. Dombrowski reluctantly took the work and opined to Mrs. Ladnier that telephone operators should not be assigned typing duties. ^{2/}

On or about July 22, 1973, six of the eight telephone operators signed and together presented to W. F. Stokes, Chief of Medical Administration Service, a "Petition for Grievance Hearing" wherein the employees complained that they were "being assigned duties that are unrelated to our job description." In addition to Mrs. Dombrowski, two other telephone operators whose names appeared

^{2/} The foregoing summary of facts is based upon the uncontroverted and credited testimony of Mrs. Ladnier. Mrs. Dombrowski who acknowledged both the counseling and/or evaluation meeting in early April and the meeting relative to the dispute with Mildred Hinson places the latter meeting as occurring on or about May 4, 1974.

on the petition were also probationary employees. Other than Mrs. Dombrowski, the five remaining operators signing the petition are still employed by Respondent. In this latter regard, the only two other telephone operators testifying at the hearing, Pola Cannedy and Marion Gean Shoemaker acknowledged that they now enjoy better employment prospects. Telephone operator Shoemaker, who was a permanent employee at the time the grievance was filed, further testified that she voluntarily left the Respondent's employ in January 1974 to work at Kessler Air Force Base and, upon changing her mind some six weeks later, encountered no difficulty whatsoever in returning to Respondent's installation where she is currently employed. Lastly, according to Shoemaker and Cannedy, all employees played an equal part in the presentation of the grievance to Stokes.

Thereafter, by memorandum dated August 14, 1973, directed to the President of the Union, Stokes denied the grievance. The memorandum, identified in the record as Complainant Ex. No.1, describes three meetings held on the grievance and the persons in attendance at same. According to the memorandum, all six of the telephone operators signing the agreement appeared at alternate times at the three meetings held on the grievance.

On August 14, 1973, the same day that Stokes issued his reply to the grievance, Stokes also directed a memorandum to the "Chief, Personnel Service," wherein he requested that Mrs. Dombrowski who he found to be "resentful of supervision" be separated from the Agency, effective September 1, 1973. On August 20, 1973, R. N. Houston, Chief, Personnel Service, Officially notified Dombrowski that her employment would be terminated effective September 1, 1973.

According to the uncontroverted testimony in the record, it is the policy of the Respondent to review the job performance of all probationary employees during the tenth month of employment for purposes of determining whether they will be retained after the passage of their one year probationary period. Pursuant to this policy the Respondent's computer has been programmed to punch out an evaluation card or order on each probationary employee about 10 months after the initial date of employment. In Mrs. Dombrowski's case the card was punched out and submitted to Mrs. Ladnier on or about August 1, 1973, approximately ten months after Mrs. Dombrowski's employment date of November 6, 1972. Upon receiving the card or form calling for Mrs. Dombrowski's appraisal, Mrs. Ladnier conferred with her assistant, Mrs. Newman, and decided that they were in mutual agreement that Mrs. Dombrowski's resentment of supervision and the assignment of clerical work made her an undesirable employee.

Following their decision in this respect they conferred with W. F. Stokes who drafted the memorandum dated August 14, 1973, cited above.

DISCUSSION AND CONCLUSIONS


It is well established that the filing of a grievance falls within the rights generally enumerated in Section 1(a) of the Executive Order and the abridgement of same constitutes an unfair labor practice within the meaning of Section 19(a)(1). Department of Defense, Arkansas National Guard A/SLMR No. 53; National Labor Relations Board, Region 17, Footnote 3, A/SLMR No. 295. Accordingly, should it be determined that the separation of Mrs. Dombrowski was in anyway related to her action in filing a grievance, then a violation of Section 19(a)(1) and (2) of the Order is established. However, for the reasons set out below, I find that such is not the case and will therefore recommend dismissal of the complaint.

In the instant case, it is clear that Mrs. Ladnier's disenchantment with Mrs. Dombrowski's attitude towards performing clerical duties pre-dated the filing of the grievance upon which Mrs. Dombrowski and five other telephone operators affixed their signatures. While it is true that the subject matter of the grievance was related to the grounds utilized by the Respondent in support of Mrs. Dombrowski's separation, I find the evidence to be insufficient to support a finding that the filing of the grievance played any part in Respondent's decision to separate Mrs. Dombrowski. In reaching this conclusion I note that the two other probationary employees whose names appeared on the grievance have achieved permanent status without difficulty, another operator appearing thereon has been successfully reemployed after a voluntary separation, that Mrs. Dombrowski did not play any more active role in the presentation or discussion of the grievance than the other five telephone operators listed thereon, and that it was the general policy of the Respondent to review all probationary employees approximately 10 months after their initial employment. In view of the foregoing, I find that any connection between the filing of the grievance and Mrs. Dombrowski's separation was a mere coincidence.

RECOMMENDATION

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Upon the basis of the foregoing findings and conclusions, I hereby recommend to the Assistant Secretary that the Complaint herein against Respondent be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

ARMY AND AIR FORCE EXCHANGE SERVICE,
PACIFIC EXCHANGE SYSTEM,
HAWAII REGIONAL EXCHANGE
A/SLMR No. 451

Dated: July 25, 1974
Washington, D. C.

This unfair labor practice proceeding involved a complaint filed by the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186 (Complainant) alleging that the Respondent violated Section 19(a)(6) of the Order by the contracting out of certain auto repair operations without good faith consultation on the impact of the contracting out with the Complainant.

In January 1973, a new individual assumed the duties of the Chief of Personnel for the Hawaii Regional Exchange. On January 10, he was informed that the Respondent had sent out requests for bids on its auto repair operations to various private contractors, and certain of the Respondent's auto repair operations were, in fact, contracted out as of July 1, 1973. The Complainant alleged that the Respondent failed to inform the Complainant of the impending action and turned aside inquiries from the Complainant's representatives regarding the rumored change. The Respondent contended that its Chief of Personnel, at several meetings and in the course of several telephone conversations, informed the Complainant of the impending action and invited the latter to confer regarding the impact of the action on unit employees. The Respondent further contended that a copy of a letter dated March 27, 1973, addressed to all employees, announcing the contracting out and the procedures to be used in implementing the change, was sent to the Complainant.

The Chief Administrative Law Judge credited the testimony of the Complainant's representatives regarding the parties' meetings prior to the contracting out. In this regard, he concluded that the Respondent's plans to contract out its auto repair operations were alluded to in the discussions between the Respondent and the Complainant in only a tentative and incomplete fashion; that the Complainant was not adequately put on notice of the proposed action; and that the March 27, 1973, letter was not received by responsible officials of the Complainant. Accordingly, the Chief Administrative Law Judge, although noting that under the Executive Order the decision to contract out part of the Respondent's operations was not a subject upon which the Respondent had to meet and confer with the Complainant, concluded that the Respondent had violated Section 19(a)(6) of the Order by failing to notify the Complainant of its intention to contract out the work, thereby depriving the Complainant of the opportunity to seek negotiations regarding the impact of the change on affected unit employees.

Upon consideration of the Chief Administrative Law Judge's Report and Recommendation, and the entire record in this case, and noting particularly the absence of exceptions, the Assistant Secretary adopted the Chief Administrative Law Judge's findings, conclusions and recommendation.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
PACIFIC EXCHANGE SYSTEM,
HAWAII REGIONAL EXCHANGE

Respondent

and

Case No. 73-541

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL 1186

Complainant

DECISION AND ORDER

On September 6, 1974, Chief Administrative Law Judge H. Stephan Gordon issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it take certain affirmative action as set forth in the attached Chief Administrative Law Judge's Report and Recommendation. No exceptions were filed to the Chief Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Chief Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Chief Administrative Law Judge's Report and Recommendation and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendation of the Chief Administrative Law Judge.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, shall:

- 1. Cease and desist from:

Failing to notify the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, with

respect to the contracting out of auto repair or other operations, and to afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on the unit employees adversely affected by such action.

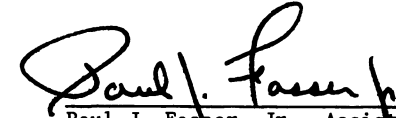
- 2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, of any intended contracting out of auto repair or other operations and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on the unit employees adversely affected by such action.

(b) Post at its facility at the Pacific Exchange System, Hawaii Regional Exchange, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander of the Hawaii Regional Exchange and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
October 31, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail to notify the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, with respect to the contracting out of auto repair or other operations, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on the unit employees adversely affected by such action.

WE WILL notify the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, of any intended contracting out of auto repair or other operations and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact such contracting out will have on the unit employees adversely affected by such action.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

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In the Matter of
ARMY AND AIR FORCE EXCHANGE SERVICE
PACIFIC EXCHANGE SYSTEM
HAWAII REGIONAL EXCHANGE
Respondent
and
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, LOCAL 1186:
.....
Robert E. Edwards, Assistant General Counsel
Army and Air Force Exchange Service
9311 Walton Walker Boulevard
Dallas, Texas 75222

For the Respondent

Benjamin C. Sigal, Esquire
333 Queen Street, Suite 800
Honolulu, Hawaii 96813

For the Complainant

Before: H. Stephan Gordon
Chief Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This proceeding, heard in Honolulu, Hawaii on February 28, and March 1, 1974, arises under Executive Order 11491, as amended, (hereinafter referred to as the Order) pursuant to a Notice of Hearing on Complaint issued on January 22, 1974, by the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, San Francisco Region, in accordance with Section 203.8 of the Rules and Regulations of the Assistant Secretary for Labor-Management

Relations, 29 C.F.R. 203.8. The Complaint here in issue, filed September 21, 1973, by Local 1186 of the International Brotherhood of Electrical Workers, AFL-CIO, (hereinafter referred to as the Union), charges that the Hawaii Regional Exchange (hereinafter referred to as H.R.E. or the Activity) failed and refused to consult, confer, and negotiate as required by the Order, in violation of Section 19(a)(6) thereof. The Complaint alleges that effective on or about July 1, 1973, the Activity contracted out to a private contractor automotive repair work which had previously been performed by Activity employees, without first having conferred, consulted or negotiated with the Union regarding the impact of that action on affected employees.

The Activity contends that responsible Union officials were apprised of its plans for contracting out well in advance of their implementation and that full and sufficient opportunity existed for the Union to request consultation regarding the impact of the proposed action.

Both parties were represented at the formal hearing and were afforded full opportunity to call, examine and cross-examine witnesses and adduce relevant evidence. Post hearing briefs received from both parties have been given close consideration. On the basis of the entire record in the case and my observation of the witnesses and their demeanor I make the following findings of fact, conclusions of law and recommendations to the Assistant Secretary.

Findings of Fact

In accordance with the Stipulations of Fact jointly submitted by the parties and accepted in evidence 1/ the following matters relevant to the controversy were established:

The Hawaii Regional Exchange is a subordinate organizational element of the Pacific Exchange System (hereinafter referred to as PACEX) headquartered in Honolulu, Hawaii. PACEX is directly responsible to Headquarters Army and Air Force Exchange Service in Dallas, Texas. The mission of the Exchange Service and its component, H.R.E., is to provide merchandise and services to authorized patrons at lower prices than are found in the general retail market.

H.R.E. is divided into six Branches; of these only the Services branch is here in issue. The Services branch, in turn, is divided into the Vending and (Auto) Services sections.

1/ Joint Exhibit No. 1.

The (Auto) Services section performs three functions: (1) Retail (Parts and Accessories), (2) Gasoline (Pumping and Sales), and (3) Auto Repairs (Mechanics). Prior to July 2, 1973, this last function was performed at all garages maintained by the Activity by Activity employees. Subsequent to that date auto repair work at two of the Activity's garage facilities, at Hickam Air Force Base and Schofield Barracks, has been performed by Keico International Incorporated, a private contractor, under a concession agreement.

Labor-management relations at the Activity are governed by an Agreement 2/ negotiated between H.R.E. and the Union, the exclusive representative of unit employees.

The controversy presented, as framed by the Complaint and developed by the evidence adduced and briefs submitted by the parties, resolves to one of fact. The Union, through the testimony of two of its officers, sought to prove that from January, 1973 when the Activity began to solicit bids from private contractors to assume its auto repair operation until July 1, 1973, when Keico International, Inc. began operating the Activity's auto repair service under a concessionaire contract, the Activity failed to inform the Union of the impending action and turned aside inquiries from the Union regarding the change. The Activity, through the testimony of its Chief of Personnel, contended that at several meetings and in the course of several telephone conversations Union representatives were informed of the proposed action and invited to confer regarding the impact of the action on unit employees. The resolution of this credibility problem, in the absence of persuasive documentary evidence one way or the other, must come after careful review and assessment of the testimony offered, its cogency, internal consistency and inherent "believability," with due regard to the demeanor of the witnesses as observed.

Mr. Kenneth R. Bass assumed the duties of Chief of Personnel for H.R.E. on December 18, 1972. On January 10, 1973, 3/ he first learned that requests for bids on the Activity's auto repair operation had been sent to prospective

2/ Joint Exhibit No. 1B.

3/ Unless otherwise noted all dates hereafter mentioned were in 1973.

private contractors. On the same date Mr. Bass first met Mr. James S. Yoshida, Assistant Business Manager of the Union, and Mr. Thomas Fujikawa, Administrative Assistant with the Union.

The Union and Activity had an established policy of meeting once a month to discuss topics of common concern with the object of continuing harmonious labor-management relations at the Activity. Pursuant to Article IV of the negotiated agreement the Activity was responsible for keeping memoranda of these and other meetings between management officials and Union representatives and for recording the date of each meeting, the names of those in attendance, the subject discussed, nature of the discussions and decisions reached. The Union had an opportunity to review the draft memorandum before it became final. A memorandum was to be prepared for all meetings, unless both parties agreed to the contrary.

At the general meeting held on January 18, 1973, Messrs. Bass, Yoshida and Fujikawa were in attendance along with several other Union representatives. Mr. Yoshida testified that after there had been discussion on several matters not here relevant he told Mr. Bass that he had heard of rumors circulating among employees that a contracting out of the auto repair operation was being contemplated by management. According to Yoshida, Bass replied that something was "in the mill" but that nothing was finalized and that the Union would be kept informed of developments. Mr. Fujikawa corroborated Mr. Yoshida's recollection of the January 18 meeting in every respect.

Contrary to Mr. Yoshida's testimony, Mr. Bass recalled himself having brought up the subject of the contracting out after the general meeting had ended and after all but Mr. Yoshida had left the room. It was Bass' testimony that as the meeting was breaking up he asked Yoshida to stay behind and informed him that something was in the works regarding contracting out of auto repair work. Mr. Bass said he did not mention the matter in the presence of the other Union representatives because he did not want to incite or disturb the employees while the Activity's plans were still unsettled and that he was trusting Mr. Yoshida's judgment not to broadcast the information to employees. In retrospect Mr. Bass admitted that it was a "poor choice of judgment not to have mentioned the Activity's plans in the context of the

formal meeting."

The memorandum of the January 18 meeting, prepared by the Activity and approved by the Union, makes no mention of any discussion of contracting out. However, Mr. Yoshida's recollection of the events of the meeting is bolstered not only by the corroborative testimony of Mr. Fujikawa but also the latter's recollection that he left the meeting room accompanied by Mr. Yoshida and drove away in the same automobile. This could not have happened, of course, had Mr. Bass kept Mr. Yoshida after Mr. Fujikawa and the others had left.

On January 19, the day following the general meeting Mr. Bass was informed by other management officials as to the number of employees who would be affected by the contracting out. Mr. Bass did not immediately communicate this information to Mr. Yoshida or any other responsible Union representative.

On February 6, a special meeting was held for the purpose of discussing the relocation of some H.R.E.'s administrative personnel to the building occupied by PACEX headquarters staff. While certain other extraneous subjects were discussed no mention was made of the contracting out.

There was an additional informal meeting between Mr. Bass and Messrs. Yoshida and Fujikawa on February 9. No memorandum was made of this meeting but Mr. Bass testified that the main subject of discussion was the scheduling of employees at one of the Activity's stores. In addition Mr. Bass recalled that he "probably" relayed to the Union representatives the information regarding the contracting out that he had learned on January 19. Both Union officers present at the meeting deny that there was any discussion regarding contracting out. The regular February meeting was held on the 14th day of the month. The memorandum of this meeting makes no mention of a discussion of contracting out and Mr. Yoshida and Mr. Fujikawa testified that the subject was not raised.

At the April 26 general meeting several topics not here relevant were discussed among the labor and management representative assembled. Mr. Yoshida testified that during the course of this meeting he raised the subject of the contracting out of the auto repair work performed by the Service section and was told by Mr. Bass that the matter was out of

his hands and that he had had no word on what was to take place. Mr. Bass denied that the subject ever was raised at the April 26 meeting. The memorandum of the meeting contains no reference to the subject.

At the May 23rd meeting, the last general meeting held before the private contractor took over operation of the Activity's auto repair operations at two of its garage facilities, neither party broached the subject of the contracting out. Only after the change-over was effected, on July 16 or 17, while the parties were meeting to begin discussions for the renewal of the negotiated agreement, was the subject raised again. At that time Mr. Yoshida reported that there were new personnel working at the Hickham Air Force Base and Schofield Barracks garage facilities and requested of Mr. Bass information regarding the names of unit employees who were affected. Several days later Mr. Yoshida received a list of the employees affected and their current status. 4/ No further information was supplied.

In addition to the several meetings between Mssrs. Yoshida and Fujikawa and Mr. Bass discussed above, Mr. Bass testified that during the period from January to July, 1973, he had some fourteen telephone conversations with Mr. Yoshida. It was Mr. Bass' testimony that contracting out was discussed several times during the course of these conversations. The one conversation of which Mr. Bass had specific recollection took place on May 23. Mr. Bass testified that on that date Mr. Yoshida called to tell him that the Union was intending to file an unfair labor practice charge against the Activity based on its alleged failure to meet and confer regarding the impact of the contracting out. Mr. Bass testified that he responded with surprise, reviewed his earlier communications with the Union on the subject and invited Mr. Yoshida to sit down and review the reduction-in-force roster that had been prepared for the areas affected. According to Mr. Bass, Mr. Yoshida made no move to seek further information or to accept the invitation to confer.

Mr. Yoshida denied ever having called Mr. Bass to threaten filing a charge on the contracting out issue but did recall having called Mr. Bass sometime in April to inform

4/ Complainant's Exhibit No. 6.

him that an unfair labor practice charge was going to be filed on an unrelated issue. A charge in fact was filed on this issue but later dropped.

Yet another conflict in testimony arose regarding a letter dated March 27 and signed by the Activity's Executive Officer, George V. Dodson. This letter was prepared by Mr. Bass' staff and was addressed to "All Employees." It was captioned: "Subject: Conversion of garages to concession Activities," and reported that the auto repair activities at Hickam Air Force Base and Schofield Barracks would be turned over to Keico International, Inc., effective June 26. The letter went on to detail the procedures to be used to administer the reduction-in-force (RIF) caused by the contracting out. Mr. Bass testified that this letter was distributed to all employees at the affected work sites during meetings he conducted on April 5. Mr. Bass further testified that a copy of the letter was also sent by regular mail to Mr. Yoshida at the Union Office. Both Mr. Yoshida and Mr. Fujikawa deny that the letter was received at the Union Office or that they or any other Union official received any written confirmation of the rumored management action.

As noted above, none of the memoranda of the regular meetings during which Mr. Bass recollected having discussed the contracting out reflect that such discussion was had. Mr. Bass testified that the subject was not reported because Mssrs. Yoshida and Fujikawa did not indicate a desire to pursue the issue and appeared to agree with the action being taken by the Activity. In retrospect Mr. Bass regretted that the memoranda did not reflect that the subject was discussed. The lack of references to the subject in these memoranda is not dispositive of the factual issue, however, because the testimony demonstrated that the memoranda did not exhaustively report all discussion topics. It is noteworthy, however, that the significance to affected employees of the contracting out was well recognized by Mr. Bass and the Union representative and that topics of equal or less significance were duly noted in the memoranda. The inescapable inference is that had the subject been discussed the draft memoranda prepared by the Activity would have so indicated or that Mr. Yoshida would have noted the omission upon review.

Likewise, the diligence with which Mr. Yoshida and Mr. Fujikawa represented the interests of Union members on many issues, large and small, indicates to me that had the

Activity clearly made known its plans regarding so major an issue as its auto repair operations the Union would have requested consultation on the impact of the action on affected employees, and had the Activity invited the Union to confer the invitation would have been accepted.

On the basis of all the evidence and my observation of the witnesses and their demeanor I conclude that the Activity's plans to contract out its auto repair operation were alluded to in discussions with Mssrs. Yoshida, and Fujikawa in only a tentative and incomplete fashion and that the Union was not adequately put on notice of the proposed action.

I find further that the Activity's March 27, letter to employees on the subject was not received by responsible Union officials and that knowledge of its content cannot be imputed to those officials by the distribution of the letter to unit employees. In addition, I find that I cannot credit Mr. Bass' recollection of the April 23 telephone conversation with Mr. Yoshida during which it was represented that the Union officer was invited to examine the RIF roster for employees in the auto repair section and to discuss the impact of the planned transfer of the operation to a private contractor.

Mr. Bass testified that he was concerned for the welfare of those employees who might be displaced by the contracting out and that he took steps to find them other employment positions. I find no cause to doubt Mr. Bass' testimony in this regard and find no evidence of anti-union animus in the conduct of the Activity. As stated above, however, I find that the Union was not fully apprised of the proposed action prior to its implementation.

Conclusions of Law

The Complaint charges that the Activity violated Section 19(a) (6) of the Executive Order 5/ by contracting out to a private company work which had been performed by Activity

5/ Section 19 provides that:

(a) Agency management shall not

(6) refuse to consult, confer, or negotiate with a labor organization as required by this order.

employees without consulting, conferring or negotiating with the exclusive representative regarding the impact of that action on unit employees.

The Order clearly contemplates that a decision to contract out certain of its operations is not a subject upon which an Agency must "confer in good faith" with the exclusive representative. Section 11(b)6/ plainly excepts a subject of this nature from the general duty to bargain imposed by Section 11(a).7/ Just as assuredly, however, the language of 11(b) provides that the duty to confer, consult, or negotiate enforced by Section 19(a) (6) may be imposed on an Activity regarding the impact of an action which is otherwise nonbargainable. This principle has been recognized by the Assistant Secretary and the Federal Labor Relations Council in several cases, see for example Immigration and Naturalization Service, FLRC No. 70A-10 (April 15, 1971), Plum Island Animal Disease Laboratory, FLRC No. 71A-11 (July 9, 1971), Griffiss Air Force Base, FLRC No. 71A-30 (April 19, 1973), Norton Air Force Base, A/SLMR No. 261 (April 30, 1973), U.S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341 (January 9, 1974), New Mexico Air National Guard, A/SLMR No. 362 (February 28, 1974).

H.R.E. does not contest this reading of the Order or deny the applicability of the duty to bargain regarding impact issues under certain circumstances. Rather, on the basis of Mr. Bass' testimony, H.R.E. argues that the Union was fully

6/ Section 11(b) reads as follows:

In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

7/ Section 11(a) reads as follows:

An Agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives,

apprised of the Activity's plans for contracting out well in advance of their execution and that the Union failed to request consultation on negotiable impact issues. Therefore, the Activity concludes, no Section 19(a)(6) violation can be found. In support of its contention the Activity cites to Norton Air Force Base, supra, wherein the Assistant Secretary adopted the conclusion of the Administrative Law Judge that no 19(a)(6) violation could be found for failing to meet and confer on negotiable impact issues where the Union was given forewarning of the Activity action and had ample opportunity to request bargaining but failed to do so.

Applying the rationale of Norton Air Force Base to the facts as found above I am compelled to conclude, contrary to the Activity's contentions, that the Order was violated by the Activity's failure adequately to apprise the Union of its intentions, so as to put the Union on notices that an opportunity for bargaining existed. This is not a case, as was Norton Air Force Base, supra, where a Union "sat" on its rights. Rather, I have found that the Union was eager for information on the proposed action and was assured by the Activity that it would be kept informed of developments. When the contracting out was accomplished and unit employees suffered the adverse effects of the attendant RIF action without the aid and support of their elected representative, as contemplated by the Order, they did so as a result of the Activity's violation of Section 19(a)(6).

(footnote 7/ continued) shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with Section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

Recommendations

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 203.22(a) of the Rules and Regulations, 29 C.F.R. 203.22(a), I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Rules and Regulations, 29 C.F.R. 203.25(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Hawaii Regional Exchange, Pacific Exchange System, Army and Air Force Exchange Service Shall:

1. Cease and Desist from -

Refusing to consult, confer or negotiate with the International Brotherhood of Electrical Workers, Local 1186, with regard to the adverse effects suffered by unit employees as a result of the contracting out of certain auto repair operations.

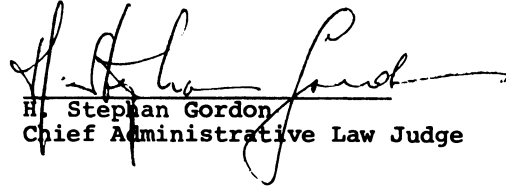
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Upon request, meet and confer, consult or negotiate with the International Brotherhood of Electrical Workers, Local 1186, regarding the impact of contracting out on affected employees.

(b) Post at its facilities at the Hawaii Regional Exchange, Honolulu, Hawaii, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Hawaii Regional Exchange Executive and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Executive shall take reasonable steps to insure that such Notices are not altered, defaced or

covered by any other material.

(c) Pursuant to Section 202.26 of the Rules and Regulations, 29 C.F.R. 202.26, notify the Assistant Secretary, in writing, within twenty (20) days of the date of this Order as to what steps have been taken to comply herewith.


H. Stephan Gordon
Chief Administrative Law Judge

Dated: September 6, 1974
Washington, D. C.

NOTICE OF ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to confer, consult, or negotiate with the International Brotherhood of Electrical Workers, Local 1186, regarding the impact on affected employees of the contracting out of certain auto repair operations.

WE WILL, upon request, meet and confer, consult, or negotiate with the International Brotherhood of Electrical Workers, Local 1186, regarding the impact on affected employees of the contracting out of certain auto repair operations.

Dated: _____

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES NAVY,
 NAVAL AIR STATION (NORTH ISLAND),
 SAN DIEGO, CALIFORNIA
 A/SLMR No. 452

This case involved an unfair labor practice complaint filed by individual employees (Complainants) against the United States Navy, Naval Air Station (North Island), San Diego, California (Respondent). The complaint alleged that the Respondent violated Sections 19(a)(1) and 7(d)(1) of the Executive Order by its refusal to accept a joint grievance. At the hearing, the complaint was amended to include an alleged violation of Section 19(a)(2) of the Executive Order.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. The Assistant Secretary concurred in the recommendation of the Administrative Law Judge noting the latter's findings that Section 7(d)(1) of the Order does not confer any rights enforceable under Section 19; that where employees are subject to an agency grievance procedure, in the absence of anti-union motivation, any improper failure by the agency to apply the provisions of its own procedure cannot be considered violative of the Order; and that where no labor organization has been accorded exclusive recognition, Section 10(e) of the Order is inapplicable.

Accordingly, and noting that no exceptions were filed, the Assistant Secretary dismissed the complaint in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES NAVY,
 NAVAL AIR STATION (NORTH ISLAND),
 SAN DIEGO, CALIFORNIA

Respondent

and

Case No. 72-4280

HELEN S. KUHN, -ET AL

Complainants

DECISION AND ORDER

On August 22, 1974, Administrative Law Judge William B. Devaney issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the Administrative Law Judge's recommendation that dismissal of the instant complaint is warranted.

In reaching the foregoing conclusion, particularly noted were the Administrative Law Judge's findings that Section 7(d)(1) of the Order does not establish any rights for employees, organizations or associations enforceable under Section 19 of the Order; 1/ that where employees are subject to an agency grievance procedure, in the absence of evidence of anti-union motivation, an improper failure by the agency to apply the provisions of its own procedure cannot be considered violative of the

1/ Cf. U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278; Internal Revenue Service, Chicago District, A/SLMR No. 279; and U.S. Department of the Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR No. 280.

Order; 2/ and that where no labor organization has been accorded exclusive recognition, Section 10(e) of the Order is inapplicable. 3/

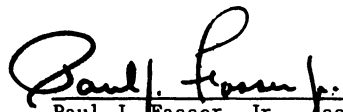
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-4280 be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 5, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

2/ Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, affirmed, in pertinent part, FLRC No. 74A-3. Under the circumstances, I view it as unnecessary to pass upon the Administrative Law Judge's interpretation of certain provisions of the Federal Personnel Manual.

3/ Compare U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, cited above, and U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242.

.....
: In the Matter of: :
: :
: UNITED STATES NAVY :
: NAVAL AIR STATION (NORTH ISLAND) :
: SAN DIEGO, CALIFORNIA, :
: Respondent, : Case No. 72-4280
: :
: and :
: :
: HELEN S. KUHN, ET AL, :
: Complainants. :
:

Basil L. Mayes, Esquire
Labor Relations Advisor
Regional Office of Civilian
Manpower Management
Suite 1313
110 West "C" Street
San Diego, California 92101
For Respondent

Mr. Leo Molina
National Representative
American Federation of Government
Employees, AFL-CIO
Local 1085
2223 El Cajon Boulevard
San Diego, California 92104
For the Complainants

BEFORE: WILLIAM B. DEVANEY
Administrative Law Judge

REPORT AND RECOMMENDATION

STATEMENT OF THE CASE

This case arises under Executive Order 11491 as amended, and was initiated by a complaint dated May 29, 1973, and filed on May 30, 1973. The complaint alleges violations of Sections 19(a)(1) and 7(d)(1) of the Executive Order by the refusal of Respondent to accept a joint grievance. At the hearing, the complaint was amended to include an allegation of violation of Section 19(a)(2) of the Executive Order.

A hearing was held in San Diego, California on December 4 and 5, 1973, and in Los Angeles, California on February 4, 1974. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, and the relevant evidence at the hearing, I make the following findings of fact, conclusions and recommendation:

FINDINGS OF FACT

1. The Respondent Activity is located on North Island, San Diego, California. Complainant Helen S. Kuhn 1/ is a supply clerk in the Supply Department of Respondent and on January 19, 1973, was employed in the RC Processing Branch of the Supply Department. At the time of the hearing she was on detail in the Purchase Branch of the Supply Department.

2. On January 19, 1973, a matter of personal concern or dissatisfaction (NASNINST 12770.13, §6(a), Ass't. Sec. Exh. 1(a), Exh. D) to Complainant Helen Kuhn arose. Discussion with the Branch Supervisor, Mrs. Yeager was had

1/ Other employees purported to join in the complaint; however, the moving party was Helen Kuhn and she will be referred to as Complainant.

on January 19, 1973, and several days later, the matter not having been resolved to the satisfaction of Complainant Kuhn, Mr. Serrano called Mrs. Yeager and requested a meeting on Complainant Kuhn's grievance and a meeting on Complainant Kuhn's grievance was scheduled for February 13, 1973. At the meeting of February 13, Complainant Kuhn's grievance was presented, and, in addition, an uncertain and hesitant move (names of other "grievants" not disclosed, etc.) to convert the individual grievance into a group grievance was made but, when Respondent objected, the "group" grievance aspect was not pressed. The meeting of February 13, 1973, ended inconclusively when Complainant Kuhn insisted that the only solution acceptable to her removal of supervisors Yeager, with whom the meeting of February 13 was held, and Clark. Because Mrs. Yeager lacked authority to resolve the matter, the grievance was referred, under Respondent's grievance procedure, to Commander Murphy.

3. A meeting was held on February 26, 1973, with Complainant Kuhn and her representative Mr. Serrano, by Commander Murphy, then Deputy Control Officer, and Mr. Kenneth Parsell, Deputy Control Officer. On February 26, 1973, a direct effort to convert the individual grievance of Complainant Kuhn into a group grievance was made and Respondent refused to entertain a group grievance. Thereafter, Complainant Kuhn's grievance was discussed and Commander Murphy offered several proposals designed to resolve the matter. Mr. Serrano agreed to consider the proposed resolution but later advised Respondent that the proposed solution had been rejected.

4. On March 3, 1973, a "formal group grievance" was filed with the Commanding Officer and was rejected by Respondent on March 14 because, as to Complainant Kuhn, the initial appeal was to the Supply Officer (Department Head) under the second step of the informal procedure, and, as to the other grievants, each grievant must initiate and process an individual grievance under Respondent's grievance procedure. Although 15 days were allowed, Complainant Kuhn did not file an appeal to the Supply Officer and no other grievant processed an individual grievance.

5. During the first week of April, 1973, Commander Murphy met with employees of the Supply Department. As employees of the Supply Department were located in two buildings about three quarters of a mile apart, a separate meeting was held with employees in each building. 2/ Before entering the room in which the meeting was held which Complainant Kuhn attended, Complainant Kuhn asked Commander Murphy if the meeting had anything to do with her grievance because she wanted her representative present if her grievance were to be discussed. Commander Murphy told Complainant that he was not going to discuss her grievance but that he was going to discuss Respondent's grievance procedure. Complainant, on direct, testified that Commander Murphy made reference to "the Union" and implied employees should "bypass the Union"; but on cross-examination admitted that Commander Murphy did not use the work "Union" and had said that discussion with the immediate supervisor could be bypassed and a grievance could be brought directly to him. Commander Murphy directly testified that he did not use the work "Union" and that the only reference to "representative" or "representation" was that he stated that grievances should be processed under two step informal procedure as outlined in the instruction and that they were entitled to have representation when they initiated the procedure. Commander Murphy further testified that he stated that they could come directly to him, rather than to their immediate supervisor, as the first step of the grievance procedure for the reason that many of them no longer worked for the same immediate supervisor they may have worked for when a grievance arose. Commander Murphy's testimony, supported by the testimony of Cleo M. Harris, a witness called by Complainant, by the testimony of Mr. Parsell and even by the testimony of Complainant on cross-examination, is fully credited. To the extent inconsistent therewith, the testimony of Complainant Kuhn is not credited.

2/ At the time these meetings were held, the time allowed in the letter of March 14, 1973, had expired.

CONCLUSIONS

The Complaint 3/ alleged a violation of Sections 7(d)(1) and 19(a)(1) by the refusal of Respondent to accept a joint grievance as provided in Federal Personnel Manual, Section 3-6(d)(1) and was amended at hearing to allege, in addition, a violation of Section 19(a)(2) of the Executive Order.

1. 19(a)(1) - 7(d)(1) allegations.

Complainant asserts that because the Federal Personnel Manual provides that:

"...grievances can be initiated...by employees, either singly or jointly..." (§3-6(d)),

Respondent's refusal to entertain a group grievances, i.e., a two or more individual grievances, violated Section 19(a)(1) by interfering with rights provided by the Executive Order as amended by Section 7(d)(1). Section 7(d)(1) simply provides that, whether an employee is in a unit of exclusive recognition, recognition of a labor organization does not prevent an employee from exercising grievance or appellate rights. It has been held in numerous cases that Section 7(d)(1) of the Order does not confer any rights enforceable under Section 19. Internal Revenue Service, Chicago District and National Association of Internal Revenue Employees, et al, A/SLMR No. 279; U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278; U. S. Department of the Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR No. 280; In the Matter of United States Navy, Naval Air Station (North Island) San Diego, California and Antonio G. Serrano, No. 72-4306(1974).

3/ Respondent's contention that the Complaint was not filed in accordance with §§203.1 and 203.3 of the Rules and Regulations of the Assistant Secretary, 29 C.F.R. §§203.1 and 203.3, is without merit. The complaint was signed by Helen S. Kuhn, in accordance with §203.3(f) and the fact that additional persons "joined" in the complaint and not render the complaint defective.

Section 3-6 of the Federal Personnel Manual provides:

"a. Establishment of informal procedure.

(1) Each agency must establish a procedure appropriate to its organization and delegations of authority for the informal adjustment of grievances. 4/ (Emphasis supplied).

...

"(4) The Commission purposely has established few requirements for the informal procedure. It is the Commission's view that agencies should tailor their informal procedure to their own specific requirements and should be free to experiment and devise techniques most suitable to their needs. Within the framework of a few Commission requirements, it is the responsibility of each agency to devise an informal procedure best suited to its own size, organizational structure, and mission. (Emphasis supplied).

...

"d. Using the informal procedure.

(1) Initiation by employee. In keeping with the personal nature of matters covered by grievance procedures, grievances can be initiated only by employees, either singly or jointly; they may not be initiated by labor organizations.

(2) Time limit. An employee may present a grievance concerning a continuing condition at any time. He must present a grievance concerning a particular act or occurrence within 15 days of the date of that act or occurrence...

4/ Under Subsection a., Establishment..., reference is solely to "An employee's grievance"; "the grievance"; "A dissatisfied employee"; "every employee's grievance"; "convince the employee that he has been fairly treated" (3-6(a)(2)); "the employee"; "the employee may present his grievance" (3-6(a)(3)).

(3) Form of grievance. An employee may present a grievance...

...

(5) Mandatory use of informal procedure. An employee must complete the informal procedure before the agency may accept from him a grievance concerning the same matter for processing under the formal procedure."

Respondent's unilateral grievance procedure provides, in part, as follows:

"7. Right to Present. An employee is entitled to present a grievance through the procedures contained herein...

"8. Informal Procedure. It is mandatory that an employee complete action under the informal procedure...

"a. Time Limit

"(1) Presenting. An employee shall present a grievance concerning a particular act or occurrence within 15 days of that date of the act or occurrence...

"(2) Completing. Action on the employee's grievance...

"b. First Step

"(1) Grievance. An employee shall initiate the informal procedure by presenting his grievance orally to his supervisor...

...

"c. Second Step. If the grievance is not resolved at the first step, the employee will be referred to the Department Head. ..." (Ass't. Sec. Exh. 1(a), Exh. D).

Only Paragraph 10 provides for joint grievances as follows:

"10. Joint Grievances. When several employees within the same activity have identical grievances; that is, the dissatisfaction expressed and relief requested are the same, the Commanding Officer may require that they be joined and processed as one grievance applicable to all. ..." (Ass't. Sec. Exh. 1(a), Exh. D) (Emphasis supplied).

The precise question of law urged by Complainant, namely, whether a right created by the Federal Personnel Manual is enforceable under Section 19(a)(1) of the Executive Order, is neither reached nor decided since, for the reasons hereinafter set forth, the Federal Personnel Manual does not require the allowance of joint grievances and/or does not create a right to file and process joint grievances. Thus, as the pertinent portions of the Federal Personnel Manual set forth above demonstrate, nothing contained in the Federal Personnel Manual creates an obligation on an agency to permit joint grievances or grants to employees the right to join individual grievances. To the contrary, the Federal Personnel Manual repeatedly refers to grievances, in terms of "An employee's grievance", etc., and Subsection d., relied upon by Complainant, when read in its entirety is, actually, an admonition that grievances can be initiated only by employees. The words "either singly or jointly" as used in subsection d.(1) are not a mandatory requirement that agencies must permit employees, at their option, to initiate grievances singly or jointly. Rather, as noted, it is part of the limitation that grievances may be initiated only by employees, either singly or jointly - not by a labor organization. Indeed, the whole tenor of subsection d.(1) is in apposition to any form of agent grievances, i.e., the "personal nature" of a grievance; "grievances can be initiated only by employees"; "they may not be initiated by labor organizations". It would be a non-sequitur to prohibit initiation of a grievance by a labor organization but to require acceptance by an agency of a grievance initiated by one employee on behalf of another. Throughout subsection d., reference is to

"employee" in the singular, including the heading of subsection (1) entitled "Initiation by employee". Moreover, the Federal Personnel Manual states that "Each agency must establish a procedure appropriate to its organization" and "it is the responsibility of each agency to devise an informal procedure". Accordingly, Respondent's informal grievance procedure is fully in accord with all requirements of the Federal Personnel Manual and Respondent's requirement that each employee initiate his, or her, grievance individually was well within the discretion granted each agency to devise an informal procedure, and entirely consistent with the tenor and purpose of the Federal Personnel Manual.

Subsection d.(5) of the Federal Personnel Manual specifically provides that "An employee must complete the informal procedure before the agency may accept ... a grievance, under the formal procedure." Respondent had the right under its grievance procedure to require that each employee initiate his, or her, grievance individually and Respondent's refusal to accept a grievance under the formal procedure prior to completion of the informal procedure was permitted, if not mandated, by the requirement of subsection d.(5) of the Federal Personnel Manual.

Complainant's further assertion that Section 10 of Respondent's grievance procedure, which permits the Commanding Officer to require that grievances be joined, creates a correlative right in employees to require that grievances be joined, is without merit. The grant of discretionary power to the Commanding Officer to join identical grievances creates no correlative right in employees. Indeed, nothing in Section 10 alters in any manner the requirement that each employee initiate his, or her, grievance individually. Section 10 applies only after two or more employees have initiated identical grievances and permits, but does not require, the Commanding Officer to require, after initiation, that they be joined for processing. By way of analogy, 29 C.F.R. §206.6 provides, in part, that the Regional Administrator may consolidate cases; but the power of the Regional Administrator to consolidate cases creates no power in the parties to do so.

Complainant's contention is defective for the further reason that: a) except for the grievance of Complainant Kuhn no other individual grievance was ever initiated and, until two or more individual grievances were initiated, Section 10 of Respondent's grievance procedure had no applicability in any event; and b) grievances may not properly be accepted under the formal procedure, either pursuant to Sections 7 and 9 of Respondent's grievance procedure or subsection d.(5) of the Federal Personnel Manual, until the informal procedure has been completed. There was no disagreement that Complainant Kuhn's grievance was heard by Commander Murphy as a first step grievance. Even if Complainant Kuhn understood that the first and second steps were merged, and no finding on this issue has been made, the letter of March 14, 1973, granted her 15 days to file an appeal with the Supply Officer (Department Head). There is also no disagreement that no other grievance was ever initiated by any individual employee.

There was no contention and, certainly, no evidence that, apart from the rejected contention concerning the Federal Personnel Manual, Respondent in any manner interfered with, restrained, or coerced any employee in the exercise of any right assured by the Executive Order. In the absence of discriminatory motivation or disparity of treatment based on Union membership considerations, Respondent's insistence on compliance with its unilaterally establishes grievance procedure would not violate Section 19(a)(1) of the Executive Order. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SIMR No. 334, aff'd in pertinent part, FLRC No. 74 A-3; In the Matter of: General Services Administration, Region 7, Fort Worth, Texas, Case Nos. 63-4757(CA) and 63-4758(CA)(1974); In the Matter of: United States Navy, Naval Air Station (North Island), San Diego, California, and Antonio G. Serrano, Case No. 72-4306(1974). Therefore I shall recommend that the allegations of the complaint charging a violation of Sections 19(a)(1) and 7(d)(1) be dismissed.

2. 19(a)(2) Allegation.

Complainant's assertions in support of the 19(a)(2) allegation are: a) that a group of employees was grieving and they were interfered with through the administrative procedure (Tr. 216); and b) that the Union was not allowed to have a representative present during Commander Murphy's April, 1973, meetings with employees (Tr. 217-218). As to a), what has been said with regard to the 19(a)(1) - 7(d)(1) allegation is equally applicable to the 19(a)(2) allegation. Respondent did not encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment by its refusal to accept a group grievance and/or by insisting upon compliance with the provisions of its grievance procedure.

As to b), Commander Murphy met with employees in April, 1973, to explain the procedure for processing a grievance under Respondent's grievance procedure. Complainant Kuhn asked if her grievances were going to be discussed as she wanted her representative present if it were to be discussed. Commander Murphy told her that her grievance would not be discussed. Complainant Kuhn then attended the meeting and there was no discussion of her grievance. It is true, of course, that no labor organization was given notification of the April, 1973, meetings; but no Union had been accorded exclusive recognition and, accordingly, Section 10(e) of the Executive Order has no application. In the absence of a recognized or certified bargaining representative, there is no obligation under the Executive Order to give a union the opportunity to be represented at formal discussions. Accordingly, I shall recommend that the allegations of the Complaint, as amended at hearing, charging a violation of Section Section 19(a)(2) be dismissed.

RECOMMENDATION

I recommend that the complainat herein, as amended at the hearing, be dismissed in its entirety.

William B. Devaney
 WILLIAM B. DEVANEY
 Administrative Law Judge

DATED: August 22, 1974
 Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

IOWA STATE AGRICULTURAL STABILIZATION
 AND CONSERVATION SERVICE OFFICE,
 DEPARTMENT OF AGRICULTURE
 A/SLMR No. 453

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 823 (Complainant), against the Iowa State Agricultural Stabilization and Conservation Service Office, Department of Agriculture (Respondent). The Complainant alleged that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by instituting a reduction in force (RIF) among the Respondent's employees without prior notice to, or consultation with, the Complainant although the latter was the recognized exclusive representative of the Respondent's employees.

In April 1973, the Agricultural Stabilization and Conservation Service (ASCS) of the Department of Agriculture instituted a RIF in its various state offices, including the Respondent's, because of an impoundment of funds. One of the divisions of the ASCS is headed by the Deputy Administrator for State and County Operations (DASCO) and is located in Washington, D.C. The DASCO has several regions and the Respondent, the Iowa State Office, is one of the state offices included in DASCO's Midwest Region. Under the Deputy Administrator for Management of the ASCS is the Management Field Office (MFO) which is located in Kansas City, Missouri and which serves as the personnel office for the 50 state offices of the ASCS.

As a result of the impoundment of funds in December 1972, it was generally understood by employees of the ASCS that there would be a RIF in the state offices. However, the specifics of such RIF were not known. In February 1973, the ASCS directed the MFO to prepare for the RIF action in the various state offices. Early in April 1973, the DASCO decided how many positions were to be abolished in each state office, including the Respondent's, effective at the end of the fiscal year and directed the MFO to determine which persons were to be separated or retired as the result of the projected abolishment of these positions. Accordingly, the MFO in Kansas City determined in April 1973, which employees in various state offices, including the Respondent's, were to be separated or transferred pursuant to the RIF. During this period, the Respondent was not consulted by either the DASCO or the MFO with respect to the RIF action, or with respect to any of the plans which had been formulated.

On April 20, 1973, the MFO prepared RIF notices for approximately eight employees in the Respondent's office, four of whom were to be transferred and four to be terminated. On April 25, 1973, a meeting of the seven State Executive Directors of the Midwest Region was held in Washington, D.C. At that time, the Respondent's Director was told that a RIF in his office would take place and he was given the RIF notices to

deliver to named employees. Prior thereto, he had no knowledge or information concerning the number of positions to be abolished in his office, their identity, nor the employees to be affected. Immediately upon learning of the RIF action, the Respondent's Director gave his office instructions that the Complainant should be advised of the RIF and stated that he would be in his office the next morning with the details. The following morning, he returned to his office and personally advised Complainant's President of the RIF, and also served the RIF notices on the individuals involved. The evidence indicates that the employees involved received more than 60 days notice before the RIF was to be effective.

On May 3, 1973, the Complainant requested certain RIF information which was furnished that day. On May 7, more information was requested and delivered on May 14, and on May 24, a meeting was held between both parties, arranged by the Complainant's National Office, and attended by DASCO and MFO officials which lasted about five hours and in which the ramifications of the RIF were discussed. On June 5, another meeting was held involving the Respondent's Director and the Complainant's past and present presidents. The record indicates that from the time the RIF action was announced until June 30, its effective date, the Respondent's Director at no time refused to discuss the RIF with representatives of the Complainant.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In this connection, he noted that the Respondent played no part in the decision to have a RIF, the determination of the number of positions to be eliminated, nor the formulation of the plan to effectuate the RIF; that such authority and decision-making emanated from the ASCS and its subordinate offices, DASCO and MFO; that when the Respondent's Director was notified of the RIF he promptly gave his office instructions that the Complainant was to be notified of the RIF; that there is no evidence that Respondent ever refused to meet and confer with the Complainant concerning the RIF or any other subject; and that, in fact, after the delivery of the RIF notices, the parties met and conferred on the RIF action and there is no evidence that the Director ever refused to consider recommending a change or that any specific suggestion was made to him. In conclusion, the Administrative Law Judge found that, although management representatives had authority to cancel the RIF if a reasonable alternative plan should be proposed, no such alternative was proposed. Under all of the circumstances, the Administrative Law Judge found no violation of the Executive Order and recommended that the complaint be dismissed.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the case, including the Complainant's exceptions and supporting brief, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IOWA STATE AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE OFFICE, DEPARTMENT OF AGRICULTURE

Respondent

and

Case No. 62-3711(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 823

Complainant

DECISION AND ORDER

On July 29, 1974, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the findings, conclusions, and recommendation of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-3711(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C. November 5, 1974

Handwritten signature of Paul J. Fasser, Jr. followed by the typed name and title: Paul J. Fasser, Jr., Assistant Secretary of Labor for Labor-Management Relations



Vertical text on the right side of the page, including 'In the Matter of', 'IOWA STATE AGRICULTURAL STABILIZATION and CONSERVATION SERVICE OFFICE, DEPARTMENT OF AGRICULTURE Respondent :Case No. 62-3711(CA)', 'and', 'NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 823 Complainant', and decorative dots.

Michael Sussman National Federation of Federal Employees 1737 H Street, N. W. Washington, D. C. 20006

H. James Gormley Agricultural Stabilization and Conservation Service 8430 Ward Parkway Kansas City, Missouri 66141

Before: MILTON KRAMER Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated June 27, 1973

and filed July 2, 1973. ^{1/} The complaint alleged that late in April 1973, a reduction in force was instituted among Respondent's employees without prior notice or consultation with the Complainant although it was the recognized exclusive representative of Respondent's employees. This was alleged to constitute a violation of Sections 19(a)(1) and (6) of the Executive Order.

The Area Administrator investigated the complaint and reported to the Assistant Regional Director. Pursuant to a Notice of Hearing by the Assistant Regional Director dated December 4, 1973, and an Order Rescheduling Hearing, hearings were held March 11 and 12, 1974 in Des Moines, Iowa. The Complainant was represented by counsel and the Respondent by the Chief, Personnel Field Office, Agricultural Stabilization and Conservation Service, Kansas City, Missouri. Timely briefs were filed by the parties on April 12, 1974.

Findings of Facts

The Complainant is the exclusive bargaining representative of Respondent's non-supervisory employees under the Executive Order. It has been recognized as the exclusive bargaining representative since April 1964. The bargaining unit includes about 40 employees. At the time of the events involved herein, there was no collective agreement in effect between the parties.

The Agricultural Stabilization and Conservation Service ("ASCS") is a segment of the Department of Agriculture, headed by an Administrator. One of the divisions of ASCS for operational purposes is headed by the Deputy Administrator for State and County Operations ("DASCO"), located in Washington, D.C. DASCO has several regions, one of which was the Midwest Region with headquarters in Washington. Included in the Midwest Region were seven State Offices, in-

^{1/} The complaint states, in Item 6, that it is filed by Michael Forscay, Staff Attorney, National Federation of Federal Employees. At the hearing the complaint was amended to change the name of the Complainant as stated in the caption above. Tr. 11-12.

cluding the Iowa State ASCS, the Respondent, with headquarters in Des Moines. For staff purposes supporting substantive operations, under the Administrator of ASCS is the Deputy Administrator for Management, with headquarters in Washington. Under that Deputy Administrator is the Management Field Office ("MFO") in Kansas City, Missouri. MFO, among other functions, is the personnel office for the 50 State offices of ASCS. The State Office does not have authority to hire, fire, or demote employees. When a position is vacant and needs to be filled, the State Executive Director notifies the Regional Office in Washington which makes the arrangements through the Management Field Office in Kansas City.

In most ASCS State Offices there is no union recognition. In those where there is recognition, it is of diverse locals with diverse national affiliations.

One of the programs administered by ASCS was the Rural Environmental Assistance Program ("REAP"). This program was administered through the State and County Offices of ASCS. On December 22, 1972, the funds to carry out the substantive aspects of this program were impounded. As a consequence, it was generally understood by employees in ASCS that there would be a reduction in force in the ASCS State Offices. This belief was strengthened by a decline in the work involved in administering the other programs administered through the State Offices.

About the middle of February 1973, ASCS decided to effectuate a RIF in its State Offices, and directed DASCO to carry it out. DASCO commenced a study of the projected workload in the State Offices after June 30, 1973. Through the Deputy Administrator for Management, it took the matter up with the Management Field Office (in Kansas City), preparing for reductions in force in the various State Offices. Early in April 1973, DASCO decided how many positions were to be abolished in each State Office effective at the end of the fiscal year and advised MFO to determine which persons were to be separated or retired as a result of the projected abolishment of those positions in the respective State Offices. It was DASCO (in Washington) that made the decisions, early in April 1973, on which positions were to be abolished in the Iowa State Office, and it was MFO (in Kansas City) that

decided (later in April 1973) which employees in the Iowa State Office of ASCS were as a consequence to be separated or transferred within that Office in accordance with procedures and guidelines of the Civil Service Commission promulgated in the Federal Personnel Manual. MFO thereupon undertook to prepare the final retention registers and to prepare the notices of reduction in force to the affected employees.

About the middle of April 1973, MFO determined which employees in the Iowa State Office would be adversely affected by separation or transfer. On April 20, 1973, it prepared the RIF Notices. They were signed by the Chief of the Personnel Services Division of MFO in Kansas City. They were addressed, but not mailed, to eight employees, four of whom were to have their employment terminated and four of whom were to be laterally transferred pursuant to the F.P.M. MFO, as the personnel office for the ASCS State Offices, had the employee's personnel files. During all this time there was no communication with the Iowa State Office concerning the planned RIF nor did the Iowa State Office know when the RIF in that Office would take place nor of what it would consist. Also, there was no communication or consultation with the Complainant on the matter by the Iowa State Office, MFO, or DASCO.

A meeting of the seven State Executive Directors in the Midwest Region was called for April 24 and 25, 1973 in the Region's headquarters in Washington. A staff assistant to the ASCS Deputy Administrator for State and County Operations (DASCO) was present. About noon on April 25, the Iowa State Executive Director, Dale H. Awtry, was told that the RIF in his Office would take place and was given the RIF notices to deliver to the employees to whom they were addressed. Theretofore he did not know the nature of the RIF nor which employees would be affected, although he assumed, as did the other employees in the State Offices, that a RIF would take place because of the impoundment of the REAP funds and decline in other administrative work. He had no knowledge or information concerning the number of positions to be abolished in his office, their identity, nor the employees to be affected.

Upon learning of the RIF in his office, Mr. Awtry called his office at 1:15 p.m. the same day. He gave instructions that the Complainant should be advised of the RIF and that he would be in his office the next morning with the details. He returned to Des Moines the same day and was in his office the next morning.

There is a conflict in the evidence on whether the President of the Complainant, Patricia A. Thomas, was notified of the RIF on April 25 or April 26. Mr. Awtry, on April 25 told his secretary by telephone to tell the Administrative Chief to notify the union of the RIF immediately, and the Administrative Chief, who did not testify at the hearing, told Mr. Awtry that he had done so. The President of the Respondent, on the other hand, testified directly that it was not until the next day that she was advised by the Administrative Chief of the RIF. In these circumstances, I find that the union was notified of the RIF on April 26 and not on April 25.

On April 26 Mr. Awtry notified the eight employees affected. Four received lateral transfers, and four were to be separated. ^{2/} He gave each of them the RIF notice, read it to the employee, and read and explained the employee's rights. This was done individually with each employee, and consumed about 20 to 25 minutes per employee. Two of the eight employees were absent that day, and were not notified until a later date when they returned. It was not until late in the afternoon of April 26 that Mr. Awtry completed notifying the six employees.

The Federal Personnel Manual provides that a RIF notice shall be issued at least 30 days in advance of its effective date. In this case, each of the employees received the notice in excess of 60 days before its effective date.

On May 3, 1973, Mrs. Thomas (Complainant's President) and a past President of the Local called upon Mr. Awtry to deliver a letter asking for certain information concerning

^{2/} Two of the four to be separated accepted involuntary retirement. Later, an employee in the Office resigned, eliminating the need for another RIF separation. It appears that only one employee in the RIF was separated from service involuntarily other than by retirement.

the RIF and its impact. The same day Awtry furnished the information to the extent he had it; the union had asked for the new ceiling on numbers of authorized employees after June 30 and Awtry did not have that information.

On May 7 the Complainant delivered a letter to Awtry requesting additional information and asking a number of questions. On May 11 Awtry furnished the additional information and answered the questions. On May 14 the Local and Awtry had a meeting at which the RIF was discussed.

On May 24 a meeting was held in the Respondent's office which was arranged by the Complainant's national office in Washington. Present for the Complainant were Local President Thomas, Past President Marvin Smith, and a staff Attorney from the NFFE national office. Present for the Respondent were State Executive Director Awtry, James Gormley (Chief, Personnel Field Office, ASCS, Kansas City who represented the Respondent at the hearings in this case), and Harold L. Jamison (Deputy Director of the Midwest Region). The meeting began about 10:30 a.m. and ended about 3:30 p.m. Gormley and Jamison had with them a telegram signed by the Deputy Administrator for State and County Operations to MFO in Kansas City which they were to send if the union should present a reasonable alternate proposal for the RIF notices that had been delivered. The telegram contained an instruction from DASCO to MFO to withdraw the RIF notices that had been issued to the Iowa State Office. The telegram was not sent because no alternative proposal was made. The meeting consisted largely of a discussion of why certain people had been selected for the RIF instead of others.

On June 5 Awtry and his Administrative Chief met with Thomas and Smith again. Awtry advised the union representatives that one of the RIF notices would be rescinded because of a resignation in the office.

In the period from April 25, 1973, when Awtry first learned the details of the RIF in his office, to June 30, 1973, when the RIF became effective, Awtry never refused to discuss the RIF with representatives of the Complainant.

Discussion and Conclusions

In United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289, a number of propositions are clearly established. Among these are first, that a RIF is "a matter affecting working conditions" concerning which an agency and an exclusive representative are required by Section 11(a) of the Executive Order to meet at reasonable times and confer. Second, that although there is no obligations to confer about the decision to effectuate a RIF, there is an obligation to meet and confer about the method and impact of carrying it out before carrying it out; that the final plan of carrying out the RIF should be arrived at with the benefit of consultation when there is time to consult. And third, that the "reasonable time" at which the conferring should begin is as soon as the RIF decision is reached, and "perhaps sooner".

In that case RIF notices were issued by the Respondent on January 20, 1972, without consultation, to be effective March 19, 1972. The Assistant Secretary held that since there had been time to consult before issuing the RIF notices, and the Activity had not consulted before issuing the notices, it had violated Section 11(a) of the Order. However, he held that since the Union had notice of the RIF on January 20, 1972 and had made no effort to consult concerning their impact prior to their effective date, March 19, 1972, there was not a violation of Section 19(a) (6).

In the case before us, the decision that there would be a RIF was not, unlike in the Great Lakes Naval Hospital case, the decision of the Respondent. It came from the office of the Administrator of ASCS, without consultation with or advice from the Respondent. Nor was the decision of how many positions in the Respondent's office were to be eliminated the Respondent's decision. That decision was made by DASCO, also without consultation with or advice from the Respondent. Nor was the formulation of the plan by which the positions were to be eliminated the product of the Respondent. It was formulated by the Management Field Office (MFO), also without consultation with or advice from the Respondent. In short, the Respondent played no part in the decision to have a RIF, the determination of the number of

positions to be eliminated, nor the formulation of the plan to effectuate the RIF.

After the decisions on having a RIF, determining its extent, and formulating the plan to carry it out had been completed and the RIF notices prepared, they were handed in Washington to Respondent's Executive Director for delivery in Des Moines to the employees affected. He promptly called his office and gave instructions that the Complainant was to be notified of the RIF immediately and advised that the Director would be in Des Moines the next day with the details. That the Complainant was not actually notified until the next day is of no moment. There is no indication of anything that could have been accomplished during the less than twenty-four hour delay in the absence of the details, and notice the next day was reasonably prompt.

Until the time that the RIF notices were delivered, there was nothing that the Respondent did or not do in violation of Executive Order 11491. The Executive Director did not consult with the Complainant about the RIF that all contemplated would come some time, but there was nothing about which he could consult with the Complainant nor is there any evidence he ever refused to confer with the Complainant about the RIF or anything else. There was no violation by the Respondent of any obligations imposed by Section 10(e) of the Order.

We should not in this case decide whether DASCO or MFO violated the Executive Order in not conferring with the Complainant about the RIF that was going to take place in the Iowa State Office. They were working out the RIF and its details more than two months before the RIF notices were delivered to the employees affected. Neither of them is named as a party Respondent. Even if we assume that an unfair labor practice can be committed by someone not a party to the exclusive recognition, and a remedy afforded, a remedy should not be afforded against one not a party to the litigation. I reach no conclusion and make no recommendation on whether DASCO or MFO had any obligation or violated any obligation it had with respect to the Complainant.

After the delivery of the RIF notices, the parties conferred from time to time. At the most extensive conference, the Respondent was assisted by DASCO. The Respondent at no time between the time of the notices and their effective date, - more than sixty days, - refused to consult. To be sure, the Executive Director's authority was limited; he could not make any change in the implementation of the RIF but could only recommend such change. There is no evidence that he ever refused to consider recommending such a change, or that any specific suggestion was made to him. At the extensive meeting on May 24, 1973 the management representatives had authority to cancel the RIF in the Iowa State Office if a reasonable alternative plan should be proposed by the Complainant. But no such alternative was proposed. Accordingly, I find no violation by the Respondent of its obligation under Section 19(a)(6) of the Executive Order.

The Merchant Marine Academy Case
and the
Naval Ordnance Station Case

The Complainant argues that the Executive Order imposes on the agency (the Department of Agriculture) the obligation to delegate to the Activity (the Iowa State ASCS Office) the authority to confer and negotiate on all subjects which are mandatory subjects of conferring or negotiation under the Executive Order, and cites in support United Federation of College Teachers and U. S. Merchant Marine Academy, FLRC No. 71A-15.

In that case an Act of Congress in 1961 had authorized the Secretary of Commerce to employ teachers at the Merchant Marine Academy without regard to the Classification Act. The Secretary of Commerce delegated that authority with respect to salaries to the Department's Director of Personnel. Another regulation of the Department conferred on each operating unit of the Department, including the Superintendent of the Academy, the obligations of the Department under Section 11(a) of Executive Order 11491 including the limitation "so far as may be appropriate under . . . published policies and regulations of the Department . . . and Executive Order 11491."

There was only one Merchant Marine Academy. The union was granted recognition as exclusive representative of the teachers at the Academy in 1965. The negotiated agreement did not include a provision on salaries. Later the Federation made two proposals to the Facility that would change salaries. The Department held the proposals non-negotiable because beyond the authority of the Superintendent of the Academy, and the Federal Labor Relations Council granted review.

The Council held that the limitation in Section 11(a) of the Executive Order, "so far as may be appropriate" under published agency policies and regulations, applied only to regulations applicable generally or at least to more than one Activity and therefore was not applicable to the regulation leaving the teaching salaries at the Academy to the Director of Personnel while other personnel policies were fixed by other more general regulations or by the negotiated agreement between the Academy and the Federation.

The Department argued that nevertheless the regulation delegating authority to alter salaries to the Director of Personnel took the subject outside the scope of bargaining although another regulation (not limited to the Academy) gave the Superintendent authority to fulfill the bargaining obligations of Section 11(a) of the Executive Order. The Council disagreed. It held that insofar as the agency regulations conferred on the Superintendent the responsibility for fulfilling the agency's bargaining obligations under the Order, but barred negotiations on a mandatory subject of bargaining, it was in contravention of the Executive Order. That did not mean that the Superintendent had the authority to bargain on salaries. It meant that the obligation to bargain on salaries was in the Director of Personnel as the "appropriate representative" of the agency to fulfill the obligation "An agency and a labor organization . . . shall meet at reasonable times and confer . . . with respect to . . . matters affecting working conditions . . ." Executive Order 11491, Section 11(a).

The first of those holdings is not applicable to this case. Constituting MFO the personnel office for the Iowa State Office was not limited to the Iowa State Office; MFO

was the personnel office for all 50 State ASCS offices. And the direction to DASCO to determine the number of positions to be abolished was also not limited to Iowa; it applied to all State Offices.

With respect to the second holding in that case described above, the most that could be argued is that DASCO or MFO was the "appropriate representative" to confer with the Complainant about the RIF. The Merchant Marine Academy case came up on the issue of bargainability, not as an unfair labor practice for refusal to consult or confer as in this case. But neither DASCO nor MFO is a Respondent in this case, so it is unnecessary to determine whether either or both of them violated Section 19(a)(1) or (6) of the Executive Order.

The unfair labor practice charge, made pursuant to Section 203.2(a)(1) of the Regulations, was made against "Mr. Dale Awtry, State Executive Director, Iowa State ASCS Office". The complaint was filed against "Iowa State Agriculture Stabilization and Conservation Service (ASCS) Office" and it "alleges that the Iowa State ASCS Office was in violation of Section 19(a)(6) of Executive Order 11491 as amended for failure to consult with NFFE 823 regarding the reduction in force." As we have seen, neither the Iowa State ASCS Office nor its Executive Director did anything or failed to do anything in violation of Executive Order 11491 as amended.

Nor is this case governed by the decision in Department of Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400, re 41-3128(CA). In that case the Activity had imposed discipline on an employee in a unit represented by a labor organization, and an appeal was taken by the employee. Under the alternate established appeal procedure that was used, a Grievance Examiner was appointed by another division of the Navy, the Regional Office of Civilian Manpower Management. The Union was not notified of the appeal. Under the appeal procedure the Examiner's decision was only a recommendation which the Respondent need not accept. The recommendation was that the imposition of the discipline be affirmed, and the recommendation was adopted by the Respondent. In considering the appeal and reaching his decision to recommend

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

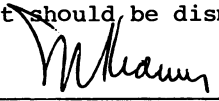
affirmance of the discipline, the Grievance Examiner discussed the matter in private with the employee; the Union was not invited to the discussion nor did it even know of the appeal until later.

The absence of notification to the Union and the private discussion with the employee were held to be in violation of the last sentence of Section 10(e) of the Executive Order which requires that a recognized labor organization be given the opportunity to be present at formal discussions between management and an employee concerning grievances, personnel policies and practices, or other matters affecting general working conditions. It was held that although the Grievance Examiner was not under the jurisdiction of the Respondent, he was the Respondent's representative in deciding the appeal, and that hence his private discussion with the employee, without the Union being given an opportunity to be present, was a formal discussion between management and the employee concerning grievances or personnel policies and practices.

In this case it cannot be said that DASCO and MFO were the agents or representatives of the Respondent in working out the RIF. Unlike the situation in the Naval Ordnance Station case, the decision to have the RIF and the decision on how it should be effectuated were not decisions of the Respondent which was not even consulted in reaching those decisions. As observed above, the Respondent in this case did not do anything or fail to do anything in violation of the Executive Order.

CONCLUSION AND RECOMMENDATION

Since the Respondent has not been shown to have violated any provision of Executive Order 11491, and those who might arguably be considered to have committed violations are not Respondents in this case, the complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

DATED: July 29, 1974
Washington, D. C.

ARMY AND AIR FORCE EXCHANGE SERVICE,
PACIFIC EXCHANGE SYSTEM,
HAWAII REGIONAL EXCHANGE
A/SLMR No. 454

This unfair labor practice proceeding involved a complaint filed by International Brotherhood of Electrical Workers, AFL-CIO, Local 1186 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by interfering with the exercise of protected rights of employees exclusively represented by Complainant and by reclassifying certain employees without consulting and conferring in good faith.

The Assistant Secretary concurred with the Chief Administrative Law Judge's finding that, although the Respondent was not obligated to meet and confer with the Complainant on the reclassification of the employees involved, it violated Section 19(a)(6) by instituting the classification without affording the Complainant a meaningful opportunity to meet and confer on the impact of such action on adversely affected unit employees. In finding that Respondent failed to provide an opportunity to meet and confer on such impact, it was noted that on June 7, 1973, the Chief of the Engineering Branch met with three stewards of the Complainant and indicated that the effective date of the reclassification was "as of now," leaving the Complainant's representatives with the belief that the reclassification was an accomplished fact and that no opportunity existed for the Complainant to have any input into the implementation of the decision, even though the effective date of the reclassification was, in fact, June 15, 1973.

The Chief Administrative Law Judge also found the Respondent's conduct constituted a violation of Section 19(a)(1). He noted that this finding was made after an independent evaluation of the evidence. In his decision, the Chief Administrative Law Judge implied that under the holdings of the Assistant Secretary a Section 19(a)(1) violation might not be found as a derivative of a Section 19(a)(6) violation. In this regard, the Assistant Secretary noted that the original language of Section 19(d) in Executive Order 11491, effective January 1, 1970, precluded a finding of a derivative Section 19(a)(1) violation based on a violation of other subsections of Section 19(a) because of the possibility that an established grievance procedure existed which would require dismissal of the Section 19(a)(1) allegation. In the Assistant Secretary's view, Executive Order 11616, which amended Executive Order 11491, effective November 24, 1971, modified the pertinent parts of Section 19(d) so that currently when an aggrieved party has elected to process his action under the unfair labor practice procedures of the Order, a derivative violation of Section 19(a)(1) of the Order may be found, when alleged in connection with conduct which is determined to be violative of other subsections of Section 19(a). In this connection, the Assistant Secretary noted that a violation of any of the other subsections of Section 19(a)

necessarily would tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Order and, therefore, also would constitute a violation of Section 19(a)(1). Accordingly, the Assistant Secretary found that the Respondent's conduct in the instant case constituted a violation of Section 19(a)(6) and, derivatively, also violated Section 19(a)(1) of the Order.

A/SLMR No. 454

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
PACIFIC EXCHANGE SYSTEM,
HAWAII REGIONAL EXCHANGE

Respondent

and

Case No. 73-531

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,
LOCAL 1186

Complainant

DECISION AND ORDER

On September 6, 1974, Chief Administrative Law Judge H. Stephan Gordon issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action, as set forth in the attached Chief Administrative Law Judge's Report and Recommendation. No exceptions were filed to the Chief Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Chief Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Chief Administrative Law Judge's Report and Recommendation and the entire record in this case, I hereby adopt the Chief Administrative Law Judge's findings, conclusions and recommendation.

The Chief Administrative Law Judge essentially found, and I concur, that although the Respondent was not obligated to meet and confer with the Complainant on the reclassification of the employees involved in the instant case, the Respondent violated Section 19(a)(6) of the Order by instituting the reclassification without affording the Complainant a meaningful opportunity to meet and confer on the impact of such action on adversely affected unit employees.

In addition, the Chief Administrative Law Judge found that this same conduct of the Respondent interfered with the Section 1(a) rights of the employees affected in violation of Section 19(a)(1). In this regard, he implied that, under the holdings of the Assistant Secretary, such a 19(a)(1) violation must be found to constitute an independent violation of the Order, as distinguished from a derivative violation of Section 19(a)(6). 1/

1/ In this regard, the Chief Administrative Law Judge cited Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

Section 19(d) of the original Executive Order 11491, which was effective January 1, 1970, provided, in part:

When the issue in a complaint of an alleged violation of paragraph (a) (1), (2), or (4) of this section [19] is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint.

Under this provision, it was the view of the Assistant Secretary that he was precluded from finding automatically a derivative Section 19(a)(1) violation based on a violation of other subsections of Section 19(a) because of the possibility that an established grievance procedure existed which would require dismissal of any Section 19(a)(1) allegation. However, Executive Order 11616, which amended Executive Order 11491, effective November 24, 1971, modified the pertinent parts of Section 19(d) to read as follows:

Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures.

Thus, under Executive Order 11491, as amended, when an aggrieved party has elected to process his action under the unfair labor practice procedures of the Order, a derivative violation of Section 19(a)(1) of the Order may be found, when alleged in connection with conduct which is determined to be violative of other subsections of Section 19(a), even though an established grievance procedure is available. Under these circumstances, I find that no bar exists to finding a derivative violation of Section 19(a)(1) of the Order in situations where it is concluded that Sections 19(a)(2), (3), (4), (5), and/or (6) have been violated. Further, in my view, a violation of any of these foregoing subsections of Section 19(a) necessarily tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order and, therefore, also is a violation of Section 19(a)(1). ^{2/} Accordingly, based on the foregoing considerations, I find that, in the instant case, the Respondent's improper failure to meet and confer with the Complainant constituted a violation of Section 19(a)(6) and, derivatively, also violated Section 19(a)(1) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor

^{2/} This is not to say that Section 19(a)(1) may not be violated independently without regard to violations of other subsections of Section 19(a) of the Order.

for Labor-Management Relations hereby orders that the Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, shall:

1. Cease and desist from:

(a) Failing to notify the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, concerning the reclassification of unit employees, and to afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such reclassification will have on the unit employees adversely affected by such action.

(b) Assigning to reclassified employees work tasks different than those assignable prior to such reclassification, without affording the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such assignments will have on the unit employees adversely affected by such action.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

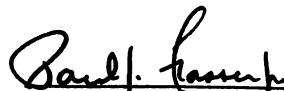
2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, of any intended reclassification of unit employees and, upon request, afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such reclassification will have on the unit employees adversely affected by such action.

(b) Post at its facility at Pacific Exchange System, Hawaii Regional Exchange, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
November 26, 1974


Paul J.asser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail to notify the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, with respect to the reclassification of unit employees, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such reclassification will have on the unit employees adversely affected by such action.

WE WILL NOT assign to reclassified employees represented by International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, work tasks different than those assignable prior to such reclassification, without affording International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such assignments will have on the unit employees adversely affected by such action.

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

WE WILL NOTIFY the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186, or any other exclusive representative, of any intended reclassification of unit employees and, upon request, afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact such reclassification will have on the unit employees adversely affected by such action.

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

(Agency or Activity)

Dated _____ By _____
(Signature)



..... :
In the Matter of :
: ARMY AND AIR FORCE EXCHANGE SERVICE :
: PACIFIC EXCHANGE SYSTEM :
: HAWAII REGIONAL EXCHANGE :
: Respondent : Case No. 73-531
and :
: INTERNATIONAL BROTHERHOOD OF :
: ELECTRICAL WORKERS, AFL-CIO, :
: LOCAL 1186 :
: Complainant :
..... :

Robert E. Edwards, Assistant General Counsel
Army and Air Force Exchange Service
9311 Walton Walker Boulevard
Dallas, Texas 75222

For the Respondent

Benjamin C. Sigal, Esquire
333 Queen Street, Suite 800
Honolulu, Hawaii 96813

For the Complainant

Before: H. STEPHAN GORDON
Chief Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This proceeding arises under Executive Order 11491, as amended, and the Rules and Regulations promulgated thereunder by the Assistant Secretary of Labor for Labor-Management Relations, 29 C.F.R. Part 203. The Amended Complaint here in issue was filed by Local 1186 of the International Brotherhood of Electrical Workers (referred to hereinafter as the Union) on October 10, 1973, charging the Hawaii Regional Exchange (hereinafter referred to as H.R.E. or the Activity)

with interfering with the exercise by unit employees of protected rights and failing and refusing to consult and confer in good faith, thereby violating subsections (1) and (6) of Section 19(a) of the Executive Order.

A hearing on the Amended Complaint was held on February 26, 1974, in Honolulu, Hawaii. Both parties were present and represented by counsel. Each was allowed full opportunity to call, examine and cross-examine witnesses and adduce relevant evidence. Post hearing briefs were received from both parties and have been carefully considered.

On the basis of the entire record in this case and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendation to the Assistant Secretary.

Findings of Fact

The Activity, Hawaii Regional Exchange, functions basically as a retail organization, providing merchandise and services to military personnel and other authorized patrons at various installations in the State of Hawaii. H.R.E. is a subordinate organizational element of the Pacific Exchange System (PACEX) headquartered in Honolulu, which reports to Headquarters, Army and Air Force Exchange Services in Dallas, Texas. The Union is the exclusive representative of all unit employees. A negotiated agreement first approved September 25, 1970, and subsequently renewed governs labor-management relations at the Activity. 1/

Organizationally, H.R.E. is divided into six Branches. Of these, only the Engineering Branch is involved in the present controversy. Engineering, in turn, is divided into two sections, Architecture and Engineering and Equipment and Facilities, both of which are supervised by Mr. Philip Roach, Chief, Engineering Branch. Prior to the reclassification of employees in the Equipment and Facilities section, from which action the present controversy stems, the twenty-four workers there employed were classified as skilled laborers. Employees worked under job titles as refrigeration and air conditioning mechanics, electricians, carpenters, plumbers, and painters, with five employees carrying the

1/ Joint Exhibit No. 1, Appendix B.

generalist job title of maintenance worker in lower grade positions.

The evidence regarding the events leading to the filing of the present Complaint is without serious conflict. Mr. Barney Miyaji, a Chief Union Steward, Mr. Henry Shinotsuka, his alternate and Mr. Richard Asao, a Union Steward, were called to Mr. Roach's office during the morning of June 7, 1973. They were shown a document entitled "Manpower Authorization Voucher" 2/ and were informed by Mr. Roach that the job titles of employees in the section had been changed from craft designations, e.g. "electrician," "plumber," etc., to "Maintenance Worker," at several grade levels. Mr. Roach explained that there would be an increase of one Grade 7 position in the shop, and that under the new classification system there would be greater opportunity for promotion.

There was no discussion as to how the change would affect the employee contingent as then constituted. Mr. Miyaji asked Mr. Roach for the job descriptions for the new maintenance worker classifications and was informed that copies would be supplied to him the following day. Mr. Miyaji noted that if each of the employees under the new classification was going to be expected to perform all types of specialized work, a safety hazard would be presented. He observed that, for example, an employee who had worked as a carpenter under the old classification scheme was unprepared and untrained for assignment to potentially dangerous electrical work. In response Mr. Roach queried whether the Union could provide the training necessary to prepare employees adequately for the wide variety of work assignments which the new classification would allow. When Mr. Miyaji responded that the Union did not have the resources to provide the necessary training the subject was dropped.

Miyaji then asked Roach when the new classifications were to be put into force and was informed that they were effective "as of right now." The Manpower Authorization Voucher shown to the Union representatives indicated in the space provided that the effective date of the reclassification was May 19, 1973. 3/ The document showed the signature of George V. Dodson,

2/ Complainant's Exhibit No. 1.

3/ Mr. Kenneth Bass, Chief of Personnel for PACEX Headquarters, testified that it was an "administrative error" to have indicated an effective date of May 19, 1973, on the voucher. That date was chosen because it was the beginning of a payroll period and it was anticipated that final approval for the change would be secured by then.

Executive of H.R.E. Little else of substance was discussed at the June 7th meeting. As the Union representatives prepared to leave, Mr. Miyaji turned to Mr. Roach and said "I am going to contest this," referring to the reclassification, to which Mr. Roach replied, "Be my guest."

Mr. Miyaji testified that prior to June 7, 1973, he worked under the job title of "Electrician" and although he, like the other employees in the section, was not licensed in his job specialty, he possessed sufficient expertise to perform adequately the duties required of the position. He testified that although he did a variety of different types of work, 95% of his assignments were electrical. All of the Union witnesses testified that since reclassification their work routine has not changed and that although the job descriptions for the new maintenance worker classifications would allow their assignment to all types of maintenance work, in practice this has not occurred.

The day following the June 7 meeting Mr. Roach supplied Mr. Miyaji with copies of the new job descriptions as promised. There was no further communication between the parties on the reclassification issue until June 22, 1973, when by letter to Lt. Colonel John C. Brown, Commander H.R.E., James S. Yoshida, Assistant Business Manager of the Union, accused the Activity of several violations of the negotiated agreement, including one charge based on the institution of the reclassification in the Equipment and Facilities section without prior consultation with the Union. 4/

The response of Colonel Brown, 5/ dated July 20, 1973, stated the position of the Activity regarding the consultation issue, which, in substantial form remained the position of the Activity at the hearing. Colonel Brown stated that under relevant sections of the Executive Order the Activity was under no obligation to consult, confer or negotiate on the manner in which it organized its work force, including the classification of employees. Brown went on to state that even if a duty to consult on the subject were to be found in the Order, the Activity had met its obligation at the June 7 meeting. He observed, contrary to what the Union representatives had been told by Mr. Roach, that the reclassification was not given

4/ Complainant's Exhibit No. 3.

5/ Complainant's Exhibit No. 4.

final approval until June 14, 1973, with an effective date of June 15, 1973. Thus, in the Activity's view, there was sufficient time allowed the Union to make known its comments on the subject, and sufficient opportunity for the Union to request further consultation.

The Activity introduced evidence at the hearing relative to its procedures for the approval of job classification changes. Regarding the reclassification of employees of the Equipment and Facilities section, Mr. Roach testified that it was upon his request that the procedures were invoked. It was his view that the change to the maintenance worker classifications and job descriptions would more accurately reflect the work actually performed by employees of the section and would allow for greater flexibility in the assignment of job tasks to the end that the mission of the section would be better served. Mr. Roach's request for the classification change was directed first to the H.R.E. personnel office. Various communications passed between Mr. Roach and responsible personnel officials on the subject and on April 16, 1973, a meeting was held in the office of Mr. George Hiel, PACEX Position Classification Specialist, to discuss the change. At no time was the Union informed of the action under consideration or invited to make its views known.

Sometime after the April meeting the H.R.E. personnel office gave its approval to the classification change recommended by Mr. Roach and the Manpower Authorization Voucher prepared to institute the change was signed by Mr. Dodson indicating approval at the H.R.E. level. The changes approved by Mr. Dodson were as reflected on the original voucher, of which Claimant's Exhibit No. 1 is a copy. The Voucher also contained certain other classification changes not in issue. Given the nature of the maintenance worker classifications, approval by Mr. Dodson was only an intermediate step in the authorization procedure mandated by controlling Activity regulations.

The "maintenance worker" job classification is not found in the list of "standard" jobs contained in Army and Air Force Manual 2-4. As a "non-standard" job, approval for its institution must come from PACEX, whereas a standard job classification could be approved by Mr. Dodson as H.R.E. Executive. When, as was the case here, non-standard and standard classifications were combined in a single "job-package" PACEX retained final approval authority over all

classifications so submitted, including the standard jobs.

The original Manpower Authorization Voucher signed by Mr. Dodson, in due course, was submitted to Mr. Heil at PACEX. In the course of reviewing the reclassification certain changes were incorporated in the "package" submitted by H.R.E. These changes (not here relevant) were made on the original voucher by interlineation. The effective date shown as May 19, 1973, also was changed on the first page of the two-page Voucher to read June 12, 1973. 6/ As indicated above, the altered Voucher was not given final official approval until June 14, 1973, with an effective date of June 15, 1973.

From the evidence adduced it is obvious that the three Union representatives left the June 7 meeting with Mr. Roach with the belief that reclassification was an accomplished fact and that no opportunity existed for the Union to have any input into the decision itself or its implementation. I conclude from the evidence that this belief was completely reasonable and that, indeed, no other inference could be drawn from the actions of Mr. Roach, and the contents of the Manpower Authorization Voucher, the effective date of which was clearly shown thereon. The fact that final approval of the reclassification was not given by PACEX until June 14, 1973, is not relevant to the limited issue presented here.

Conclusions of Law

Section 11(a) of the Executive Order sets out the scope of the Activity's duty to "confer, consult, or negotiate," enforced in Section 19(a)(6). Section 11(b) contains the proviso that,

....the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices.

6/ Respondent's Exhibits Nos. 1-b and 1-c.

The reclassification of employees in the Equipment and Facilities Section, at issue in the instant case, is clearly excluded by the above quoted language from the subjects upon which the Activity would be obligated to confer. The Union makes no argument to the contrary. The above language is not dispositive of the Complaint filed herein, however, for Section 11(b) goes on to provide that,

This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

It may thus be seen that where, as here, an agency is excused from consulting or conferring regarding a proposed action it may still be required to give forewarning to the exclusive representative and, upon request, consult and confer regarding the impact of the proposed action on the employees affected. The duty to bargain regarding impact has been recognized by the Assistant Secretary and the Federal Labor Relations Council in several cases, see for example Immigration and Naturalization Service, FLRC No. 70A-10 (April 15, 1971), Plum Island Animal Disease Laboratory, FLRC No. 71A-11 (July 9, 1971), Griffiss Air Force Base, FLRC No. 71A-30 (April 19, 1973), Norton Air Force Base, A/SLMR No. 261 (April 30, 1973), U.S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341 (January 9, 1974), New Mexico Air National Guard, A/SLMR No. 362 (February 28, 1974).

That the reclassification action formally taken on June 14, 1973, had an impact on employees in the Equipment and Facilities section is clear beyond question. The change was sought and effected by the Activity at least in part to make it possible to have employees, who under their former classifications and job descriptions were assignable to only a limited type of work, available for assignment to the variety of maintenance tasks it was the duty of the section to perform. 7/ As Mr. Miyaji observed

7/ That the duties of employees have not in fact been changed since reclassification is not material to the instant proceeding. With the new position descriptions presently in effect the possibility that employees will be assigned to work for which they are untrained or undertrained exists, with attendant safety hazards.

at the June 7 meeting when first informed of the reclassification and as recognized by Mr. Heil in testimony, the change in the employee's position descriptions presented a potential safety hazard if adequate training was not provided. For this reason any proposal of the Union directed to the amelioration of the potential hazard would clearly be negotiable, Griffiss Air Force Base, supra.

In order that the Union be given a meaningful opportunity to consult and confer on impact issues, of necessity, it would have to be informed of the action sufficiently in advance of its implementation to allow for the preparation of proposals and the good faith exchange of views contemplated by the Order. If the Activity is found to have failed to have afforded the Union a meaningful opportunity to confer regarding the impact of reclassification on the employment relationship, especially in so vital an area as safety and health, then a violation of Section 19(a) (6) must be found.

As found above, the evidence demonstrates that the Union, through three of its steward representatives, was informed on June 7, 1973, that effective that date employees in the Equipment and Facilities section were to have their job classifications and position descriptions changed. They were shown a Manpower Authorization Voucher with the imprimatur of the Activity's Executive which plainly authorized the reclassification effective May 19, 1973. The evidence further proves that contrary to the representations made to the Union stewards on June 7, the reclassification was not given the final approval from PACEX necessary for implementation until June 14, with an effective date of June 15.

The Activity argues that between June 7 when the Union was informed of the reclassification and June 15 when the change was officially instituted the Union had the opportunity to request consultation on negotiable impact issues. No such overtures having been received from the Union, the Activity contends it cannot be found in violation of the duty to bargain in good faith. I cannot so conclude.

On June 7, the Union was presented with the accomplished fact of reclassification. Its views were not sought then as they had not been sought in the several months preceding while the change was being discussed both within the Activity and with personnel officials in PACEX. As far as the Union was concerned there was no opportunity to discuss the impact of

the reclassification prior to its implementation. 8/ That the change was not given final, official confirmation until June 14 is of no moment. To hold as the Activity urges would be to impose upon the Union an obligation to request consultation regarding an Activity action which it reasonably believed was already instituted. This, in effect, would require the Union to perform what, under the circumstances, would be essentially a futile act.

I therefore conclude that by reclassifying employees in the Equipment and Facilities section without conferring, consulting or negotiating with the Union regarding the impact of such action the Activity violated Section 19(a)(6) of the Order.

I also conclude that this same conduct of the Activity interfered with the Section 1(a) rights of the employees affected, in violation of Section 19(a)(1). This finding is made after an independent evaluation of the evidence and is not based on any theory that a 19(a)(1) violation is a derivative of a 19(a)(6) violation, see Veterans Administration Hospital, A/SLMR No. 87 (August 3, 1971). Section 1(a) of the Order grants to each employee the right to form, join and assist a labor organization and Section 19(a)(1) prohibits an Agency from interfering with that right. Where, as here, Activity management takes a privileged action without meeting its obligation to confer and consult regarding the impact and potentially adverse effects of that action, the exclusive representative is undercut and disparaged so as to affect Section 1 rights of employees in violation of Section 19(a)(1).

Recommendations

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 203.22(a) of the Rules and Regulations, 29 C.F.R. 203.22(a), I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.

8/ In this connection see the Decision of Administrative Law Judge Francis E. Dowd in Anaheim Post Office, affirmed and adopted by the Assistant Secretary in A/SLMR No. 324 (November 16, 1973).

Recommended Order


Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Rules and Regulations, 29 C.F.R. 203.25(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Hawaii Regional Exchange, Pacific Exchange System, Army and Air Force Exchange Service shall:

1. Cease and desist from:
 - (a) Refusing to consult, confer, or negotiate with International Brotherhood of Electrical Workers, Local 1186, with regard to the impact on affected employees of changes in job classifications and position descriptions.
 - (b) Assigning to reclassified employees work tasks different than those assignable prior to reclassification, pending full consultation with the exclusive representative on bargainable issues.
 - (c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Exclusive Order:
 - (a) Upon the request of the exclusive representative, meet and confer, consult, or negotiate regarding the impact of reclassification on employees including, but not limited to, safety and health issues and training.
 - (b) Post at its facilities at the Hawaii Regional Exchange, Honolulu, Hawaii copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Hawaii Regional Exchange Executive and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Executive

shall take reasonable steps to insure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 202.26 of the Rules and Regulations, 29 C.F.R. 202.26, notify the Assistant Secretary, in writing, within twenty (20) days of the date of this Order as to what steps have been taken to comply herewith.


H. Stephan Gordon
Chief Administrative Law Judge

Dated: September 6, 1974
Washington, D. C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to confer, consult, or negotiate with the International Brotherhood of Electrical Workers, Local 1186, regarding the impact of reclassification on affected employees.

WE WILL NOT assign work tasks to reclassified employees different from those assignable prior to reclassification pending full consultation with the exclusive representative.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by Section 1(a) of the Executive Order 11491, as amended.

WE WILL, upon request, meet with the exclusive representative and confer, consult, or negotiate regarding the impact of reclassification of employees, including, but not limited to, health and safety issues and training.

Dated: _____

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. DEPARTMENT OF DEFENSE,
 DEPARTMENT OF THE ARMY,
 U. S. ARMY ADJUTANT GENERAL
 PUBLICATION CENTER,
 ST. LOUIS, MISSOURI
 A/SLMR No. 455

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2761, AFL-CIO (AFGE), against the U. S. Department of Defense, Department of the Army, Adjutant General Publication Center, St. Louis, Missouri (Respondent), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to process a grievance to arbitration under the provisions of the parties' negotiated agreement.

The evidence revealed that, under the terms of the parties' negotiated agreement, an employee who receives a satisfactory performance rating and is dissatisfied with such rating may raise the matter before a local ad hoc Board of Review or a Statutory Performance Rating Board of Review. On June 28, 1974, an employee who received a satisfactory rating filed a grievance questioning the propriety of his rating through the medium of the ad hoc Board of Review and the negotiated grievance procedure. He subsequently withdrew the grievance from consideration by the Board of Review but continued to process the matter through the negotiated grievance procedure. When the grievance reached the arbitration step in the grievance procedure the Respondent refused to proceed to arbitration because the submission of the grievance to arbitration would be in violation of the negotiated agreement as well as applicable regulations.

The Administrative Law Judge concluded that, as the evidence established that the negotiated agreement provided that grievances relating to satisfactory ratings would be processed exclusively through the medium of the ad hoc Board of Review or a Statutory Performance Rating Board of Review and, as there was an absence of any evidence of a contrary intent by the parties, the Respondent's refusal to accede to the Complainant's request to submit the instant grievance pertaining to a satisfactory performance rating to arbitration did not constitute a violation of Section 19(a)(1) and (6) of the Order.

Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and, accordingly, ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF DEFENSE,
 DEPARTMENT OF THE ARMY,
 U. S. ARMY ADJUTANT GENERAL
 PUBLICATION CENTER,
 ST. LOUIS, MISSOURI

Respondent

and

Case No. 62-3838(CA)

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, LOCAL 2761, AFL-CIO
 ST. LOUIS, MISSOURI

Complainant

DECISION AND ORDER

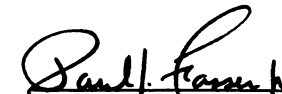
On September 12, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-3838(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
 November 26, 1974


 Paul J. Vasser, Jr., Assistant Secretary of
 Labor for Labor-Management Relations



REPORT AND RECOMMENDATIONS

Statement of the Case

Pursuant to an amended complaint first filed on November 21, 1973, under Executive Order 11491, as amended, by Local 2761, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or AFGE), against the U.S. Army Adjutant General Publications Center, St. Louis, Missouri, (hereinafter called the Army or Agency), a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the Kansas City, Missouri, Region on June 26, 1974.

The complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Order by virtue of its action in refusing to process a grievance to arbitration.

A hearing was held in the captioned matter on August 13, 1974, in St. Louis, Missouri. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witness and his demeanor and other relevant evidence adduced at the hearing, I make the following conclusions and recommendations:

Findings of Fact

The facts are not in dispute and no credibility issues are involved.

The Union, which is the recognized representative of a majority of the Agency's employees, and the Army are parties to a collective bargaining contract dated May 5, 1970. Article XXXIII of the aforementioned contract contains a four step grievance procedure. According to step four of the procedure, if the Union is dissatisfied with the decision of the Commanding Officer at the third step of the grievance procedure, it may request arbitration of the matter. Upon such request, according to the contract, it is then incumbent upon the Agency to participate in the selection of an arbitrator for resolution of the matter in dispute.

.....
In the Matter of

U.S. DEPARTMENT OF DEFENSE
DEPARTMENT OF THE ARMY
U.S. ARMY ADJUTANT GENERAL
PUBLICATION CENTER
ST. LOUIS, MISSOURI

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 2761, AFL-CIO
ST. LOUIS, MISSOURI

Complainant
.....

Case No. 62-3838 (CA)

Lawrence Newmeyer, Esquire
7361 Normandie Court
Apartment C
Hazelwood, Missouri

For the Respondent

Mr. Walter Von Steiger
Chief Labor Management and Employee
Labor Relations Branch, C.P.O.
32 Beacon Hill
St. Louis, Missouri

For the Complainant

Mr. William Cole
3641 Marvin
St. John, Missouri

Mr. William Martin, Jr.
4830 Cupples Place
St. Louis, Missouri

BEFORE: BURTON S. STERNBURG
Administrative Law Judge

Article XXIII of the contract provides as follows:

ARTICLE XXIII
PERFORMANCE EVALUATION

Section 1. The Employer and the Union agree that a well conducted performance evaluation program results in benefits to both the Employer and employees.

Section 2. The Employer agrees that informal and spontaneous discussions, in addition to periodic counseling sessions, will be held between supervisor and employee to discuss performance and other matters pertinent to the employee's performance. The supervisor in the course of the evaluation process shall discuss with the individual employee, training needs as related to his present work or anticipated assignments.

Section 3. When an employee performed in all major aspects of his assigned work during the entire rating period in such a manner that his performance not only exceeded normal requirements but was outstanding, he will be recommended for an outstanding performance rating and will be considered for an appropriate award.

Section 4. When an employee believes that he has not been fairly and objectively rated, the procedure outlined below will be used:

a. The employee will be counseled and every effort made to resolve his problem on a verbal basis.

b. If the employee still believes that he has not been fairly and equitably rated, he will be advised of his right to have his rating reviewed impartially:

(1) Either by a local ad hoc Board of Review or a Statutory Performance Rating Board of Review, but not by both, with decision of the Board being final, if he received a Satisfactory rating.

(2) Either as a Type III Grievance under CPR E2.4 or by a Performance Rating Board of Review, or by both in that order, with the decision of the Board being final, if he received an Unsatisfactory rating, or

(3) By processing under the grievance procedures as set forth in Article XXXIII, this Contract, or by a Performance Rating Board of Review, or both in that order, with the decision of the Board being final, if he received an Unsatisfactory rating.

Article XXIII, Section 4, quoted above, is a restatement of Department of Army, Civilian Personnel Regulation 400 which is applicable to all civilian employees of the Department of Army.

On May 10, 1973, Norman Fulkerson, a civilian employee of the Agency, received a satisfactory rating from his supervisor, Forrest Waggoner. Thereafter, on June 14, 1973, Fulkerson, who was not satisfied with the rating, filed an appeal of his rating through the medium of Article XXIII of the contract, i.e., ad hoc committee. Subsequently, on June 28, 1973, he withdrew his appeal under Article XXIII but continued, however, to pursue his complaint relative to his evaluation through the medium of the grievance procedure, Article XXXIII. Although not clear from the record, Fulkerson's grievance which was being processed by AFGE eventually reached step 4 of the grievance procedure, submission to arbitration.

On August 16, 1973, Colonel Penrod, Commanding Officer of the Agency, following review of Fulkerson's grievance, wrote a letter to the chairman of the AFGE Grievance Committee wherein he cited the provisions of Articles XXIII and XXXIII of the contract and concluded that the matter of Fulkerson's satisfactory appraisal was not subject to the grievance procedure. Thereafter, representatives of the AFGE and Colonel Penrod exchanged a number of letters concerning Fulkerson's appraisal. In the aforementioned letters the AFGE requested submission of the matter to arbitration and the Agency, through Colonel Penrod, refused to take such action pointing out that submission of the matter to arbitration would be both a violation of the contract and applicable Regulations.

DISCUSSION AND CONCLUSIONS

It is well settled that an agency's refusal, predicated solely on its own unilateral interpretation of contract provisions, to submit a grievance to arbitration pursuant to the terms of a negotiated grievance procedure is violative of

Sections 19(a)(1) and (6) of the Order. 1/ In reaching this conclusion the Assistant Secretary has found that such action constitutes a unilateral modification of the contract since it renders useless the bi-laterally established grievance and arbitration machinery, evidences to the rank and file employees the futility of joining a union and consequently interferes with the rights of employees established under Section 1(a) of the Order.

In the above cited cases, as well as others, the determination has always turned on the fact that the refusal to submit the grievance to arbitration was predicated solely on the agency's determination that its interpretation of the contractual terms was the correct one and that therefore any further decision by an arbitrator would be superfluous. In no case did the agency's refusal turn on specific contract language excluding the matter or matters in dispute from the negotiated grievance procedure.

While in the instant case the parties have agreed to a contract containing a grievance procedure, the fourth step of which being arbitration, applicable to the resolution of complaints involving the interpretation and application of the contract, they have also agreed to another separate and exclusive appeals procedure in the area of "performance evaluations". By the very terms of this latter procedure contained in Article XXIII, Section 4(1), an employee being dissatisfied with his "satisfactory rating" may have such rating reviewed "by a local ad hoc Board of Review or a Statutory Performance Rating Board of Review". Only in the case of an "unsatisfactory rating" may an employee elect to utilize, among other avenues of appeal, the grievance procedures set forth in Article XXXIII of the contract.

In view of the foregoing contractual provision, it is clear that the processing of any grievance relating to a "satisfactory rating" is to be solely through the medium of the ad hoc Board of Review or a Statutory Performance Rating Board of Review. Had the intent been otherwise there


1/ Puget Sound Naval Shipyard, Dept. of the Navy, Bremerton, Washington A/SLMR No. 332; Norfolk Naval Shipyard, A/SLMR No. 290; Long Beach Naval Shipyard A/SLMR No. 154.

would have been no necessity for making the distinction between the appeals available to the different types of ratings. 2/

Accordingly, in the absence of any evidence, whatsoever, indicating a contrary intent from a literal reading of the words contained in Article XXIII, it cannot be said that the Agency's action in refusing to accede to the Union's request for arbitration under the circumstances here disclosed amounted to a unilateral change in a condition of employment, in violation of Section 19(a)(6) of the Order. 3/

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

DATED: September 12, 1974
Washington, D. C.

- 2/ In this connection it is noted that Article XXIII of the contract is a restatement of Department of the Army Civilian Personnel Regulation 400 which is applicable to all Army installation and therefore a "non-negotiable item". Cf. United Federation of College Teachers, Local 1460 and the U.S. Marine Academy, FLRC No. 71A-15.
- 3/ Had the Union's request for arbitration concerned an interpretation of Articles XXIII and XXXIII of the contract, a contrary conclusion might well have been justified. However, I do not find the Union's request to be couched in such terms.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
SOUTHERN REGION
A/SLMR No. 456

U. S. DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
SOUTHERN REGION 1/

Activity

and

Case No. 40-5476(RO)

The Petitioner, National Federation of Federal Employees, Local 1735, (NFFE) sought an election in a unit of all professional and non-professional employees of the Electronic Engineering Branch, Airway Facilities Division of the Federal Aviation Administration's Southern Region. The Activity contested the appropriateness of the unit sought.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1735

Petitioner

DECISION AND ORDER

The Assistant Secretary determined that the proposed unit was not appropriate for the purpose of exclusive recognition. He noted particularly that the accomplishment of the mission of the Airway Facilities Division is dependent upon the interaction and cooperation of the various Regional Office sub-elements of the Division and that each, including the Electronic Engineering Branch, performs a necessary part of an integrated work process. Further, he found that the job classifications of Electronic Engineering Branch personnel are not unique to that particular sub-element but generally are common throughout the Division and that there have been employee transfers from both the Regional Office and field components of the Electronic Engineering Branch into the other sub-elements of the Division. Also, the Assistant Secretary noted that all personnel services, including the maintenance of personnel records, for all employees of the Airway Facilities Division are provided by the Manpower Division of the Southern Region.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Leonard L. Garofolo. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

Under these circumstances, the Assistant Secretary concluded that the employees sought by the NFFE did not possess a clear and identifiable community of interest separate and distinct from certain other employees of the Activity and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, he ordered that the petition be dismissed.

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, the National Federation of Federal Employees, Local 1735, herein called NFFE, seeks an election in a unit of all professional and nonprofessional employees of the Electronic Engineering Branch, Airway Facilities Division, Southern Region, excluding management officials; employees engaged in Federal personnel work in other than a purely clerical capacity, and guards and supervisors as defined in Executive Order 11491, as amended. 2/

1/ The name of the Activity appears as amended at the hearing.

2/ The unit description appears as amended at the hearing.

The Activity contends that the petitioned for unit is inappropriate. In this regard, the record reveals that there is no history of bargaining with respect to the claimed unit or other Airway Facilities Division personnel employed at the Activity's Regional Office.

The evidence establishes that the Airway Facilities Division is one of five major operating divisions of the Southern Region of the Federal Aviation Administration. The Division has the total responsibility for the engineering, installation, modernization, and maintenance of the electronic aids in the Region, including communication, radar, and navigational aids. At the Regional Office in Atlanta, Georgia, the Airway Facilities Division consists of two staff components and four branches, all of which report directly to the Chief of the Division. 3/ At the field level, the Division has 17 Sectors which report directly to the Chief of the Division, Field Maintenance Parties assigned to the Environmental Operations Section of the Maintenance Operations Branch, and two Category IV F and E Field Staffs, one of which is assigned to the Electronic Engineering Branch and the other to the Environmental Engineering Branch.

The record reveals that in the process of accomplishing its mission, the Airway Facilities Division at the Regional Office level performs a number of tasks in response to each requirement to facilitate an air traffic control job or function. These tasks include making cost estimates, planning, funding, scheduling, engineering hardware, correlating the use of frequencies, engineering plant facilities, writing specifications, developing maintenance programs, and evaluation. The Electronic Engineering Branch is responsible primarily for the "engineering hardware" part of the task series. The evidence establishes that the Branch is part of an integrated work operation or planning and program cycle and performs its function by means of close, daily coordination with the other staffs and branches of the Division at the Regional Office. 4/

Most of the personnel of the Airway Facilities Division at the Regional Office, including those in the Electronic Engineering Branch, are engineers and a majority of these are Electronic Engineers, GS-0855. With respect to the Category IV F and E Field Staff assigned to the

3/ These are the Evaluation Staff, the Frequency Management and Leased Communications Staff, the Program and Planning Branch, the Electronic Engineering Branch, the Environmental Engineering Branch, and the Maintenance Operations Branch.

4/ Coordination between the Division sub-elements begins at the Branch Chief level and extends down to the project engineers who, in the Electronic Engineering Branch, constitute approximately 25 percent of the Branch personnel located at the Regional Office.

Electronic Engineering Branch, the record indicates that it is composed of Electronic Engineers, GS-0855, and Technicians, GS-0856. The duties of the Field Staff constitute the "establishment of the facilities" portion of the Electronic Engineering Branch's functions and consist totally of the physical installation and modification of electronic hardware throughout the Region. 5/ Although a number of engineers from the Field Staff have been promoted and transferred into the Regional Office, the majority of these have been promoted into sub-elements of the Airway Facilities Division other than the Electronic Engineering Branch. Further, it appears that office engineers of the Electronic Engineering Branch have had temporary and permanent transfers into other Regional Office sub-elements of the Airway Facilities Division.

According to record evidence, the Manpower Division of the Southern Region maintains all personnel records and provides the full line of personnel services for the Airway Facilities Division. The record discloses that all engineer personnel in the Airway Facilities Division, whether stationed at the Regional Office or in the field, share common personnel policies, practices, and procedures. In this connection, all engineer personnel are subject to the same reduction in force procedures, the same agency grievance procedure, the same leave policy, the same promotion policies, and the same area of consideration for promotion opportunities.

Based on the foregoing, I find that the unit sought herein by the NFFE is not appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. In this regard, it was noted particularly that the accomplishment of the mission of the Airway Facilities Division is dependent upon the interaction and cooperation of the various Regional Office sub-elements of the Division and that each component, including the Electronic Engineering Branch, performs a necessary part of the integrated work process. Further, the job classifications of the personnel within the Electronic Engineering Branch are not unique to that particular sub-element but generally are common throughout the Division. Moreover, there have been employee transfers from both the Regional Office and field components of the Electronic Engineering Branch into the other sub-elements of the Division. And, as noted above, the evidence establishes that all personnel services, including the maintenance of personnel records for all employees of the Division, are provided by the Manpower Division of the Southern Region.


5/ The record reveals that field personnel assigned to the Electronic Engineering Branch deal directly with the other Branch personnel and have virtually no daily work interaction or coordination with other sub-elements of the Division.

Under all of these circumstances, I find that the employees of the Electronic Engineering Branch do not share a clear and identifiable community of interest separate and distinct from certain other employees of the Activity and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the NFFE's petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-5476(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 26, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION (NASA),
WASHINGTON, D. C.

and

LYNDON B. JOHNSON SPACE CENTER (NASA),
HOUSTON, TEXAS
A/SLMR No. 457

This case involved a complaint filed by the American Federation of Government Employees, Local Union 2284, AFL-CIO (Complainant) against the Respondents, National Aeronautics and Space Administration (NASA), Washington, D.C. (Agency) and Lyndon B. Johnson Space Center (NASA), Houston, Texas (Activity) alleging violations of Section 19(a)(1) and (6) of the Order. The case was transferred to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations after the parties submitted a stipulation of facts and exhibits to the Assistant Regional Director. Specifically, the complaint alleged that the Respondents violated Section 19(a)(1) and (6) by the Agency's Assistant Administrator for Equal Opportunity Programs holding official meetings with several groups of employees in bargaining units represented by the Complainant without giving notification to the exclusive representative, and by denying the Complainant the right to have observers present at these meetings.

The Assistant Secretary found that the Complainant's rights as exclusive representative are based on the exclusive recognition accorded it by the Activity, and that under these circumstances, the Respondent Agency was not obligated to meet and confer with the Complainant pursuant to Section 11(a) of the Order. Further, he concluded that the Respondent Activity did not act in derogation of its bargaining obligations under the Order. In this regard, he noted that the evidence established that no management official of the Respondent Activity exercised any supervision or control over the Respondent Agency's representative who conducted the meetings in question. Further, there was no evidence that the Respondent Activity refused to meet and confer with the Complainant concerning any matters involving personnel policies or practices under its control or direction. Based on these considerations, the Assistant Secretary found that the Respondent Activity did not violate Section 19(a)(1) and (6) of the Order. Moreover, he found that because the Respondent Agency was not a party to a bargaining relationship with the Complainant, it was not in violation of 19(a)(6) of the Order.

While the Assistant Secretary found that the Respondent Agency did not violate Section 19(a)(6) of the Order, he found that such a finding does not preclude his finding an independent 19(a)(1) violation which was not

premiered on the existence of a bargaining relationship between the Respondent Agency and the Complainant. The Assistant Secretary found that the Respondent Agency's conducting of meetings or interviews with unit employees in which their terms and conditions of employment were discussed, while refusing the request of the exclusive representative of these employees to participate in such discussions, ran counter to the purposes and policies of the Order with regard to the obligation owed to an exclusive representative as the spokesman of the employees it represents. Further, the Assistant Secretary found such conduct to be inconsistent with the policy set forth in Section 1(a) of the Order concerning an agency head's obligation to assure that employees' rights are protected. Under all of the circumstances, the Assistant Secretary found that the Respondent Agency's conduct constituted an undermining of the status of the exclusive representative selected by the employees of the Respondent Agency. Accordingly, he found that the Respondent Agency's conduct resulted in improper interference with, restraint, or coercion of unit employees in the exercise of rights assured by the Order in violation of Section 19(a)(1) and he, therefore, ordered the Respondent Agency to cease and desist from such conduct and to take certain affirmative actions.

A/SLMR No. 457

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION (NASA),
WASHINGTON, D.C.

Respondent

and

Case No. 63-4826(CA)

LYNDON B. JOHNSON SPACE CENTER (NASA),
HOUSTON, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION 2284, AFL-CIO

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Acting Assistant Regional Director James W. Higgins' Order Transferring Case to the Assistant Secretary of Labor pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The instant complaint, as amended, alleges that the Respondents violated Section 19(a)(1) and (6) of the Executive Order by holding official meetings with several groups of employees in bargaining units represented by the Complainant without giving notification to the exclusive representative, and by denying the Complainant the right to have observers present at these meetings.

The Respondent Agency takes the position that the Complainant's rights as an exclusive representative are based on exclusive recognition accorded it by the Activity rather than by the Agency. Thus, it asserts that the Agency has no obligation to meet and confer with the Complainant. In addition, the Respondent Agency contends that the meetings involved herein

were part of program evaluation and merely involved a factfinding mission rather than formal discussions of proposed changes in personnel policies or practices. Finally, it argues that the alleged violation of Section 19(a)(1) was not raised during the 30 day pre-complaint charge period and, therefore, it was deprived of the opportunity to resolve this alleged violation informally. The Respondent Activity contends that it did not violate Section 19(a)(1) and (6) because the meetings involved herein were not within its authority or discretion. Furthermore, it argues that through frequent meetings and consultation with the Complainant, which are still taking place, it met its obligation to consult and negotiate.

The facts, as set forth in the parties' stipulation, are essentially as follows:

The Respondent Agency has accorded national consultation rights to the National Office of the American Federation of Government Employees, and the Respondent Activity accorded exclusive recognition to the Complainant in three separate bargaining units at the Activity.

On April 16, 1973, Dr. Dudley G. McConnell was appointed to the position of NASA Assistant Administrator for Equal Opportunity Programs, which position he assumed on or about July 1, 1973. In order to assess the state of the Respondent Agency's Equal Employment Opportunity (EEO) Programs, Dr. McConnell decided that it was necessary to visit various NASA Centers, including the Respondent Activity, where he could meet with the EEO Officers and groups of employees.

On or about August 30, 1973, Dr. McConnell visited the Respondent Activity. At his request, the Activity arranged three meetings or interviews between Dr. McConnell and various employees or employee groups, without regard as to whether they were members of bargaining units. These meetings or interviews were held with black, Spanish surname and women employees of the Respondent Activity. All of the employees with whom meetings or interviews were arranged were in one of the bargaining units for which the Complainant had been accorded exclusive recognition. In addition to the above meetings, separate meetings or interviews were held with members of community groups and representatives of the Complainant. No management official of the Respondent Activity attended these meetings, nor did the Respondent Activity exercise any supervision or control over Dr. McConnell. At these meetings, Dr. McConnell solicited the opinions of the employees with respect to the EEO Program of the Respondent Agency and listened to their suggestions for EEO Program additions and modifications. No commitments were made to the employees.

Upon learning of the scheduled meetings, by letter dated August 21, 1973, the Complainant requested that it "be allowed to have an observer present at each of the meetings of employee groups" and that it be granted a separate meeting with Dr. McConnell in order to give its "thoughts" relative to the EEO Program. On August 27, 1973, the Respondent Activity's

Personnel Officer responded by letter and, pursuant to directions from the Respondent Agency, granted the Complainant's request to meet separately with Dr. McConnell, but denied the "specific requests for union participation in the meetings" The letter stated further that, "It has been determined that there is no basis for authorizing a union observer at each of the group meetings."

CONCLUSIONS

In my view, both the Respondent Agency and the Respondent Activity are correct in their contention that the Complainant's rights as exclusive representative are based on the exclusive recognition accorded it by the Respondent Activity and that the Respondent Agency, under these circumstances, was not obligated to meet and confer with the Complainant pursuant to Section 11(a) of the Order. Thus, the obligation to meet and confer under the Order applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive recognition. As noted above, the evidence herein establishes that the Respondent Activity and not the Respondent Agency accorded exclusive recognition to the Complainant. And, under the circumstances of this case, I find that the Respondent Activity did not act in derogation of its bargaining obligations under the Order. Thus, the evidence establishes that no management official of the Respondent Activity exercised any supervision or control over the activities of Dr. McConnell, that the Respondent Agency's representative called for and directed the meetings or interviews in question, and that representatives of the Respondent Activity did not attend any of the meetings. Further, there was no evidence that the Respondent Activity refused to meet and confer with the Complainant concerning any matters involving personnel policies or practices under its control or direction, including matters relating to the EEO Program. Based on these considerations, I find that the Respondent Activity did not violate Section 19(a)(1) and (6) of the Order. Moreover, I find that the Respondent Agency, which was not party to a bargaining relationship with the Complainant, could not be in violation of Section 19(a)(6) of the Order based on Dr. McConnell's meetings with such employees.

However, while I find that the Respondent Agency did not violate Section 19(a)(6) of the Order, in my view, such finding does not preclude a finding of an independent 19(a)(1) violation, which is not premised on the existence of an exclusive bargaining relationship between the Respondent Agency and the Complainant. 1/ As stated in previous decisions,

1/ As noted above, the Respondents contend that the Section 19(a)(1) portion of the instant complaint should be dismissed because the Complainant did not raise this alleged violation of the Order during the prescribed 30 day pre-complaint charge period. In my view, the pre-complaint charge in this matter was sufficiently clear to put the Respondents on notice of the allegation involved herein. Accordingly, I reject the Respondents' Motion to Dismiss the Section 19(a)(1) allegation of the complaint. See, in this regard, Report on a Ruling of the Assistant Secretary, No. 33.

once an exclusive bargaining representative has been designated by a majority of the employees in an appropriate unit, the obligation of the agency or activity which has accorded recognition is to deal with such representative concerning grievances, personnel policies and practices, or other matters affecting working conditions of all unit employees. Such obligation is exclusive and carries with it the correlative duty not to treat with others. 2/ Further, Section 1(a) of the Order states, in part, that "The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization." It is clear from the parties' stipulation that the Respondent Activity had accorded exclusive recognition to the Complainant and that the Respondent Agency was aware of this bargaining relationship at the time of the denial of the request that the Complainant's representative be permitted to participate in the Respondent Agency's EEO discussions with unit employees. Nevertheless, the Respondent Agency, through its representative, Dr. McConnell, although conducting meetings or interviews with unit employees in which certain of their terms and conditions of employment were discussed, refused the request of the exclusive representative of these employees to participate in such discussions. In my view, by these actions, the Respondent Agency implicitly suggested to unit employees that Agency management could deal directly with them concerning their terms and conditions of employment and, in effect, interfered with the existing exclusive bargaining relationship. I find that such conduct by the Respondent Agency is inconsistent with, and in derogation of, the exclusive bargaining relationship described above between the Respondent Activity and the Complainant, runs counter to the purposes and policies of the Order with regard to the obligation owed to an exclusive representative as the spokesman of the employees it represents, and is inconsistent with the policy set forth in the Order concerning an agency head's obligation to assure that employees' rights are protected.

Under the circumstances, I conclude that the Respondent Agency's conduct constituted an undermining of the status of the exclusive representative selected by the employees of the Respondent Activity. Such conduct, in my view, resulted in improper interference with, restraint, or coercion of unit employees by the Respondent Agency in the exercise of their rights assured under the Order in violation of Section 19(a)(1).3/

2/ See e.g., Veterans Administration, Veterans Administration Hospital, Muskogee, Oklahoma, A/SLMR No. 301, and United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42.

3/ In reaching this decision it was noted that Section 19(a) of the Order sets forth violations of "Agency management" which is defined in Section 2(f) of the Order as "the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency on any matters relating to the implementation of the agency labor-management relations program established under this Order."

REMEDY

Having found that the Respondent Agency has engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I shall order that the Respondent Agency cease and desist therefrom and take specific affirmative actions, as set forth below, designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the National Aeronautics and Space Administration, Washington, D.C. shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing unit employees at the Lyndon B. Johnson Space Center (NASA) who are represented exclusively by the American Federation of Government Employees, Local Union 2284, AFL-CIO, by dealing directly with such employees with respect to personnel policies and practices, or other matters affecting their general working conditions.

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

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order.

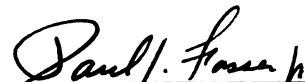
(a) Upon request, permit the American Federation of Government Employees, Local Union 2284, AFL-CIO, the exclusive representative of employees of the Lyndon B. Johnson Space Center (NASA), to participate in meetings or interviews with unit employees with regard to personnel policies and practices, or other matters affecting their general working conditions.

(b) Post at the Lyndon B. Johnson Space Center (NASA), Houston, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Administrator of the National Aeronautics and Space Administration and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees at the Lyndon B. Johnson Space Center (NASA), Houston, Texas, are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violation of Section 19(a)(1) and (6) against the Respondent Activity and violation of Section 19(a)(6) against the Respondent Agency be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 26, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX A
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, AS AMENDED
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce unit employees of the Lyndon B. Johnson Space Center (NASA), Houston, Texas, who are represented exclusively by the American Federation of Government Employees, Local Union 2284, AFL-CIO, by dealing directly with such employees with respect to personnel policies and practices, or other matters affecting their general working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, permit the American Federation of Government Employees, Local Union 2284, AFL-CIO, to participate in meetings or interviews with unit employees at the Lyndon B. Johnson Space Center (NASA), Houston, Texas, regarding personnel policies and practices, or other matters affecting their general working conditions.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER
OF THE ASSISTANT SECRETARY

PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF AGRICULTURE,
OFFICE OF AUTOMATED DATA SYSTEMS,
KANSAS CITY, MISSOURI 1/

DEPARTMENT OF AGRICULTURE, OFFICE OF
AUTOMATED DATA SYSTEMS, ST. LOUIS,
MISSOURI AND KANSAS CITY, MISSOURI
A/SLMR No. 458

Activity

and

Case No. 60-3536(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1633, KANSAS CITY

Petitioner

DEPARTMENT OF AGRICULTURE,
OFFICE OF AUTOMATED DATA SYSTEMS,
ST. LOUIS, MISSOURI 2/

Activity

and

Case No. 62-3935(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3354, ST. LOUIS

Petitioner

SUPPLEMENTAL DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held in Case No. 60-3536(RO). Thereafter, on May 10, 1974, I issued a Decision and Remand, 3/ in which, among other things, I ordered that the case be remanded to the appropriate Assistant Regional Director for the purpose of reopening the record to secure additional evidence concerning the appropriateness of the unit sought. On May 31, 1974, Case No. 60-3536(RO) and a related petition in Case No. 62-3935(RO) were ordered consolidated for hearing by the Assistant

1/ The name of this Activity appears as amended at the hearing.

2/ The name of this Activity appears as amended at the hearing.

3/ A/SLMR No. 387.

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 387 and an order by the Assistant Regional Director consolidating Case No. 62-3935(RO) with Case No. 3536(RO), a subsequent consolidated hearing was held for the purpose of obtaining evidence pertaining to the appropriateness of the units sought by National Federation of Federal Employees, Local 1633 (NFFE) and American Federation of Government Employees, AFL-CIO, Local 3354 (AFGE). The NFFE sought a unit of all employees employed at the Department of Agriculture, Office of Automated Data Systems in Kansas City, Missouri, and the AFGE sought a unit of all employees employed at the St. Louis Computer Center, Office of Automated Data Systems. The Activities contended that the petitioned for units were inappropriate and that the only appropriate unit would be one which included all eligible employees of all of the Automated Data Systems' (ADS) computer centers.

The Assistant Secretary found that neither of the units sought was appropriate for the purpose of exclusive recognition because, in each instance, the claimed employees do not possess a clear and identifiable community of interest separate and apart from the other employees of the ADS computer centers. In this connection, he noted that the computer centers operate under the centralized control of the ADS Director and Assistant Director; the operations of the computer centers are highly integrated; and there is substantial interchange and contact between the employees of the computer centers. Further, he found that the work, skills, training, and education of the ADS employees in all of the computer centers are similar, and all employees of the computer centers operate under the same uniform personnel procedures.

Based on these considerations, the Assistant Secretary found that the separate units proposed by the NFFE and the AFGE do not contain employees who share a clear and identifiable community of interest different from other employees of the ADS. Moreover, he found that if such units were established, they would artificially fragment the ADS and could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, he ordered that both petitions be dismissed.

Regional Director and, on July 10 and 11, 1974, a consolidated hearing was held before Hearing Officer Robert E. Lackland. The Hearing Officer's rulings made at the consolidated hearing are free from prejudicial error and are hereby affirmed. 4/

Upon the entire record in these cases, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activities.
2. In Case No. 60-3536(RO), the NFFE seeks an election in a unit of all employees employed at the Department of Agriculture, Office of Automated Data Systems (ADS) in Kansas City, Missouri. In Case No. 62-3935(RO), the American Federation of Government Employees, AFL-CIO, Local 3354, St. Louis, herein called AFGE, seeks an election in a unit of all General Schedule and Wage Grade employees employed at the St. Louis ADS Computer Center. 5/ The Activities contend that the petitioned for units are inappropriate and that the only appropriate unit would be one which includes all eligible employees of all of the ADS computer centers.

The ADS was established on March 30, 1972, for the purpose of providing a more efficient automated data processing system within the Department of Agriculture to meet management's information needs. Toward this end, the data processing facilities at various Department of Agriculture offices throughout the country were consolidated into an integrated computer network comprised of computer centers under the direction of the newly created ADS. This consolidation involved the computer centers located at Washington, D.C.; New Orleans, Louisiana; Fort Collins, Colorado; Kansas City, Missouri; Minneapolis, Minnesota; and St. Louis, Missouri. 6/ All of the computer centers are tied into an integrated computer network which allows for an even

4/ Petitioner, National Federation of Federal Employees, Local 1633, herein called NFFE, filed a Motion to Dismiss the Activity's objection to the appropriateness of the unit sought in Case No. 60-3536(RO). Noting the disposition herein, the NFFE's Motion is hereby denied.

5/ Both of the claimed units appear as amended at the hearing.

6/ Following the initial hearing in this matter, the ADS officially opened and made operational the Fort Collins, Colorado, Computer Center. The Minneapolis Computer Center, which previously was a branch of the Kansas City Computer Center, was transferred to the Fort Collins Computer Center and now is a branch of that Center. The record reveals that the ADS has nearly completed the phasing out of the Minneapolis Computer Center, with its workload being transferred to Fort Collins and its non-essential employees being transferred to Kansas City and Fort Collins. The ADS also is in the process of phasing out the operation in St. Louis.

distribution of work among the centers and assures sufficient backup support in cases where, because of a large project, one or two centers may not be able to handle the matter, or in the event of an equipment failure at any one of the centers.

The Central Office of the ADS is in Washington, D.C., and includes the Office of the Director and the various branches which assist him in the operation of the ADS computer network. The Director, who is the chief executive officer of the ADS, exercises close control and has the final authority over all aspects of the ADS operation, including all procurements and formal grievances. The Assistant Director of the ADS assists the Director and is responsible directly for the coordination of operational policy and procedures among the computer centers and between the centers and other organizational elements of the ADS. In this connection, the Assistant Director is in constant contact with the computer centers and he meets monthly with the computer center directors.

Each of the computer centers is headed by a computer center director who is responsible for the day-to-day operation of the center. The center director has the authority to initiate all personnel actions and has the final authority over promotions and hiring, GS-11 and below. Further, the center director handles grievances at the informal stages, approves travel, and reviews individual employee performance evaluations. The computer centers are divided into three branches: an Agency Liaison Branch; Computer Resources; and a System Engineering Branch. The work, skills, training and education of the ADS employees in all of the computer centers are similar and, except for minimal training in certain job categories resulting from slightly different or newer equipment, the record reveals that employees of any one unit could step in and perform similar work within any other ADS center.

Because of the highly integrated nature of the ADS, there is substantial interchange between the employees of the various computer centers. In this regard, the evidence establishes that the ADS maintains an extensive cross-training program where employees from one center will go to another for the purpose of specialized training in either new equipment and methods, or in an attempt to correct a deficiency at the center involved. Further, the ADS utilizes a "special teams concept" and joint projects which last from one week to several months and which involve certain employees from different centers being brought together to solve a particular problem. Also, because of the nature of the work and the common problems experienced by the centers, there is frequent contact between the employees of the various centers in order to resolve mutual problems. In the past year, there have been approximately 50 transfers involving center employees, which transfers have been facilitated by the similarity of the jobs at each center.

The ADS has its own Office of Personnel which provides all personnel services for the computer centers in Washington, D.C., Fort Collins, and

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTIONS OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL DEPOSIT INSURANCE CORPORATION
 A/SLMR No. 459

This case arose as a result of a representation petition filed by the American Federation of Government Employees, Local 3488, AFL-CIO (AFGE), seeking a unit of all full-time, permanent employees of the Federal Deposit Insurance Corporation's (FDIC) New York Region. The unit sought would consist of approximately 160 Bank Examiners and 20 clerical employees. The Activity contended that Bank Examiners, GS-11 and above (Commissioned Bank Examiners), are supervisors and should be excluded from the appropriate unit, that clerical employees should be "excluded" from the appropriate unit inasmuch as they do not share a community of interest with Bank Examiners and that a unit consisting of both Bank Examiners and clerical employees would not promote effective dealings and efficiency of agency operations.

The Assistant Secretary found that Bank Examiners and clerical employees do not share a community of interest inasmuch as the two groups have different first-level supervision, work locations and duties, have little or no work contact, do not interchange and have separate areas of consideration in promotions and reductions-in-force. However, the Assistant Secretary found two separate units, one consisting of Bank Examiners and the other consisting of clerical employees, to be appropriate for the purpose of exclusive recognition and, accordingly, he directed elections in these units.

The Assistant Secretary found also that Bank Examiners, GS-11 and above, who are designated as "Commissioned Bank Examiners," were not supervisors within the meaning of Section 2(c) of the Order and, therefore, should be included in the unit of Bank Examiners found appropriate. In this connection, he noted that the Commissioned Bank Examiners, when performing as examiners-in-charge of bank examinations or when directing subordinate examiners in examination of a branch or department of a bank, act within well established guidelines and agency procedures and do not perform supervisory functions. He noted also that Commissioned Bank Examiners fulfilled examiner-in-charge functions only on an irregular and non-continuing basis. Moreover, the Assistant Secretary found that the Commissioned Bank Examiners were not supervisors when they act as training/evaluation team leaders for Bank Examiners, GS-9 and below, as the direction provided by the Commissioned Bank Examiners when acting in this capacity is in the nature of a more experienced employee assisting less experienced employees and that the evidence failed to establish that the input they provide concerning the performance of such employees effectively leads to promotions or is effective for any other purpose.

Minneapolis. The personnel services for the Kansas City, New Orleans, and St. Louis computer centers have been contracted out to other Department of Agriculture agencies under a special delegation. Although these other agencies perform the day-to-day personnel services for the above-named centers, the record reveals that they do so under guidelines established by the ADS Personnel Office and that the ADS Personnel Office, under the ADS Director, has the final authority in the area of labor relations, formal grievances and promotions or hirings above GS-11. The ADS has activity-wide merit promotion, reduction-in-force and equal employment opportunity plans and all center employees have the same fringe benefits and grievance procedures. All job vacancies are announced through the ADS Personnel Office and all vacancies above GS-11 must be approved there. Further, all job vacancies GS-7 and above, which include the majority of the jobs found in the computer centers, are posted on an activity-wide basis.


Under all of the foregoing circumstances, I find that neither of the units sought in the subject cases is appropriate for the purpose of exclusive recognition because in each center the claimed employees do not possess a clear and identifiable community of interest separate and apart from the other employees of the ADS computer centers. Thus, the record reveals, among other things, that all of the computer centers operate under the centralized control of the ADS Director and Assistant Director; the operations of the computer centers are highly integrated; and there is substantial interchange and contact between the employees of the computer centers. Further, the evidence establishes that the work, skills, training, and education of the ADS employees in all of the computer centers are similar, and all center employees operate under the same uniform personnel procedures set up by the ADS Personnel Office which has the final authority in all personnel matters.

Based on these considerations, I find that the separate units proposed herein by the NFFE and the AFGE do not contain employees who share a clear and identifiable community of interest different from other employees of the ADS. Moreover, in my view, such units, if established, would artificially fragment the ADS and could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, as the units sought are inappropriate for the purpose of exclusive recognition, I shall order the petitions herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petitions in Case No. 60-3536(RO) and Case No. 62-3935(RO) be, and they hereby are, dismissed.

Dated, Washington, D.C.
 November 27, 1974


 Paul J. Fasser, Jr., Assistant Secretary of
 Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL DEPOSIT INSURANCE CORPORATION

Activity

and

Case No. 30-5475(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3488, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Adam J. Conti. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the parties, the Assistant Secretary finds:

I. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, Local 3488, AFL-CIO, herein called AFGE, seeks an election in a unit of all full-time permanent employees of the Federal Deposit Insurance Corporation's (FDIC) New York Region, excluding management officials, supervisors, guards, and employees engaged in Federal personnel work in other than a purely clerical capacity. 1/ The Activity contends that the proposed unit is inappropriate. In this regard, it asserts that clerical employees should be "excluded" from the bargaining unit inasmuch as they do not share a community of interest with the other claimed employees and that a unit consisting of Bank Examiners and clerical employees would not promote effective dealings and efficiency of agency operations. The Activity further contends that Bank Examiners, GS-11

1/ During the hearing, the parties stipulated that the Activity's Regional Director, two Assistant Regional Directors, three Examiners-in-Charge of the Rochester, Albany and Puerto Rico Field Offices, and the supervisor of the typing pool in the Regional Office were supervisors, and that the Regional Director's secretary was a confidential employee. Accordingly, it was contended that these employees should be excluded from any unit found appropriate. As there is no evidence in the record to the contrary, I shall exclude these employees from the units found appropriate herein.

and above, are supervisors within the meaning of Section 2(c) of the Order and, thus, should be excluded from any unit found appropriate. Also, it takes the position that Bank Examiners should be found to be professional employees.

The FDIC is engaged in bank examination and supervision activities. The New York Region, which encompasses New York, New Jersey, Puerto Rico and the Virgin Islands, is headquartered in New York City and has Field Offices in Rochester and Albany, New York, and in Puerto Rico. The Region has approximately 180 nonsupervisory employees, of whom approximately 160 are Bank Examiners and 20 are clerical employees.

The record reveals that Bank Examiners spend virtually all of their working time in banks, away from the Regional and Field Offices, performing duties such as counting cash, reconciling correspondent bank accounts, preparing schedules, and examining loan and investment portfolios. Bank Examiners generally are required to have a college degree and participate in specialized on-the-job and classroom training during their careers. In contrast, clerical employees spend all of their working time in the Regional Office, do not perform duties similar to those performed by Bank Examiners, have little or no day-to-day contact with Bank Examiners, and most have as their first level of supervision the supervisor of the typing pool.

Under all of the circumstances, I find that the Activity's Bank Examiners do not share a community of interest with its clerical employees, and that, as contended by the Activity, a unit consisting of both classifications would not promote effective dealings and efficiency of agency operations. Thus, the two groups have different first-level supervision, work locations and duties, have little or no work contact, do not inter-change and have separate areas of consideration in promotions and reductions-in-force. I find, however, that a separate Regionwide unit of clerical employees, and a separate Regionwide unit of Bank Examiners, would encompass employees who share a community of interest and that such units would promote effective dealings and efficiency of agency operations. Accordingly, I find that such units are appropriate for the purpose of exclusive recognition and I shall direct a separate election in each under the circumstances set forth below. 2/

As noted above, the Activity asserts that all Bank Examiners, GS-11 and above, are supervisors and should be excluded from any unit found appropriate. In this regard, the record reveals that Bank Examiners generally are hired at the GS-5 level and, after being employed a certain length of time, are promoted to the GS-7 and 9 levels. After having been employed an additional length of time and passing a promotional evaluation examination, they are promoted to the GS-11 level, at which point they are designated as "Commissioned Bank Examiners." 3/ The Activity maintains

2/ In view of this disposition, I find it unnecessary to determine whether or not Bank Examiners are professional employees within the meaning of the Order.

3/ The Activity employs approximately 70-75 Commissioned Bank Examiners, ranging in grade from GS-11 through GS-14.

that Commissioned Bank Examiners are supervisors inasmuch as, on occasion, they may be designated to act as the examiners-in-charge of bank examinations, they direct the duties of subordinate examiners when placed in charge of the examination of a branch or department of a bank, and they may act as leaders of training/evaluation teams.

The evidence establishes that the duties performed by a Commissioned Bank Examiner, when acting as the examiner-in-charge of a bank examination or when placed in charge of the examination of a bank branch or department, are within well established guidelines. Thus, the areas to be examined during a bank examination are set forth in a report of investigation, and the procedures to be utilized in conducting the examination are established by the FDIC manual. The evidence further establishes that Commissioned Bank Examiners, when acting as examiners-in-charge, do not, except in isolated instances, approve leave, do not sign time and attendance cards, do not approve overtime, have no authority to hire, transfer, reassign or discharge, and do not initiate or approve promotions. Moreover, the record reveals that the Commissioned Bank Examiners fulfill such examiner-in-charge duties on an irregular and non-continuing basis. Thus, a Commissioned Bank Examiner may act as an examiner-in-charge in one bank examination, having in his group other Bank Examiners in higher or lower grades, but on the next examination he may serve in a group under another Commissioned Bank Examiner of a higher or lower grade. Accordingly, the record reflects Commissioned Bank Examiners, as a group, do not serve as examiners-in-charge on a regular, continuing basis.

With respect to the Activity's contention that Commissioned Bank Examiners are supervisors inasmuch as they may act as training/evaluation team leaders, the record discloses that, in addition to their other duties, approximately one-third of the Commissioned Bank Examiners, for varying periods of time, lead training/evaluation teams consisting of three to five Bank Examiners, GS-9 and below, coordinating on-the-job training and providing periodic input for performance evaluations. 4/ The record reveals, however, that the direction given by the Commissioned Bank Examiner to the members of a particular training/evaluation team is in the nature of a more experienced employee assisting a less experienced employee as distinguished from supervision. 5/ While the Commissioned Bank Examiners, in many instances, provide input concerning the performance of members of the training/evaluation teams to the Regional Director in the form of quarterly letters and semi-annual forms, the evidence fails to establish that such input effectively leads to promotions or is effective for any other purpose. 6/

4/ Written performance appraisals are signed by the Regional Director, rather than by Commissioned Bank Examiners.

5/ Cf. Department of the Navy, United States Naval Station, Adak, Alaska, A/SLMR No. 321 and Arizona National Guard, Air National Guard, Sky Harbor Airport, A/SLMR No. 436.

6/ Cf. Federal Aviation Administration, National Capital Airports, A/SLMR No. 405.

Based on the foregoing, I find that the evidence is insufficient to establish that supervisory authority has been vested in the Activity's Commissioned Bank Examiners, inasmuch as they do not hire, discharge, or reassign employees and when they act as examiners-in-charge, which is not required on a regular and continuing basis, such direction as they give to other employees is routine in nature, is within established guidelines and is dictated by established procedures. Nor does the evidence establish that they promote or effectively evaluate other employees. In these circumstances, I find that Commissioned Bank Examiners, GS-11 and above, are not supervisors within the meaning of Section 2(c) of the Order, and that they should be included in the unit of Bank Examiners found appropriate.

Accordingly, I find that the following employees constitute separate appropriate units for the purpose of exclusive recognition under Executive Order 11491, as amended:

All Bank Examiners employed by the New York Region of the Federal Deposit Insurance Corporation, excluding clerical employees, the Regional Director, Assistant Regional Directors, the Examiners-in-Charge of the Rochester, Albany and Puerto Rico Field Offices, the supervisor of the typing pool in the Regional Office, the secretary to the Regional Director, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

All clerical employees employed by the New York Region of the Federal Deposit Insurance Corporation, excluding Bank Examiners, the Regional Director, the Assistant Regional Directors, the Examiners-in-Charge of the Rochester, Albany and Puerto Rico Field Offices, the supervisor of the typing pool in the Regional Office, the secretary to the Regional Director, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTIONS 7/

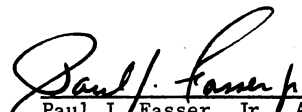
Elections by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not

7/ The record in the subject case is unclear as to whether the finding, that the employees in the petitioned for unit constitute two separate, appropriate units would render inadequate the showing of interest in either of the units found appropriate. Accordingly, before proceeding to election in the subject case, the appropriate Area
(Continued)

later than 60 days from the date upon which the appropriate Area Administrator issues his determination with respect to any intervention in this matter. The appropriate Area Administrator shall supervise the elections, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 3488, AFL-CIO, or by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis.

Because the above Direction of Elections is in two units substantially different from the one sought by the AFGE, I shall permit it to withdraw its petition if it does not desire to proceed to elections in the units found appropriate in the subject case upon notice to the appropriate Area Administrator within 10 days of the issuance of this Decision. If the AFGE desires to proceed to election (and if its showing of interest is adequate), because the units found appropriate differ substantially from that it originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices normally are posted affecting the employees in the units I have herein found appropriate. Such Notices shall conform in all respects to the requirements of 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot in the election among the employees in the units found appropriate.

Dated, Washington, D.C.
November 27, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

7/ Administrator is directed to reevaluate the showing of interest. If he determines that the showing of interest is inadequate in either unit, an election should not be conducted in that unit.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. GEOLOGICAL SURVEY,
DEPARTMENT OF THE INTERIOR,
ROLLA, MISSOURI
A/SLMR No. 460

Pursuant to the Decision and Remand of the Assistant Secretary in A/SLMR No. 413, a subsequent hearing was held in this case for the purpose of adducing evidence on the supervisory status of the Petitioner at the time he filed the instant decertification petition. Local 934, National Federation of Federal Employees (NFFE), contended that at all times material to drawing up, circulating and arranging the petition, the Petitioner was a supervisor. The NFFE's contention was based upon the fact that during the period September 1, 1973, to October 24, 1973, the Petitioner had engaged in "compilation review", which the NFFE contended was a supervisory function.

The Assistant Secretary found that the Petitioner was not a supervisor within the meaning of the Order and, therefore, was eligible to file the decertification petition. He based his finding on the fact that when the Petitioner was engaged in compilation review, he did not exercise any of the duties attributed to a supervisor as enumerated in Section 2(c) of the Executive Order and that, in fact, the job amounted merely to a technical review under the overall supervision of his Section Chief.

Accordingly, pursuant to the Assistant Secretary's finding in A/SLMR No. 413, that the decertification petition had been timely filed and the above finding that the Petitioner was eligible to file the decertification petition, the Assistant Secretary ordered that an election be held in the unit described in the petition, which he found to be appropriate for the purpose of exclusive recognition.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. GEOLOGICAL SURVEY,
DEPARTMENT OF THE INTERIOR,
ROLLA, MISSOURI

Activity

and

Case No. 62-3832(DR)

IRVIN J. HAWKINS

Petitioner

and

LOCAL 934, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Intervenor

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held in the subject case. Thereafter, on July 11, 1974, I issued a Decision and Remand 1/, in which, among other things, I ordered that the subject case be remanded to the appropriate Assistant Regional Director for the purpose of reopening the hearing to obtain evidence on the Petitioner's supervisory status at the time he filed the instant decertification petition. Pursuant to the above-noted Decision and Remand, on August 28 and 29, 1974, a hearing was held before Hearing Officer Clarence E. Teeters. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including those facts developed at the initial and reopened hearings, I find:

The Petitioner, Irvin J. Hawkins, seeks the decertification of Local 934, National Federation of Federal Employees, herein called the Intervenor, which currently represents exclusively a unit of all General Schedule and Wage Board employees, including those in printing and lithographic positions, employed by the U.S. Geological Survey, Department of the Interior, Rolla, Missouri.

1/ A/SLMR No. 413.

The Intervenor contended that the petition should be dismissed on the grounds that there existed an agreement bar to the election, and that, at all times material "to drawing up, circulating and arranging the petition," the Petitioner was a supervisor. 2/ It also contended that the Petitioner's activity prior to September 1, 1973, would "give the impression to other employees that he was a supervisor." The Petitioner, on the other hand, asserted that during the period between September 1, 1973, and October 24, 1973, in which he was drawing up, circulating and arranging the petition, he did not exercise any supervisory authority. The Activity was in agreement with the Petitioner's position and noted, in this regard, that in the original election held in 1971 the Intervenor did not raise a question as to the supervisory status of the Petitioner and was doing so in this instance only because the Petitioner had filed a decertification petition.

The Petitioner is one of the 30 employees found in the Activity's Branch of Photogrammetry. He is one of the three advanced level GS-11 Cartographic Technicians in one of the two units of compilation within the Branch. The basic function performed by the Petitioner and the other Cartographic Technicians is to transfer information from aerial photographs, along with other information supplied by field personnel, onto a compilation sheet or "flimsy", which is the basis for the production of maps. Due to the need for a high degree of accuracy in these maps, a compilation review is done on each compilation sheet. Compilation review is the prime responsibility of the Section Chief who receives additional help from the first-line supervisors. When, because of workload, the Section Chief is unable to handle the compilation review of all the compilation sheets, he will assign this work to his GS-11 and, in some cases, his GS-9 Senior Cartographic Technicians who will perform the required compilation review under the supervision of the Section Chief. When the Senior Technician has finished the review and recorded any errors to be corrected or details that were omitted, he brings the compilation sheet to the Section Chief who checks it for errors. Once this is accomplished, the Section Chief returns it to the supervisor of the employee involved to make the necessary corrections or additions.

When handling compilation review, the Senior Technician exercises no control or authority over the employee or employees whose work he is reviewing and, as the compilation review function is strictly technical in nature, he does not make any evaluation of an employee or employees' work

2/ In A/SLMR No. 413, it was found that the Petitioner had timely filed his petition during the 60-90 day open period of the negotiated agreement between the Intervenor and the Activity and, accordingly, that the negotiated agreement did not bar an election among the employees covered by the instant decertification petition. It also was found that the Hearing Officer erred in not permitting the introduction of evidence pertaining to the alleged supervisory status of the Petitioner and the case was remanded to secure evidence on this issue.

performance. In this regard, the Activity has various codes which it uses to keep track of time usage and, when the Senior Technician is performing compilation review, his work is charged to a catch-all code as opposed to a supervisory code.

The Intervenor, in asserting that the Petitioner is a supervisor, relies particularly on the fact that during the period September 16 to September 30, 1973, the Petitioner spent 20 hours performing compilation review. The Intervenor did not raise or present any further evidence to support its allegation that the Petitioner was a supervisor. As the record clearly indicates that when a Senior Technician is performing compilation review, he does not exercise any of the duties attributed to a supervisor as enumerated in Section 2(c) of the Executive Order 3/ and, in fact, his job amounts merely to a technical review under the overall supervision of his Section Chief, I find that the fact that the Petitioner engaged in compilation review during the period September 1, 1973 to October 24, 1973, did not make him a supervisor within the meaning of the Order and disqualify him from filing the decertification petition in this matter. Accordingly, as I have found that the decertification petition was timely filed and that the Petitioner was eligible to file said petition, I shall direct that an election be conducted in the following unit, described in the petition, which I find to constitute an appropriate unit for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule and Wage Board employees, including those in printing and lithographic positions, employed by the U.S. Geological Survey, Department of the Interior, Rolla, Missouri, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations.

3/ Under Section 2(c) of the Order, a supervisor is defined as, "an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by Local 934, National Federation of Federal Employees.

Dated, Washington, D.C.
November 27, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
SAN FRANCISCO, CALIFORNIA,
DEFENSE CONTRACT ADMINISTRATION
SERVICES DISTRICT (DCASD),
SALT LAKE CITY, UTAH
A/SLMR No. 461

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION SERVICES
REGION (DCASR),
SAN FRANCISCO, CALIFORNIA,
DEFENSE CONTRACT ADMINISTRATION SERVICES
DISTRICT (DCASD),
SALT LAKE CITY, UTAH 1/

Activity

and

Case No. 61-2341(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3540, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

This case arose as the result of a petition filed by the American Federation of Government Employees, Local 3540, AFL-CIO, seeking a unit of all professional and nonprofessional employees employed by the Defense Contract Administration Services District, Salt Lake City, Utah. The Activity contended that the petitioned for unit was not appropriate because it excludes other employees of the Region who share a community of interest with employees in the sought unit, and further, that the petitioned for unit would not promote effective dealings or efficiency of agency operations.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Paul Hirokawa. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Under all of the circumstances, the Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition under the Order. In this regard, the Assistant Secretary noted that the petitioned for employees share common overall District-wide supervision, perform their work within an assigned geographical locality, and do not interchange or have job contact with other employees of the Region. Moreover, any transfers occurred only in situations involving promotion or reduction-in-force procedures. Based on these considerations, the Assistant Secretary found that the petitioned for unit would promote effective dealings and efficiency of agency operations.

Upon the entire record in this case, including the brief filed by the Activity, the Assistant Secretary finds:

Accordingly, the Assistant Secretary ordered that an election be conducted in the unit found appropriate.

1. The labor organization involved claims to represent certain employees of the Activity.
2. The American Federation of Government Employees, Local 3540, AFL-CIO, herein called AFGE, seeks an election in a unit of all professional and nonprofessional employees employed by the Defense Contract Administration District (DCASD), Salt Lake City, Utah, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

The Activity contends that the claimed unit is not appropriate because it excludes employees who share a community of interest together with the employees in the sought unit and, further, that the sought unit will not promote effective dealings and efficiency of agency operations. In the Activity's view, the only appropriate unit in this situation is a unit composed of all eligible employees of the Defense Contract Administration Region (DCASR), San Francisco, California.

1/ The name of the Activity appears as amended at the hearing.

The DCASR, San Francisco, is one of eleven such regions of the Defense Supply Agency (DSA) and is a primary level field activity of the DSA. It provides contract administration services and support for the Department of Defense, as well as other Federal agencies, and encompasses a geographic area which includes the States of Utah, Montana, Idaho, Washington, Oregon, Alaska, Hawaii, as well as the Mariana Islands, most of Nevada and northern California. There are two DCASD's within DCASR, San Francisco; namely, DCASD, Seattle, and DCASD, Salt Lake City. In addition, the Region includes six Defense Contract Administration Services Offices (DCASO's) located in Portland, Oregon, and at Contractors' Offices at the FMC Corporation, Philco Corporation, Sylvania Corporation, Westinghouse Corporation and Applied Technology Division of Itek Corporation (ATD). With the exception of the DCASO in Portland, which reports through the DCASD in Seattle, all DCASO's and DCASD's within the Region report directly to DCASR headquarters in San Francisco. Approximately 1,250 civilian employees are employed throughout the DCASR, San Francisco, with most of the employees located in northern California.

The DCASR, San Francisco, is headed by a Regional Commander (a military officer) whose office is located at the DCASR headquarters in San Francisco. Directly under the Commander, and located at the headquarters, are a number of offices and directorates which are responsible for planning and monitoring all facets of the DCASR's operations. In this regard, the offices are concerned primarily with matters regarding planning, administration, contract compliance problems and security problems at defense plants, while the directorates are concerned with matters regarding contract administration, production and quality assurance. There is no collective bargaining history in the DCASR, San Francisco, or with respect to any of its component organizations, including DCASD, Salt Lake City.

The Salt Lake City District geographically encompasses the State of Utah and portions of southern Idaho. It is under the supervision of a District Commander (a military officer) and organizationally is subdivided to correspond with the directorates of the Regional headquarters. Thus, within the DCASD, there is a division of contract administration, a division of production, a division of quality assurance, and an office of planning and administration. The Commander of the District reports directly to the Regional Commander.

The record reveals that all employees assigned to the DCASD are assigned to one of the divisions comprising the DCASD, that employees are assigned to a particular division and share common job classifications with other employees in the same division, and that employees so classified utilize similar skills and perform substantially similar duties. All employees of the DCASD perform their duties within the geographical area of the DCASD and submit daily reports of their activities to their first-line supervisors, who then transmit these reports to branch or division chiefs of the DCASD and, thereafter, to the District Commander.

These reports ultimately are transmitted to the region's headquarters office. The record also reveals that all of the employees of the DCASD perform their duties pursuant to policies and procedures established by the Regional headquarters' staff and that employees within the Region are subject to uniform personnel policies and job benefits. There is no evidence of any degree of interchange or job contact between the employees of the DCASD and employees of any other organizational components of the Region outside of headquarters, or between employees of the DCASD and employees of the Regional headquarters' staff, other than the daily reports indicated above. While the evidence establishes that there is some degree of transfer of employees among the various organizational components within the Region, generally such transfers are within the context of promotion or reduction-in-force procedures. The record discloses that the area of consideration for promotions and reductions-in-force for all employees classified GS-8 and above is Regionwide, whereas the area of consideration for promotions and reductions-in-force for employees classified GS-7 and below, is within the geographic area of the District. While all employees assigned to the DCASD, with one exception, work out of the DCASD office, the evidence establishes that a significant number perform their duties at the sites where contracts for particular products or services are being performed and, to this extent, the working conditions of the employees may vary from one assignment to another. The record further reflects that while training programs are prepared by headquarters' staff personnel, generally they are administered within the DCASD, often by DCASD personnel.

Under all of the foregoing circumstances, I find that the unit sought herein is appropriate for the purpose of exclusive recognition under the Order. Particularly noted in this regard were the facts that the petitioned for employees share common overall District-wide supervision, perform their duties within the assigned geographical locality of the DCASD, and do not interchange or have job contact with any other employees of the Region. Moreover, any transfer to or from the District office occurs only in situations involving promotion or reduction-in-force procedures. Based on these considerations, I find that the employees in the petitioned for unit share a clear and identifiable community of interest separate and distinct from other employees of the Region. Further, based on the foregoing considerations, I find that such a unit will promote effective dealings and efficiency of agency operations. 2/

2/ Cf. Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, etc., A/SLMR No. 372. For the reasons set forth in A/SLMR No. 372, I reject the contention made by the Activity that the certification of a less than regionwide unit would limit the scope of negotiations solely to those matters within the delegated discretionary authority of the Commander of the District Office.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional and nonprofessional employees employed by the Defense Contract Administration District, Salt Lake City, Utah, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

As stated above, the unit found appropriate includes professional employees. ^{3/} However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following voting groups:

Voting Group (a): All professional employees employed by the Defense Contract Administration District, Salt Lake City, Utah, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Voting Group (b): All nonprofessional employees employed by the Defense Contract Administration District, Salt Lake City, Utah, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 3540, AFL-CIO.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 3540, AFL-CIO. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken

^{3/} The parties stipulated, and I find, that three employees in the claimed unit who were classified as mechanical engineer, electrical engineer, or

to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the Area Administrator indicating whether or not the American Federation of Government Employees, Local 3540, AFL-CIO, was selected by the professional employees.

The unit determination in the subject case is based, in part, then upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

(1) If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following units are appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees employed by the Defense Contract Administration District, Salt Lake City, Utah, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(b) All nonprofessional employees employed by Defense Contract Administration District, Salt Lake City, Utah, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

(2) If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees employed by the Defense Contract Administration District, Salt Lake City, Utah, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations.

^{3/} industrial engineer met the criteria for professional employees within the meaning of the Order. Cf. Department of Interior, Bureau of Land Management, Riverside District and Land Office, A/SLMR No. 170.

Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, Local 3540, AFL-CIO.

Dated, Washington, D.C.
November 27, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT
OF THE AIR FORCE,
DAVIS-MONTHAN AIR FORCE BASE,
ARIZONA
A/SLMR No. 462

The Petitioner, International Association of Firefighters Local Union F-176, Washington, D.C., (IAFF), sought an election in a unit of all non-supervisory, nonprofessional GS firefighters at the Davis-Monthan Air Force Base in Arizona.

Commencing in 1964, the National Federation of Federal Employees, Local Union 81, Tucson, Arizona, (NFFE) represented a unit of all GS employees at the Base. The Activity and the NFFE's latest three-year negotiated agreement, which was executed on November 26, 1973, contained the following unit description: "all eligible United States Air Force Classifications Act employees serviced by the Central Civilian Personnel Office (CCPO)." The evidence established that firefighter classification existed at the Activity, and at least three civilian firefighters were employed in such classification, as early as July 1973, during the term of the parties' previous agreement; that approximately 13 civilian firefighter positions were filled prior to the execution of the current agreement on November 26, 1973; and that the firefighters were serviced by the same civilian personnel office as were the other bargaining unit employees. Further, no evidence was presented that the parties sought or intended during the negotiation of their current agreement to exclude the civilian firefighter classification from the unit, or that the firefighters had not been represented effectively by the NFFE.

Based on these considerations, the Assistant Secretary found that the unit sought by the IAFF was covered by a current negotiated agreement and that, therefore, the petition herein was filed untimely. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE AIR FORCE, DAVIS-MONTHAN AIR FORCE BASE, ARIZONA

Activity

and

Case No. 72-4659

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL UNION F-176, WASHINGTON, D. C.

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL UNION 81, TUCSON, ARIZONA

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Linda G. Wittlin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Activity, the Petitioner, International Association of Firefighters, Local Union F-176, herein called IAFF, and the Intervenor, National Federation of Federal Employees, Local Union 81, herein called NFFE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The IAFF seeks an election in the following unit:

All nonsupervisory, nonprofessional GS Fire Fighters, Crew Chiefs, Fire Inspectors, Fire Dispatchers and Training Officers employed at and

by Davis-Monthan Air Force Base, Arizona, excluding all supervisors, professionals, guards, management officials and employees engaged in Federal personnel work, except in a purely clerical capacity within the meaning of the Order. 1/

The NFFE and the Activity contend that the employees sought are covered by an existing three-year negotiated agreement, signed on November 26, 1973, which constitutes a bar to the instant petition filed on February 19, 1974, and that the instant petition, in effect, constitutes an attempt to sever the firefighter employees from a unit currently represented by the NFFE. In these circumstances, they assert that the instant petition should be dismissed. The IAFF, on the other hand, asserts that the firefighter classification is not part of the existing unit, but is, in effect, a new employee classification which is unrepresented. In this regard, the IAFF concedes that if the firefighter classification was part of the exclusive unit, severance would not be warranted based on existing precedent.

The Davis-Monthan Air Force Base is under the jurisdiction of the Strategic Air Command for command purposes. Its facilities are utilized by other major air commands in accomplishing their separate and distinct responsibilities. The NFFE has represented all GS employees at the Base since 1964. The current agreement, which was negotiated between August 28, 1973, and September 20, 1973, and executed by the parties on November 26, 1973, for a three year term, contains, in pertinent part, the following unit description ". . . all eligible United States Air Force Classifications Act employees serviced by the Central Civilian Personnel Office (CCPO), Davis-Monthan Air Force Base (DMAFB). . ." 2/

The 803 Civil Engineering Squadron is one of the subordinate service units composing the 803 Combat Support Group. The Civil Engineering Squadron is directed by the Base Civil Engineer who is the Squadron Commander. The Fire Protection Branch or Fire Department is one of eight branches of the Civil Engineering Squadron, each having its own specialized function and headed by a separate director whose authority is limited to his own branch.

The record reveals that the Fire Department recently has undergone a conversion from essentially a military department to a civilian department. At the time of the hearing in this matter, there were approximately 35 civilian firefighters employed in the proposed unit. In July 1973, the Department consisted of 3 civilian and 75 military personnel. 3/ Only

1/ The unit description appears as amended at the hearing.

2/ The parties had a prior negotiated agreement which terminated on November 23, 1973.

3/ On July 1, 1973, the Fire Chief was authorized to hire six additional firefighters and on October 1, 1973, another authorization was obtained to hire nine additional firefighters. Seventeen positions had been authorized by August 1973, 21 by January 1974, and 46 by April 1974.

four firefighter positions actually were filled by September 1973, eight more in October 1973, and one in November 1973. By November 1973, approximately 13 positions were filled. Twenty-two additional civilian firefighters were hired after January 1, 1974. Approximately nine authorized positions remained to be filled at the time of the hearing herein.

The evidence establishes that the civilian firefighter classification existed at the Activity and that three civilian firefighters were employed in such classification as early as July 1973, during the term of the parties' prior agreement and before the latest agreement was negotiated and signed, which was prior to the filing of the instant petition. The record further shows that the firefighters are serviced by the same civilian personnel office as other employees in the unit; that firefighters, like other Activity employees, are advised during their orientation of the exclusive representative status of the NFFE; and that an official NFFE bulletin board is maintained in the Fire Department area. Additionally, the parties stipulated that the NFFE has "fully, fairly and effectively provided representation to any employee covered by its bargaining unit" and that "there has been no rejection of representation" with regard to the employees in the Fire Department.

Based on the circumstances herein, I conclude that the requested employees sought by the IAFF are part of the existing unit at the Activity covered by a negotiated agreement and that the instant petition, therefore, was filed untimely. In reaching the determination herein, particular note was taken of the fact that the civilian firefighter classification existed at the Activity, and three civilian firefighters were employed in that classification, at least as early as July 1973, during the term of the previous negotiated agreement; that approximately 13 civilian firefighter positions were filled prior to the execution of the current negotiated agreement on November 26, 1973; that civilian firefighter employees, as in the case of the other employees in the unit, are serviced by the same civilian personnel office; and that there was no evidence presented that the NFFE and the Activity sought or intended, during the negotiation of their current agreement, to exclude the civilian firefighter classification from the unit. Moreover, no evidence was presented to indicate that civilian employees in the firefighter classification were not represented effectively by the NFFE. Based on these considerations, I find that the November 26, 1973, negotiated agreement, which covers all eligible United States Air Force Classification Act employees and encompasses all existing classifications of such employees at the Base, constitutes a bar to the instant petition as such petition did not meet the timeliness requirements set forth in Section 202.3(c) of the Assistant Secretary's Regulations. ^{4/}

^{4/} Section 202.3(c) provides, in pertinent part, that "When an agreement covering a claimed unit has been signed by an activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed. . . ."

Accordingly, I find that the dismissal of the instant petition is warranted. ^{5/}

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 72-4659 be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 27, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

^{5/} The Assistant Regional Director referred to the Assistant Secretary a motion to dismiss filed by the Activity and an opposition motion filed by the IAFF. In view of the disposition herein, it was considered unnecessary to pass upon the Activity's motion.

December 3, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT AUDIT AGENCY,
CHICAGO BRANCH OFFICE
A/SLMR No. 463

This case involves a representation petition filed by the American Federation of Government Employees, AFL-CIO (AFGE), for a unit of all employees, including professionals, of the Defense Contract Audit Agency (DCAA), Chicago Branch Office. The claimed unit is the largest of eighteen field audit offices in the Chicago Region of the DCAA. The Activity contended that the only appropriate unit would include all employees of the Chicago Region, DCAA.

The Assistant Secretary concluded that the petitioned for unit was not appropriate for the purpose of exclusive representation. In reaching this determination, the Assistant Secretary noted that the Chicago Regional Office performs a centralized planning function which, among other things, has resulted in interchange and transfer of employees among the various field audit offices in the Region. Moreover, the area of consideration for competitive promotions is broader than the claimed unit and effective control and final responsibility for most personnel matters for employees in the Chicago Region resides within the Regional Office. Under these circumstances, the Assistant Secretary found that the employees in the Chicago Branch Office did not share a clear and identifiable community of interest separate and distinct from certain other DCAA employees and that such a fragmented unit would not promote effective dealings and efficiency of agency operations.

Accordingly, he ordered that the petition be dismissed.

A/SLMR No. 463

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT AUDIT AGENCY,
CHICAGO BRANCH OFFICE

Activity

and

Case No. 50-11111(RO)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Ronald D. Mailhot. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit of all employees, including professionals, of the Defense Contract Audit Agency (DCAA), Chicago Branch Office, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined by Executive Order 11491, as amended. 1/

The Activity asserts that the proposed unit is inappropriate because the employees in question do not possess a separate and distinct community of interest. It notes, in this regard, that the principal personnel decisions concerning the employees sought are made at the Regional Office level, that the nature of the DCAA's mission makes it necessary for the Regional Office to reassign personnel among the various subordinate activities which make up the Region and that, therefore, the unit sought

1/ The unit description appears as amended at the hearing.

herein would not promote effective dealings and efficiency of agency operations. 2/

The mission of the DCAA is to provide all contract auditing for the Department of Defense and various other government agencies and to provide accounting and financial advisory services regarding contracts and sub-contracts to all components of the Department of Defense which are responsible for procurement and contract administration. It is divided into seven Regional Offices, each of which is under the supervision of a Regional Manager. The Chicago Region of the DCAA encompasses the States of Wisconsin, Illinois, Indiana, Ohio, Michigan and parts of Kentucky and Pennsylvania, with headquarters in Chicago, Illinois.

The record reveals that the claimed unit in the Chicago Branch Office consists of some 55 auditors and 8 clerical employees and that this Branch Office is the largest of the eighteen field audit offices within the Chicago Region. The Chicago Branch Office has a central office which is located in the same building as the Regional Office. The central office is the home base for the Branch Manager, supervisory personnel, the clerical staff, and part of the auditor staff. The other auditors assigned to the Chicago Branch are located at one of six sub-offices which are located as far as 150 miles from the central office of the Branch.

The evidence establishes that the Chicago Regional Office primarily is responsible for the major operational decisions affecting employees within the Region. Thus, based on monthly planning reports submitted by the field office managers, the Regional Office selects auditors for temporary duty assignments to other field audit offices. The Regional Manager is the only person authorized to reassign employees between the various field audit offices and the evidence establishes that employee interchange and transfer occurs among the various field audit offices in the Region based on workload requirements determined by the Regional Office. Further, interchange of employees between contractors serviced by a particular field audit office and overtime within the field audit offices must be approved by the Regional Office. To insure uniformity of skills, a Regional Career Board for Management selects auditors who attend the Defense Contract Audit Institute, a nationwide training center maintained by the DCAA. The Regional Office, through its training officer, also selects topics for training programs within the field audit offices. Although the area of consideration for auditor promotions up to the GS-11 level is restricted to a particular field audit office, these promotions basically are considered noncompetitive. At the competitive levels, the area of consideration for promotions to GS-12 and GS-13 are Regionwide and, for positions GS-14 and above, the area of consideration is nationwide. Selections at the competitive levels are made by the Regional Manager. Although the Branch Manager interviews and selects employees to be hired, the record discloses that the Regional Office has

2/ The Activity sought to exclude as supervisors employees classified as Auditors-in-Charge, GS-12, who are senior persons assigned to each of the sub-offices of the Chicago Branch Office. In view of the disposition herein, I find it unnecessary to determine the supervisory status of the employees in such classification.

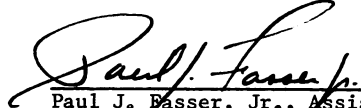
not approved some of the Branch Office selections. Moreover, while the Branch Manager has the authority to discipline employees, the record reveals that the Regional Office has rejected approximately 50 percent of the adverse actions recommended by the field audit managers.

Based on the foregoing circumstances, I find that the unit sought by the AFGE in the instant case is not appropriate for the purpose of exclusive recognition under the Order. In this regard, particular note was taken of the centralized planning function performed by the Regional Office which, among other things, has resulted in interchange and transfer of employees among the various field audit offices in the Region. Moreover, the area of consideration for competitive promotions is broader than the claimed unit and effective control and final responsibility for most personnel matters for employees in the Chicago Region resides within the Regional Office. Under these circumstances, I find that the employees of the Chicago Branch Office do not share a clear and identifiable community of interest separate and distinct from certain other DCAA employees and that such a fragmented unit would not promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the AFGE's petition herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-11111(R0) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 3, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF COMMERCE,
 NATIONAL OCEANIC AND ATMOSPHERIC
 ADMINISTRATION, NATIONAL WEATHER
 SERVICE
 A/SLMR No. 464

This proceeding arose upon the filing of an unfair labor practice complaint by the National Association of Government Employees (Complainant). The complaint alleged that the Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service (Respondent) had violated Section 19(a)(1) of the Order by statements made by its supervisor, the Manager of the Respondent's facility at the Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, which interfered with the right of an employee to seek the advice and/or the assistance of her exclusive representative, the Complainant.

The Administrative Law Judge found that on November 8, 1972, the Respondent's supervisor and the employee involved had engaged in a conversation involving a dispute over the scheduling of work on Thanksgiving Day and Christmas Day, 1972. During this conversation, the employee indicated a desire to consult with a representative of the Complainant, and the supervisor replied with statements to the effect that he did not want the Complainant meddling in the internal affairs of the facility and that he would make the decisions regarding holiday work assignments regardless of the efforts of the Complainant. The Administrative Law Judge concluded that, by such statements, the supervisor had indicated to the employee that she would have to deal directly with him regarding her problem and that, while she could contact the Complainant regarding the problem, such action would be futile. In the Administrative Law Judge's view, this conduct constituted an attempt by the supervisor to cause the employee to relinquish her right to consult with her exclusive representative in violation of Section 19(a)(1). The Administrative Law Judge further found that a subsequent conversation between the supervisor and the employee involved, whether viewed alone or in context with the earlier conversation, did not contain statements which could be construed as violative of Section 19(a)(1). Having found that the Respondent violated Section 19(a)(1), the Administrative Law Judge recommended that the Assistant Secretary order the Respondent to cease and desist from the improper conduct and to take certain affirmative actions.

The Assistant Secretary, noting the absence of exceptions, adopted the Administrative Law Judge's findings, conclusions and recommendations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF COMMERCE,
 NATIONAL OCEANIC AND ATMOSPHERIC
 ADMINISTRATION, NATIONAL WEATHER
 SERVICE

Respondent

and

Case No. 21-3825(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
 EMPLOYEES

Complainant

DECISION AND ORDER

On July 26, 1974, Administrative Law Judge Gordon J. Myatt issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendations. No exceptions were filed with respect to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in the subject case, and noting that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service shall:

1. Cease and desist from:

(a) Making statements to employees which indicate that it would be futile to seek advice or assistance from the National Association of

Government Employees, their exclusive representative, in handling employee complaints or grievances.


(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

(a) Post at its facility at the Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the National Weather Service's Manager and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The National Weather Service's Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days of the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
December 3, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make any statements to employees which indicate that it would be futile to seek advice or assistance from the National Association of Government Employees, their exclusive representative, in handling employee complaints or grievances.

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 Executive Order.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania, 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210



.....
 In the Matter of
 DEPARTMENT OF COMMERCE,
 NATIONAL OCEANIC AND ATMOSPHERIC
 ADMINISTRATION, NATIONAL WEATHER SERVICE
 Respondent
 and
 NATIONAL ASSOCIATION OF GOVERNMENT
 EMPLOYEES
 Complainant

Case No. 21-3825 (CA)

David Jay Markman, Esq.
Washington, D.C.

For the Complainant

Nicholas Rizzo, Esq.
Garden City, New York

For the Respondent

REPORT AND RECOMMENDATIONS

Statement of the Case

GORDON J. MYATT, Administrative Law Judge: Pursuant to a complaint filed on May 22, 1973, under Executive Order 11491, as amended, by National Association of Government Employees (hereinafter called the Union) against Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service (hereinafter called the Respondent) a Notice of Hearing on Complaint was issued by the Assistant Regional Director for Labor-Management Services on December 18, 1973. The Complaint alleged, among other things, that the

Respondent violated Section 19(a)(1) of the Executive Order.

A hearing was held in this matter on February 20, 1974, in Pittsburgh, Pennsylvania. All parties were represented and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendations:

Findings of Fact

The complaining party, Frances Kenney, is an employee of the National Weather Service at the Greater Pittsburgh Airport. She has been employed by the Weather Service for 31 years. The gravamen of the complaint is that the officer in charge of Mrs. Kenney's station, Robert Butler, violated Section 19(a)(1) of the Order by interfering with her right to seek Union advise or aid. The dispute centers around two conversations in November 1972 1/ between Mrs. Kenney and Butler.

A. The November 8, 1972, Conversation

Mrs. Kenney testified that Butler approached her in late October and offered to change her work schedule so as to benefit her and John Godovichik, a fellow employee, during the Thanksgiving and Christmas holidays. She stated that Butler suggested she work on Thanksgiving day, November 23, in Godovichik's place since this would tie in with his annual leave, and also mean that Godovichik would lose only one holiday that year. Bulter added that he was aware that Christmas was Mrs. Kenney's birthday, and that she would probably appreciate being off that day with Godovchik working in her place. 2/

1/ Unless otherwise indicated, all dates herein refer to the year 1972.

2/ The station ostensibly operated under a system whereby a schedule generally covering periods of six months was posted which served as a "guidance" schedule. This schedule contained several five-week cycle rotations (five people rotating shifts through a five-week period). The "fixed" or planning schedule projected ahead for two pay periods and was supposedly inflexible. The testimony indicates that Butler did not prepare a new fixed schedule at the expiration of each two pay period stretch, but merely incorporated the guidance and fixed schedule.

Mrs. Kenney testified that on about October 27 or 29, the work schedule was changed to show that she was scheduled to go on a supernumerary shift on November 23, and an operational shift on December 25. ^{3/} This was the opposite of what Butler offered in his prior conversation. Godovichik was scheduled operational on the 23rd of November and supernumerary on the 25th of December.

Mrs. Kenney met with Butler on November 8 to discuss the matter. She told Butler that she could not be pulled off her operational shift and placed on a supernumerary shift because "they had a voted cycling schedule." ^{4/} Mrs. Kenney stated that she was going to contact Joe Vazzo, a Regional Councilman of the Union, for an interpretation of Butler's shift changing prerogatives. According to Mrs. Kenney, Butler said "what does Joe Vazzo know about it." replied that she would have to find out what Vazzo knew or contact the Regional Chairman for help. Butler allegedly stated, "I don't see why you have to do this... There is no reason to bring any union people into this dispute... I think the official in charge is perfectly capable of taking care of these things and figuring these things out." Mrs. Kenney told him that the Executive Order permitted her to solicit the aid of union people. Butler responded by questioning the Union's knowledge of Activity affairs. He asserted that the Union did not know the distinct and unique setup of the Weather Station, and he saw no reason for any union people to meddle in the affairs of the Greater Pittsburg Airport. ^{5/} Mrs. Kenney responded that she would talk to Vazzo. Butler told her to go ahead and talk to Vazzo, but it would make no difference since he was the official supervisor of the station and would make the decisions.

Mrs. Kenney talked at length with Vazzo about her situation. She filed a formal grievance (which she termed a continuing grievance) about Butler's manipulation of the work schedule. The grievance was unresolved at the time of the hearing of this matter.

^{3/} A supernumerary shift is a swing or extra-man shift. The supernumerary takes the place of an employee who is on leave. Since the supernumerary is not supposed to receive holiday pay, he is not permitted to work holidays. An operational shift is one of the five regular work periods of the work day.

^{4/} It is unclear what Mrs. Kenney meant by a "voted cycling schedule." However, the inference is that she was referring to the Multi Unit Agreement between the Respondent and the Union.

^{5/} The Eastern Regional Council of the National Weather Service Locals of NAGE was awarded exclusive representative status for the eastern region of the Respondent Activity in November 1972.

Butler gave a different version of the events leading up to the conversation of November 8. He stated that in August or September when he was planning the guidance schedule, he approached Mrs. Kenney and asked her if she would like to be off Christmas day rather than Thanksgiving day. According to Butler, Mrs. Kenney's reaction was silence followed by the comment that she was supposed to work Thanksgiving day anyway. ^{6/} Butler then determined that John Godovichik did not want to make the change so he decided to drop the matter. He stated that the offer depended entirely upon the acceptance of by Godovichik. ^{7/}

Butler testified that he could force a schedule change if an emergency arose, but could not do so under ordinary circumstances. He added that if two people desired to make a schedule swap, he automatically agreed to it.

B. The Conversation During the Latter Part of November

On November 24, Mrs. Kenney sent a memo to Butler requesting annual leave for December 24, 28, 29 and January 3, 1973. Mrs. Kenney testified that Butler came up to her and stated he was going to grant her leave request with the exception of December 24. He told her that he was the only one available to take her place on that date, and he did not know whether he wanted to substitute for her because of her attitude. Mrs. Kenney responded by telling Butler "not to strain himself." She stated that two other employees were supernumerary during that period, and Butler had indicated that they were not expected to be out. ^{8/} According

^{6/} Butler denied that Mrs. Kenney was scheduled to work Thanksgiving day (November 23). However, the schedule showed a partially obliterated square around that date where Mrs. Kenney's name was located. Butler stated that it was merely an indication to him that November 23rd was a designated holiday. He also testified that he made the offer to Mrs. Kenney in August or September when he was "roughing out" the schedule, rather than in late October as indicated by Mrs. Kenney.

^{7/} Godovichik testified that he knew nothing of the conversation that took place between Mrs. Kenney and Butler on November 8, nor did he recall being told by Butler that he was to work Thanksgiving day. He stated that he would have been willing to take that day off.

^{8/} Mrs. Kenney testified that it was the policy of the Respondent, when an employee applied for and was granted leave, to have the supernumerary become operational to fill the vacancy. If the supernumerary were not available, then the official in charge was next in line as a replacement.

to Mrs. Kenney, she stated that her switch was not a matter of manpower and if it were, the regional office of the Union would be interested in looking into the situation. She testified that Butler then said, "Look girl, stop pushing me. If you don't stop pushing me on these things, I am going to show you how really tough I can get."

Mrs. Kenney then sent Butler a second memo stating that he had no basis for refusing her leave, and that he had an unreasonable and unyielding attitude.

Butler on the other hand, testified that after he received Mrs. Kenney's leave request, he informed her that he did not think it would be possible to grant her leave on December 24. He stated that he was seriously considering changing his personal plans so he would be available to relieve her, and Mrs. Kenney responded "Well, you have a whole month." He then told her it was not a matter of time, but whether he could arrange his personal affairs to cover her shift. According to Butler, Mrs. Kenney then said, "Don't strain yourself." This angered Butler, and he told the employee he would not consider making arrangements to accommodate her because of her attitude.

Concluding Findings

The sole issue here is whether Butler's statements to Mrs. Kenney constitute interference and restraint of the rights assured her under the Executive Order. Section 1(a) of the Order states that each employee has a protected right to "form, join and assist a labor organization or to refrain from any such activity," and admonishes that "no interference or restraint" be practiced "to encourage or discourage membership in a labor organization." Thus, conduct which falls within the proscribed area interferes with the rights assured employees under the Order and violates Section 19(a) (1).

In the instant case, the dispute over the holiday assignment of Mrs. Kenney was clearly a matter which affected general working conditions of the employees in the unit. Her questioning the manner in which Butler made the assignments was a subject of legitimate concern, not only for the employee but also for the Union as the exclusive representative of the employees. Thus when Mrs. Kenney indicated on November 8 that she was going to check with her union representative

8/ Continued

If this could not be arranged, then an over-time, compensatory-time, or a shift-swap arrangement was usually worked out. She stated that she did not attempt to make a swap herself, but waited to see if Butler would accommodate her request.

regarding the way Butler scheduled the holiday assignments, she was exercising a right assured by the Order. It is his response to her declared intention to invoke this right which is of concern here.

By telling the employee that he did not want the Union meddling in the internal affairs of the facility and that he would make the decisions regarding the holiday assignments, Butler made it clear to the employee that she would have to deal directly with management regarding the problem. It is true that he told Mrs. Kenney to go ahead and contact the union representative, but he left little doubt that it would be a futile exercise. 9/ In my judgement this is tantamount to an attempt to cause the employee to bypass the exclusive representative concerning her complaint and thus relinquish the right assured her by the Executive Order.

A case somewhat in point has been decided by the Assistant Secretary in U.S. Army School/Training Center, Fort McClellan, Alabama, A/SIMR No. 42. There management told the employee that the time and effort expended on her grievance could have been avoided if she had dealt directly with management rather than through the exclusive representative. It was held that such practice is "inconsistent with the exclusive representation relationship," and that an agency must "refrain from inviting employees to deal directly with management as to grievances."

In the instant case there is not suggestion that Mrs. Kenney's complaint would be acted upon more favorably if she did not involve the Union, but rather that it would be a futile and wasted effort to seek help from the Union. The ultimate effect, however, is the same. Butler's statements made it quite evident that he was urging the employee to deal directly with him and forego any assistance from the exclusive representative. 10/

9/ Although there are differences in the testimony, there are few substantive conflicts in the versions given by Mrs. Kenney and Butler. Where they are in conflict however, I credit the testimony of Mrs. Kenney.

10/ In arriving at this conclusion, I am not relying upon the conversation occurred in the latter part of November, In my judgement, the conversation, whether viewed alone or in the context of the conversation on November 8, contains nothing which can be construed as violating the Executive Order.

Accordingly, I find that Butler did interfere with and restrain Mrs. Kenney in the exercise of rights assured by the Executive Order, and by this conduct a violation of Section 19(a)(1) has been committed.

Recommendations

Upon the foregoing findings of fact and conclusions, and upon the entire record in this case, pursuant to Section 203.22(a) of the Regulations, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.


Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service shall:

1. Cease and desist from:
 - (a) Making statements to employees which are calculated to cause them to deal directly with management regarding complaints and grievances rather than through the National Association of Government Employees, their exclusive representative.
 - (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(A) of Executive Order 11491.
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:
 - (a) Post at its facility at the Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by the National Weather

Service's Manager and shall be posted and maintained by him for sixty consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The National Weather Service's Manager shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(b) Pursuant to Section 202.26 of the Regulations, notify the Assistant Secretary, in writing within twenty days of the date of this Order as to what steps have been taken to comply herewith.



 GORDON J. MYATT
 Administrative Law Judge

Dated: July 26, 1974
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make any statements to employees which indicate that it would be futile to seek advice or assistance from the National Association of Government Employees in handling employee complaints or grievances.

WE WILL NOT in any like manner interfere with, restrain or coerce our employees in the exercise of the rights assured them by the Executive Order.

DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION, NATIONAL
WEATHER SERVICE

Dated _____ By _____

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY,
U.S. ARMY ADJUTANT GENERAL
PUBLICATIONS CENTER,
ST. LOUIS, MISSOURI
A/SLMR No. 465

This unfair labor practice proceeding involved a complaint filed by the American Federation of Government Employees, Local 2761, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491 by its action in unilaterally changing the procedures applicable to the staffing of vacant positions within its installation.

The Administrative Law Judge recommended dismissal of the complaint based on the conclusion that an agency is under no obligation to consult and confer prior to instituting a change in a non-negotiable condition of employment which, among other things, owes its existence to higher level published policies and regulations that are applicable uniformly to more than one activity. In this regard, the Administrative Law Judge found that the vacancies involved herein were filled in accordance with a Department of Defense (DOD) regulation, amended as of November 5, 1973, which, as a subordinate agency of the DOD, the Respondent was obligated to follow.

Upon consideration of the Administrative Law Judge's Report and Recommendations, and the entire record in this case, and noting particularly that no exceptions were filed, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation that the complaint be dismissed. In reaching this disposition, the Assistant Secretary noted that the evidence did not establish that the application of the DOD Regulation herein was inconsistent with any of the provisions of the parties' current negotiated agreement.

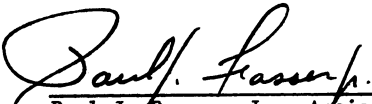
UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the complaint in Case No. 62-3953(CA) be, and it hereby is, dismissed.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY,
U.S. ARMY ADJUTANT GENERAL
PUBLICATIONS CENTER,
ST. LOUIS, MISSOURI

Dated, Washington, D.C.
December 3, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

Respondent

and

Case No. 62-3953(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2761, AFL-CIO

Complainant

DECISION AND ORDER

On September 18, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendations.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendations and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge. 1/

1/ In reaching this disposition, it was noted that the evidence did not establish that the Department of Defense Regulation (DOD 1400-20-M, as amended on November 5, 1973) concerning the filling of vacancies, which was applied in the instant case, was inconsistent with any of the provisions of the parties' current negotiated agreement. Compare Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390.



REPORT AND RECOMMENDATIONS

Statement of the Case

.....

In the Matter of :

U.S. DEPARTMENT OF DEFENSE :
DEPARTMENT OF THE ARMY :
U.S. ARMY ADJUTANT GENERAL PUBLICATIONS :
CENTER :

ST. LOUIS, MISSOURI :
Respondent :

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES :
LOCAL 2761, AFL-CIO :
ST. LOUIS, MISSOURI :

Complainant :

.....

CASE NO.
62-3953(CA)

Pursuant to a complaint filed on April 16, 1974, under Executive Order 11491, as amended, by Local 2761, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or AFGE), against the U.S. Department of Defense, Department of the Army, U.S. Army Adjutant General Publications Center, St. Louis, Missouri, (hereinafter called the Army or Agency), a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the Kansas City, Missouri, Region on June 26, 1974.

The complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its action in unilaterally changing the procedures applicable to the staffing of vacant positions within its installation.

A hearing was held in the captioned matter on August 13, 1974, in St. Louis, Missouri. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the basis of the entire record, including my observation of the witness and his demeanor, the stipulation of the parties and other relevant evidence adduced at the hearing, I make the following conclusions and recommendations:

Findings of Fact

In early February 1974, two vacancies arose within the Agency's installation, Supply Clerk GS-5 and Supply Clerk GS-4. Thereupon, in accordance with usual procedure, referral and selection registers were compiled by the Agency from the employee-eligibles currently

Mr. Joseph H. Moore
1901 Overland Drive
Overland, Missouri 63114
For the Respondent

Mr. Paul A. Stapp
Route 2, Box 163
St. Peters, Missouri 63376

Mr. William Martin, Jr.
4830 Cupples Place
St. Louis, Missouri 63113
For the Complainant

BEFORE: BURTON S. STERNBURG
Administrative Law Judge

working within the installation and forwarded to the respective selecting officials for appropriate action. However, in the interim, and before any action could be taken with respect to the referral lists, two employees (Meglitsch and Hessel) employed in another Army installation (Troop Support Command) which was about to transfer its operations to another location out of state, appeared at the Agency's personnel office with Transfer of Function letters. 1/ Both employees, Meglitsch and Hessel, who currently held GS-7 positions with Troop Support Command, were immediately hired for the above mentioned supply clerk vacancies.

According to Moore, Supervisor Personnel Staffing Specialist, whose testimony stands uncontroverted, the hiring of the two outside employees was in accordance with both the General Regulations issued by the Department of Defense (DOD 1400-20-M, Change 4, dated November 5, 1973) applicable to all military installations and past practice. In this latter context, Moore further testified that an identical procedure was utilized in 1973 with respect to "a Geneva Brown who was placed in a GS-6 position . . . non-competively".

DOD 1400-20-M Change 4, dated November 5, 1973 establishes five priority placement groups for filling vacancies in military installations. Priority 2, which is the priority involved herein, is defined in pertinent part as follows:

Employees who decline offers of functional transfer involving relocation outside the commuting area and who are not eligible for optional retirement.

1/ Transfer of Function letters are notifications to affected employees that the installation is about to move outside the commuting area and that the employees have the option of moving with the installation or forfeiting their job rights with the installation being moved.

Other sections of DOD 1400-20-M, as amended by the November 5, 1973 change, make it clear that priority 2 employees are an exception to the competitive system and take precedence over those unit employees who had previously been downgraded due to a Reduction in Force with respect to the filling of vacant positions.

Prior to the November 5, 1973 amendment, vacancies were filled in accordance with CPR 300,33.9, which is the Department of the Army's reprint of the then existing DOD 1400-20-M regulation. CPR 300,33.9, identified in the record as Complainant's Exhibit No. 2, sets forth the following schedule of referral with respect to vacancies:

- (1) Priority 1 employees
- (2) Priority 2 employees in the commuting area, regardless of DOD component, will be referred to the selecting official along with any available current employees of the activity having the vacancy and such surplus employees will receive equal consideration for selection. (Emphasis supplied.) 2/

2/ Inasmuch as CPR 300 has not been introduced into the record in its entirety it is impossible to determine the exact definition of Priority 2 which existed prior to November 5, 1973. However, in view of the absence of any evidence to the contrary, it is assumed that such definition would be identical to that appearing in the November 5, 1973 amendment to DOD 1400-20-M. In this connection, it is noted that Complainant does not contend that the two outside employees, Meglitsch and Hessel were not priority two employees.

DISCUSSION AND CONCLUSIONS

It is well settled that an agency's action in unilaterally instituting a change in a negotiable condition of employment without prior consultation with the recognized bargaining representative is violative of Sections 19(a)(1) and (6) of the Order. ^{3/} Similarly, it is also well settled that any agency is under no obligation to consult and confer prior to instituting a change in a non-negotiable condition of employment which, among other things, owes its existence to "higher level published policies and regulations that are applicable uniformly to more than one activity . . .". ^{4/}

In the instant case the Union contends that the Agency has unilaterally deviated from an established and/or announced policy of including all available current employees within the second area of consideration for vacancies of a higher grade. In support of its contention in this respect the Complainant cites the language of CPR 300,33.9, which was the policy or regulation in effect prior to November 5, 1973. Had the action of the Agency occurred prior to November 5, 1973, there would be merit in the Complainant's position. However, such is not the case.

As noted above, on November 5, 1973, the Department of Defense issued an amended "non-negotiable" regulation applicable to all installations wherein the area and definition of Priority 2 was changed. Thus, according to the amendment, five rather than two priorities in the matter of referrals were established and the definition

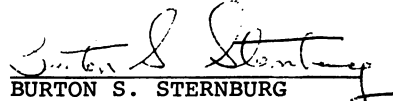
^{3/} Cf. Veterans Administration Hospital, Charleston, South Carolina A/SLMR No. 87
^{4/} United Federation of College Teachers, Local 1460 and the U.S. Merchant Marine Academy, FLRC No. 71A-15.

of priority two was changed to include only those employees who "had declined offers of functional transfer involving relocation outside the commuting area and who were not eligible for optional retirement". Unlike CPR 300,33.9, which was amended by the November 5, 1973 change, no provision was made for the inclusion in Priority No. 2 of the current down-graded employees within the area of consideration for the vacancies carrying a higher grade.

In view of the foregoing and absent any evidence that the Agency's action in filling the two supply clerk positions was not in accordance with the new amendment to the DOD regulation, (which, as a subordinate agency it was obligated to follow), or prior action taken thereunder since November 5, 1973, insufficient basis is deemed to exist for a 19(a)(1) or (6) finding.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

DATED: September 18, 1974
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND DIRECTION OF ELECTION
 OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NAVAL EDUCATION AND TRAINING
 INFORMATION SERVICES ACTIVITY,
 NAVAL AIR STATION,
 PENSACOLA, FLORIDA
 A/SIMR No. 466

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL EDUCATION AND TRAINING
 INFORMATION SYSTEMS ACTIVITY,
 NAVAL AIR STATION,
 PENSACOLA, FLORIDA

Activity

and

Case No. 42-2501(RO)

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, LOCAL 1960, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner, American Federation of Government Employees, Local 1960, AFL-CIO (AFGE), sought to represent a unit of all of the employees of the Activity in the State of Florida. Such a unit would include employees of the Activity located at its headquarters at Pensacola Naval Air Station, Whiting Naval Air Station, and the Orlando Data Processing Division. The Activity contended that only the claimed employees at the Pensacola Naval Air Station shared a community of interest. However, both the Activity and the AFGE indicated that they would accept an alternative unit of all of the Activity's employees located at Pensacola and Whiting Naval Air Stations because the employees at Whiting share the same area of consideration for promotions and reductions-in-force as those in Pensacola and because the facility at Whiting is part of the Operations Division which, for the most part, is located in Pensacola.

The Assistant Secretary concluded that the petitioned for unit was inappropriate because: the community of interest was based essentially on a common state boundary; the separate facilities in Florida were all tenant organizations at different locations and received their personnel services as tenants from the local civilian personnel offices; in the case of Orlando, there is a different area of consideration for promotions and reductions-in-force; and there is minimal transfer and no interchange or other work related contact among the employees of the separate facilities. The Assistant Secretary concluded also that an alternative unit encompassing employees of Pensacola and Whiting was inappropriate for certain of the above-noted reasons and because there are two other facilities outside the State of Florida, Meridian Naval Air Station and Corry Station, which are part of the Activity's Operations Division. However, the Assistant Secretary found that a unit of all of the employees of the Activity located in Pensacola would be appropriate because such employees shared a common mission and location, had day-to-day work contact, received their personnel services from the same civilian personnel office, and were under the same area of consideration for promotions and reductions-in-force. Eligibility determinations regarding the alleged supervisory or management official status of certain job classifications also were rendered.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate, if the AFGE desired to proceed in such a unit.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Hazel M. Ellison. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The AFGE seeks an election in a unit consisting of all nonprofessional employees [Wage Grade (WG) and General Schedule (GS)] assigned to the Naval Education and Training Information Systems Activity in the State of Florida. 2/ The Activity contends that the appropriate unit should be

1/ The Hearing Officer rejected the tender by the Petitioner, American Federation of Government Employees, Local 1960, AFL-CIO, herein called AFGE, of a copy of a negotiated agreement between the Pensacola Commissary Store Complex and the AFGE. Such agreement was alleged to cover a similar type of unit to that petitioned for in the subject case. In the circumstances, I conclude that the agreement in question is relevant to the issues in this case. Accordingly, I reverse the Hearing Officer's ruling and receive the agreement into the record. Because, in reaching the decision in this case, I have considered the entire record, including the agreement in question, the Hearing Officer's rejection of the agreement at the hearing was not found to constitute a prejudicial error.

2/ The unit inclusions appear as amended at the hearing. The claimed unit would encompass certain employees located at the Naval Air Stations in Pensacola and Whiting and at Orlando, Florida.

limited only to the employees of the Naval Education and Training Information Systems Activity located at the Naval Air Station, Pensacola. However, in the alternative, both the Activity and the AFGE indicated that they would accept a unit consisting of the employees of the Naval Education and Training Information Systems Activity located at the Naval Air Station, Pensacola, and the Naval Air Station, Whiting. Also at issue herein were questions raised by the Assistant Regional Director regarding the eligibility of certain employee classifications.

The Naval Education and Training Information Systems Activity was established on July 1, 1974, under the direction of the Chief of Naval Education and Training, to plan, design, develop and maintain the Naval Education and Training Command's Management Information System and to provide automatic data processing services to designated activities. The headquarters of the Naval Education and Training Information Systems Activity is located, as a tenant activity, at the Naval Air Station, Pensacola, Florida. Among the organizational entities of the Activity located at Pensacola, and included in the petitioned for unit, are the Management Information Office (MIO) and the Data Processing Service Center (Center). ^{3/} The record reveals that all of the divisions of the MIO are located at Pensacola, but that only one of the seven divisions of the Center, the Production Control Division, is located entirely in Pensacola. Thus, although the majority of the employees of the Center's Operations Division, (which has two branches -- the Computer Branch and the Data Entry Branch), are located at Pensacola, three of the eight data entry sections of the Data Entry Branch are located outside of Pensacola, at the Meridian Naval Air Station, the Whiting Naval Air Station and the Corry Station. And of these three data entry sections, only the one at Whiting would be included in the petitioned for unit because it is located in the State of Florida, 30 miles from Pensacola. A third division of the Center which is included in the petitioned for unit is the Orlando Data Processing Division located in Orlando, Florida. ^{4/}

The record reveals that the Chief of Naval Education and Training in Pensacola sets budget ceilings, approves all positions at or above the GS-9 level, and certifies all equipment purchases at all of the Activity's locations, including Pensacola. However, each facility located outside of Pensacola receives its personnel services, as a tenant activity, from its respective local civilian personnel office, as does the headquarters' facility in Pensacola which receives its personnel services from the Civilian Personnel Office of the Pensacola Naval Air Station. Such personnel services include the maintenance of official personnel folders, the processing of personnel actions, the counseling of employees, providing advice on grievances and administrative appeals, and the administration of performance rating programs and incentive award programs. With respect to

^{3/} The only other organizational entity of the Activity is the Memphis Detachment in Memphis, Tennessee, which is not included in the petitioned for unit of all employees of the Activity in the State of Florida.

^{4/} The four other divisions of the Center are the Corpus Christi, San Diego, Great Lakes, and Newport Data Processing Divisions, all of which are located outside the State of Florida and, therefore, are not part of the petitioned for unit.

the area of consideration for promotions and for reductions-in-force, the record reveals that this would be the local commuting area, except for the Data Entry Section at Whiting, which is included in the Pensacola Naval Air Station commuting area. Because the area of consideration is the local commuting area, the evidence established that transfers between facilities located in different commuting areas have been minimal. Moreover, there has been no interchange of employees between the various facilities involved herein.

With respect to employees of the three Florida facilities of the Activity which would be included in the petitioned for unit, the record reflects that there is no job related day-to-day contact between the employees of the Orlando Data Processing Division and those in Pensacola or the Whiting Data Entry Section. While job contact is somewhat closer between the employees located in Whiting and Pensacola because of the close proximity of the two facilities and the fact that the Whiting Data Entry Section is part of the Operations Division located in Pensacola, Florida, there is no evidence of interchange or day-to-day work related contact between the employees at these two locations.

Based on all of the foregoing circumstances, I find that the claimed unit of all of the Activity's employees located in the State of Florida is not appropriate for the purpose of exclusive recognition. In reaching this conclusion, noted particularly was the fact that the claimed employees are found at three separate geographic locations and have little in common other than location in the State of Florida. Thus, the evidence establishes that the petitioned for employees at each of the geographic locations covered are within tenant activities which receive their personnel services from different civilian personnel offices. Moreover, while the Whiting Data Entry Section has the same area of consideration for promotions and reductions-in-force as the headquarters in Pensacola, the Orlando Data Processing Division has a separate area of consideration for both. In addition, the record reveals minimal employee transfer and no evidence of interchange, or regular work related contact among the three separate geographic locations. Further, I find that the alternative unit agreed upon by both parties herein of all employees of the Activity located at Pensacola Naval Air Station and Whiting Naval Air Station is inappropriate. Thus, in addition to certain of the circumstances noted above, I find that this alternative unit would not include the employees of the Data Entry Sections outside the State of Florida at Meridian Naval Air Station and Corry Station, who the record reveals also are part of the Operations Division. However, under the circumstances of this case, I find that a unit of all of the Activity's employees located at the Pensacola Naval Air Station would be appropriate for the purpose of exclusive recognition as such a unit would encompass employees who share a common mission and location; have day-to-day work contact; receive all of their personnel services from the same civilian personnel office; and are under the same area of consideration for promotions and reductions-in-force. In my view, such a unit would encompass employees who share a clear and identifiable community of interest and would promote effective dealings and efficiency of agency operations.

Eligibility Questions

Computer Systems Analysts, GS-12, Division of Analysis and Programming, Management Information Office.

The record reveals that there are three employees in this job classification who are designated as programming supervisors. The evidence establishes that each of these employees direct the work of ten or more computer programmers; has the authority to assign work and approve leave; has prepared performance evaluations which are effective; and has issued letters of caution. Moreover, the record reflects that recommendations made by the employees in this job classification regarding reductions-in-force, discipline after the issuance of letters of caution, and quality increases are relied on and generally are followed. Under these circumstances, I find that the employees in this classification are supervisors within the meaning of Section 2(c) of the Order and, therefore, I shall exclude them from the unit found appropriate.

Computer Specialists, GS-12, Standards Division, Management Information Office.

The record reveals that the duties of an employee in this classification involve data administration and the responsibility for designing data bases and establishing standards for the administration of data. In accomplishing these duties, an employee in this classification at times serves as a team leader, or as an acting supervisor, but primarily he works alone. The Activity apparently seeks to have an employee in this classification excluded as a management official. However, in my view, the evidence establishes that an employee in this classification works in the role of an expert who renders technical advice and recommendations within established guidelines, rather than an employee who makes policy or actively participates in the ultimate determination of policy with respect to personnel, procedures or programs. Therefore, I shall include the employee in this classification in the unit found appropriate.

Management Information Systems Analysts, GS-12.

There are four employees in this classification who work with six lower grade systems analysts. Although the parties contend that employees in this classification are supervisors, the record reflects that their job description does not designate them to be supervisors. However, one of the employees in this classification, who had been in this position for some six months, testified as to certain supervisory functions he had performed on occasion and as to what functions he anticipated performing in the future. Under these circumstances, I find that there is insufficient evidence to determine whether or not employees in this classification currently are supervisors within the meaning of Section 2(c) of the Order. Accordingly, I make no finding as to whether or not such employees should be included in the unit found appropriate.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees assigned to the Naval Education and Training Systems Activity located at Pensacola Naval Air Station, including Computer Specialists, GS-12, Standards Division, Management Information Office; excluding Computer Systems Analysts, GS-12, Division of Analysis and Programming, Management Information Office, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order.

DIRECTION OF ELECTION

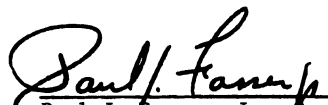
An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 60 days from the date upon which the appropriate Area Administrator issues his determination with regard to any interventions in this matter. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1960, AFL-CIO, or by any other labor organization which, as discussed below, intervenes in this proceeding on a timely basis.

Because the above Direction of Election is in a unit substantially different than that sought by the AFGE, I shall permit it to withdraw its petition if it does not desire to proceed to an election in the unit found appropriate in the subject case upon notice to the appropriate Area Administrator within 10 days of the issuance of this decision. If the AFGE desires to proceed to an election, because the unit found appropriate is substantially different than the unit it originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the unit I have herein found appropriate. Such notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the

purpose of appearing on the ballot in the election among the employees in the unit found appropriate.

December 4, 1974

Dated, Washington, D.C.
December 4, 1974



Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF ORDER VACATING STAY OF REMAND
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR
RELATIONS BOARD
A/SLMR No. 467

Pursuant to his Decision and Remand in A/SLMR No. 295, the Assistant Secretary remanded the proceeding in the subject case to the Administrative Law Judge for the purpose of reopening the record to adduce certain additional evidence and to prepare and submit to the Assistant Secretary a Supplemental Report and Recommendations.

Thereafter, he issued an Order Denying Motion, Referring Cross Motion and Response, and Staying Remand, in which, among other things, he referred to the Federal Labor Relations Council (Council) for decision certain major policy issues concerning the availability of another employee's appraisal to an employee or to others in an unfair labor practice proceeding pursuant to the Order.

Upon receipt of the Civil Service Commission's interpretation of its directives concerning the above major policy issues, the Council issued its Decision on Referral of Major Policy Issues from Assistant Secretary wherein it was found that the Federal Personnel Manual (1) prohibits an employee or his representative from seeing the appraisal of another employee, or adducing evidence thereon, in an unfair labor practice proceeding, but (2) permits the Assistant Secretary, his representative and/or the Administrative Law Judge, in a proceeding under the Order, to review such an appraisal if necessary for the execution of official responsibility and if done in a manner that maintains that appraisal's confidentiality.

In these circumstances, the Assistant Secretary vacated his Order Staying Remand and directed the Administrative Law Judge to reconsider his decision in the subject case in accordance with the Decision and Remand in A/SLMR No. 295, and with the Council's Decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD,
REGION 17, AND NATIONAL LABOR
RELATIONS BOARD

Respondents

and

DAVID A. NIXON

Case No. 60-3035(CA),
A/SLMR No. 295, and
FLRC No. 73A-53

Complainant

ORDER VACATING STAY OF REMAND

In my Decision and Remand in A/SLMR No. 295, dated August 6, 1973, I remanded the proceeding in the subject case to the Administrative Law Judge for the purpose of reopening the record to adduce certain additional evidence and to prepare and submit to the Assistant Secretary a Supplemental Report and Recommendations.

Thereafter, on September 28, 1973, I issued an Order Denying Motion, Referring Cross Motion and Response, and Staying Remand, in which, among other things, I referred to the Federal Labor Relations Council (Council) for decision the following major policy issues which had been raised in the context of this proceeding:

(1) whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding held pursuant to Section 6(a)(4) of Executive Order 11491, as amended, and (2), if an employee or his representative is so precluded from seeing and adducing evidence with respect to the appraisal of another employee, does such prohibition apply also to the Assistant Secretary, his representatives and/or Administrative Law Judges acting pursuant to their responsibilities under the Order?

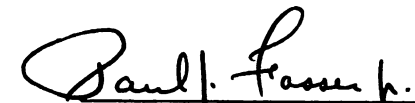
On October 31, 1974, the Council issued the attached decision on Referral of Major Policy Issues from Assistant Secretary wherein it found, upon receipt of the Civil Service Commission's interpretation of its directives concerning the above two major policy issues, that the Federal Personnel Manual:

- (1) prohibits an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding, but
- (2) permits the Assistant Secretary, his representative and/or the Administrative Law Judge, acting pursuant to their responsibilities in a proceeding under the Order, to see the appraisal of another employee if review of such appraisal is necessary for the execution of official responsibility, but only if done in a manner that maintains the confidentiality of that appraisal, while accommodating the need for establishment of a formal file in open proceeding by adhering to the guidelines set forth in the Civil Service Commission response.

In its Decision, the Council noted that while the "...Civil Service regulations set forth by way of example are not by their own terms applicable to the situation here presented, adoption of substantially similar procedures by the Assistant Secretary would be consistent with the purposes of the Order while still protecting the privacy of the Federal employees, as required by applicable law and regulation."

Based on the foregoing circumstances, the Order Staying Remand, issued September 28, 1973, is hereby vacated and the Administrative Law Judge is directed to reconsider his decision in the subject case in accordance with the Decision and Remand in A/SLMR No. 295, and with the Council's Decision in FLRC No. 73A-53.

Dated, Washington, D.C.
December 4, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

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National Labor Relations
Board, Region 17, and
National Labor Relations Board

and

David A. Nixon

Assistant Secretary
Case No. 60-3035(CA)
FLRC No. 73A-53

DECISION ON REFERRAL OF MAJOR POLICY
ISSUES FROM ASSISTANT SECRETARY

Background of Case

During his consideration of a motion and a cross motion filed by the parties in connection with his Decision and Remand in A/SLMR No. 295, the Assistant Secretary found that certain major policy issues had been raised which required resolution by the Federal Labor Relations Council. Therefore, pursuant to Section 2411.4 of the Council's Rules and Section 203.25(d) of the Assistant Secretary's Regulations, he referred the following major policy issues to the Council for decision: (1) "whether applicable laws and regulations, including policies set forth in the Federal Personnel Manual, preclude an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding held pursuant to Section 6(a)(4) of Executive Order 11491, as amended, and (2), if an employee or his representative is so precluded from seeing and adducing evidence with respect to the appraisal of another employee, does such prohibition apply also to the Assistant Secretary, his representatives and/or Administrative Law Judges acting pursuant to their responsibilities under the Order?"

Opinion

Since the issues posed by the Assistant Secretary's referral raised a question as to the effect of "applicable law and regulations, including policies set forth in the Federal Personnel Manual," the Council asked the Civil Service Commission for an interpretation of its directives in relation to the two major policy issues.

The Commission replied as follows:

The applicable Commission policy directive is found in subchapter 5, Chapter 335 of the Federal Personnel Manual, which states in part that

" . . . an employee is not entitled to see an appraisal of another employee. Nevertheless, the representative of an employee (even though an employee himself) may see the employee's appraisal, and an employee may see the appraisal of other employees when dictated by his official responsibilities, for example, as member of a promotion board."

This directive prohibits an employee or his representative from seeing the appraisal of another employee under most circumstances, including the circumstances of casual interest or the pursuit of a complaint through grievance, unfair labor practice, or other formal or informal machinery. It, on the other hand, by its own terms clearly permits the Assistant Secretary, his representative, an Administrative Law Judge, or any other person having official responsibility in connection with the investigation, examination, or decision on matters at issue in a proceeding to see the appraisal of another employee if review of the appraisal is necessary for the execution of that responsibility. However, such person, upon gaining access to the appraisal, must carry out his responsibility (including any responsibility he may have to develop and make available a complete record or file containing all documents related to the proceeding) in such a fashion as to not compromise the fundamental requirement that, except under limited circumstances not germane here, "an employee is not entitled to see an appraisal of another employee."

Basic to the above policy is the recognition that disclosure to employees (or their representatives) of supervisory appraisals of performance of other employees, or the inclusion of such appraisals in an open file, is potentially clearly invasive of their personal privacy. The above policy, and this interpretation, also recognizes that "official responsibilities" in the context of the above cited directive refers to those responsibilities officially assigned, supervised, etc., by or through appropriate agency authority. The fact that a function may appropriately be performed on official time does not alone serve to bring it within the embrace of the term, "official responsibilities." Reasonable amounts of official time may be permitted for a number of activities that are not appropriately directed or supervised by proper agency authority and which simply could not be reasonably construed as official responsibilities of the employee involved. Examples include official time for an employee to prepare an adverse action defense, or official time to serve as a member of a union negotiating team.

The above policy of course raises the secondary question of how an employee who has access to an appraisal by virtue of his official responsibility for investigating, examining, or adjudicating a complaint can protect the privacy of employees by maintaining the confidentiality of that appraisal under circumstances where that official is required to develop and make available a complete record or file containing all documents relating to the proceeding.

Illustrations of how this may be accomplished are found in a number of proceedings for which the Commission has responsibility. For example, the grievance system established under the authority of Part 771 of the Civil Service Regulations requires, as a matter of grievance policy, that an agency grievance examiner "must establish an employee grievance file. This is an independent file, separate and distinct from the Official Personnel Folder. The grievance file is the official record of the grievance proceedings and must contain all documents related to the grievance . . ." (Subchapter 3 of Federal Personnel Manual Chapter 771)

However, with respect to matters that cannot be disclosed to the grievant, Subchapter 1 of that chapter provides, in pertinent part, that "information to which the examiner is exposed which cannot be made available to the employee in the form in which it was received must be included in the file in a form which the employee can review or must not be used." Thus, under that grievance system, an examiner may conclude that the contents of a supervisory appraisal are either not relevant or not necessary for the resolution of the matter and thus need not be made a part of the file or, if its contents are relevant and necessary, then he must include it in the file "in a form which the employee can review."

For an illustration of how this can be done, we draw from another proceeding--complaints of discrimination processed under Part 713 of the Civil Service Regulations. The Handbook for Discrimination Complaints Examiners published by the Commission in April, 1973, gives specific instructions in this area and does so with specific reference to supervisory appraisals of performance. That handbook provides as follows:

"Supervisory Appraisals

1. Disclosure -- an invasion of privacy

The disclosure of supervisory appraisals of performance and potential of employees other than the complainant, to the complainant, constitutes an unwarranted invasion of the personal privacy of the employees concerned. However, this does not preclude the investigator or Complaints Examiner from reviewing the supervisory appraisals of other employees and including information from them in the record to the extent

that this can be done without identifying a particular employee as being the subject of a particular appraisal. Witnesses may testify at a hearing to matters relevant to supervisory appraisals of performance and potential of employees.

2. Concealing name of person appraised

When the supervisory appraisals of several other employees are involved in a complaint, it might be possible to make them anonymous by taping over or otherwise concealing the employees' names and other identifying information. Copies of the taped-over appraisals can then be made and included in the file. If the form and content of the appraisals do not lend themselves to this kind of treatment to assure confidentiality, it may be possible to include pertinent extracts and, if so, this should be done.

3. Narrative statement of

If there is no way that the appraisals or extracts therefrom can be included without identifying the subject of each appraisal, the only alternative is for the investigator or Complaints Examiner to include in the record a narrative statement of the results of his review of the appraisals. This can consist of something as simple as a statement that the investigator or Examiner had found the appraisals not material to the complaint, or something as extensive as a paraphrase of each appraisal.

4. Challenge to accuracy of narrative statements


If the complainant challenges the accuracy of the material included by the investigator concerning other employees' appraisals, the Examiner may verify the accuracy of that material by reviewing the appraisals himself. Similarly, the deciding official can make an independent verification if he feels the need to do so. This would not be in conflict with the instructions in Appendix B of FPM Chapter 713 because the purpose of any review of the appraisals by the Examiner or the deciding official would be to assure the accuracy of the information in the record, not to acquire and consider information not in the record."

The above illustrations are cited not to suggest their specific applicability in the case at hand but rather to illustrate how the policy of nondisclosure of supervisory appraisals cited in Chapter 335 of the Federal Personnel Manual may be accommodated in open proceedings where a formal file or record is required to be established.

Therefore, in response to the Assistant Secretary's questions, the Federal Personnel Manual: (1) prohibits an employee or his representative from seeing and adducing evidence with respect to the appraisal of another employee in the context of an unfair labor practice proceeding, but (2) permits the Assistant Secretary, his representative and/or the Administrative Law Judge, acting pursuant to their responsibilities in a proceeding under the Order, to see the appraisal of another employee if review of such appraisal is necessary for the execution of official responsibility, but only if done in a manner that maintains the confidentiality of that appraisal, while accommodating the need for establishment of a formal file in open proceeding by adhering to the guidelines set forth in the Civil Service Commission response.

While the Council notes that the Civil Service regulations set forth by way of example are not by their own terms applicable to the situation here presented, adoption of substantially similar procedures by the Assistant Secretary would be consistent with the purposes of the Order while still protecting the privacy of the Federal employees, as required by applicable law and regulation. That is, such procedures would enable the Assistant Secretary to carry out his responsibility of deciding unfair labor practice complaints based upon all necessary and relevant facts, and still protect the privacy of Federal employees.

By the Council.


Henry B. Frazier III
Executive Director

Issued: October 31, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE,
AIR FORCE DEFENSE LANGUAGE INSTITUTE,
ENGLISH LANGUAGE BRANCH,
LACKLAND AIR FORCE BASE, TEXAS
A/SLMR No. 468

On June 15, 1973, an Administrative Law Judge issued his Report and Recommendations in which he found that the Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, (Respondent) had violated Section 19(a)(6) of the Order by unilaterally implementing Defense Language Institute (DLI) Regulation 690-2 and, thus, changing the method or system of selecting unit employees stationed at the Activity for overseas duty or assignment without meeting and conferring with the American Federation of Government Employees, Local Union 1367 (Complainant), the exclusive representative of its unit employees.

On November 13, 1973, the Assistant Secretary issued a Decision and Order in A/SLMR No. 322 in which he held, among other things, contrary to the Administrative Law Judge, that the Respondent was not obligated to meet and confer with the Complainant over the adoption of DLI Regulation 690-2. In reaching this determination, the Assistant Secretary noted that in United Federation of College Teachers, Local 1460 and U. S. Merchant Marine Academy, FLRC No. 71A-15, the Federal Labor Relations Council (Council) stated that "higher level published policies and regulations that are applied uniformly to more than one activity may properly limit the scope of negotiations" Thus, the Assistant Secretary, relying on record testimony that the new regulation was applicable to employees of other branches of the Defense Language Institute as well as employees of the Respondent, found that DLI Regulation 690-2 was not inconsistent with Section 11(a) of the Order since it was issued "to achieve a desirable degree of uniformity and equality . . . common . . . to employees in more than one subordinate activity." Accordingly, the Assistant Secretary found that the Respondent was not obligated to meet and confer with the Complainant concerning the issuance of DLI Regulation 690-2 and dismissed the complaint.

On October 25, 1974, the Council set aside the Assistant Secretary's findings in A/SLMR No. 322, concluding, contrary to the Assistant Secretary, that DLI Regulation 690-2 was not applicable uniformly to more than one activity in that it was not directed to a manager or managers of more than one subordinate activity, providing guidance concerning matters common to employees of these activities. Thus, contrary to the Assistant Secretary, the Council found that DLI

Regulation 690-2 may not serve as an appropriate limitation on the scope of the negotiations concerning overseas assignments under Section 11(a) of the Order pursuant to its holding in the Merchant Marine case. Accordingly, the Council remanded the matter to the Assistant Secretary for further proceedings consistent with its holding.

Pursuant to the Council's Decision on Appeal, the Assistant Secretary reconsidered the Administrative Law Judge's Report and Recommendations and the entire record in this case. He found, based on the Council's holding and the rationale contained therein, that adoption of the Administrative Law Judge's findings, conclusions, and recommendations were warranted. Under these circumstances, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions consistent with his decision.

A/SLMR No. 468

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
AIR FORCE DEFENSE LANGUAGE INSTITUTE,
ENGLISH LANGUAGE BRANCH,
LACKLAND AIR FORCE BASE, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION 1367

Case No. 63-4218(CA)
A/SLMR No. 322
FLRC No. 73A-64

Complainant

SUPPLEMENTAL DECISION AND ORDER

On June 15, 1973, Administrative Law Judge William Naimark issued his Report and Recommendations in the above-entitled proceeding, finding that the Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, (Respondent) violated Section 19(a)(6) of the Order by unilaterally implementing DLI Regulation 690-2 and thereby unilaterally changing the system of selecting unit employees stationed at the Activity for overseas duty or assignment. In this regard, the Administrative Law Judge found that the limitations on the obligation to meet and confer found in Sections 11 and 12 of the Order did not, under the circumstances of this case, relieve the Respondent from its obligation to bargain on the matter involved herein. Thereafter, on November 13, 1973, the Assistant Secretary found in A/SLMR No. 322 that, contrary to the Administrative Law Judge, the Respondent was not obligated to meet and confer with the Complainant concerning the issuance of DLI Regulation 690-2 and ordered that the subject complaint be dismissed. In reaching this decision, the Assistant Secretary relied upon the Federal Labor Relations Council's (Council) rationale expressed in United Federation of College Teachers, Local 1460 and U. S. Merchant Marine Academy, FLRC 71A-15, and concluded that DLI Regulation 690-2 was not inconsistent with Section 11(a) of the Order since it was issued "to achieve a desirable degree of uniformity and equality . . . common . . . to employees of more than one subordinate activity."

On October 25, 1974, the Council issued its Decision on Appeal in the subject case finding, contrary to the Assistant Secretary, that DLI Regulation 690-2 may not serve as an appropriate limitation on the scope of negotiations concerning overseas assignments under Section 11(a) of the Order. Pursuant to Section 2411.17(b) of its rules of procedure, the Council remanded the matter to the Assistant Secretary for further proceedings as to the resolution of the subject unfair labor practice complaint in a manner consistent with its holding.

Based on the Council's holding in the instant case and the rationale contained therein, the Assistant Secretary has reconsidered the Administrative Law Judge's Report and Recommendations, and the entire record in this case, including the Respondent's exceptions and supporting brief, and hereby adopts the findings, conclusions and recommendations of the Administrative Law Judge.

ORDER

Pursuant to the Council's Decision on Appeal, I shall order that the complaint in Case No. 63-4218(CA) be, and it hereby is, reinstated.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, Texas, shall:

1. Cease and desist from:

Unilaterally changing the method or system of selecting unit employees, stationed at the Lackland Air Force Base, Texas, for overseas duty or assignment without meeting and conferring with the American Federation of Government Employees, Local Union 1367, the exclusive representative of its unit employees.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

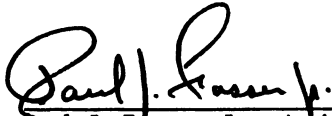
(a) Upon request, meet and confer with the American Federation of Government Employees, Local Union 1367, with respect to proposed changes in the method or system of selecting unit employees for overseas duty or assignment.

(b) Post at Lackland Air Force Base, San Antonio, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commandant of the Defense Language Institute, English Language Branch, Lackland Air Force

Base, Texas, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commandant shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
December 4, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

N O T I C E T O A L L E M P L O Y E E S

PURSUANT TO

A SUPPLEMENTAL DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change the method or system of selecting unit employees for overseas duty or assignment without meeting and conferring with the American Federation of Government Employees, Local Union 1367, the exclusive representative of our unit employees.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, Local Union 1367, with respect to proposed changes in the method or system of selecting unit employees for overseas duty or assignment.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-32
NEWBURG, MISSOURI
(FORT LEONARD WOOD,
FORT LEONARD WOOD, MISSOURI)
A/SLMR No. 469

This case involved an unfair labor practice complaint filed by two individuals (Complainants) against the National Association of Government Employees, Local R14-32, alleging that the Respondent violated Section 19(b)(1) and (2) of the Executive Order by reporting to the Activity that the Complainants, who were not members of the Respondent but were members of another labor organization, had refused to paint their trailers when, at the same time, the Respondent took no action against other delinquent drivers who were members of the Respondent.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent, the exclusive representative of a bargaining unit at Fort Leonard Wood encompassing the drivers of the Transportation Motor Pool (TMP) and including the two Complainants herein, violated Section 19(b)(1) and (2) of the Order. In reaching his determination, the Assistant Secretary relied essentially on the conduct and motivation of the Respondent's steward who, the evidence established at all times material, was aware of the Complainants' nonmembership in the Respondent and their membership in another labor organization. During June 1973, the drivers of the TMP commenced painting their trailers during slack periods of employment pursuant to an earlier agreement between the Respondent and the Activity.

Notwithstanding the fact that 6 or 8 of the 16 trailers in the TMP had not yet been painted and that the Respondent's steward knew of this fact, the latter and other drivers confronted the foreman and, singling out the Complainants, wanted to know when they were going to paint their trailers. The steward informed the foreman that, "he had some more of the union members on my back" and that "they" should have to paint their trailers. Although it appears that the Complainants had never refused to paint their trailers, shortly thereafter, the Respondent's steward complained to the Respondent's president that the Complainants had refused to paint their trailers and, as a result, the Respondent's president notified the Activity's Civilian Personnel Office which investigated the matter.

The Assistant Secretary found that the Respondent's steward's conduct in singling out and reporting to the Activity the alleged work performance deficiencies of the Complainants, who were not members of the Respondent but who were members of another labor organization, while not raising similar known deficiencies on the part of certain of the Respondent's

members, improperly interfere~~d~~ with, restrained, or coerced the Complainants in the exercise of their right assured by the Order to refrain from union activity. Further, the Assistant Secretary found that by such conduct the Respondent failed in its obligation as exclusive representative to represent "the interests of all employees in the unit without discrimination and without regard to labor organization membership" as required by Section 10(e) of the Order. Accordingly, he concluded that the Respondent's conduct violated Section 19(b)(1) of the Order. Additionally, by such conduct, the Assistant Secretary found that the Respondent attempted to induce the Activity to coerce the Complainants in the exercise of their right under the Order to refrain from union activity in violation of Section 19(b)(2) of the Order. Under these circumstances, he ordered that the Respondent cease and desist from such conduct and take certain affirmative actions.

A/SLMR No. 469

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-32
NEWBURG, MISSOURI

Respondent

and

Case No. 62-3834(CO)

L. WILLIS AND
JAMES WRIGHT

Complainants

and

FORT LEONARD WOOD,
FORT LEONARD WOOD, MISSOURI 1/

Intervenor

DECISION AND ORDER

On August 28, 1974, Administrative Law Judge Samuel A. Chaitovitz issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation, and the entire record in the subject case, including the exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation as modified below.

The complaint in the instant case alleged essentially that the Respondent violated Section 19(b)(1) and (2) of the Executive Order by reporting to the Activity that the Complainants, who were not members of the Respondent

1/ At the outset of the hearing, a representative of Fort Leonard Wood was permitted to intervene in this proceeding on behalf of the Activity.

but were members of the National Federation of Federal Employees (NFFE), had refused to paint their trailers when, at the same time, no action was taken by the Respondent against other drivers who were members of the Respondent and had not painted their trailers.

The Respondent was, at all times material herein, the exclusive representative for a unit composed of the Activity's nonsupervisory Wage Board employees. Included in the unit are the 18 or 19 drivers in the Transportation Motor Pool (TMP). The record indicates that of the 18 or 19 drivers, all are members of the Respondent except for 3 or 4 drivers, including Leo Willis and James Wright, the Complainants in this case, who were members of the NFFE. ^{2/} There were approximately 16 trailers in the TMP, of which 13 or 14 were assigned to the drivers. As the drivers worked on 2 shifts, 12 on the day shift and 6 on the night shift, some of the trailers were assigned to 2 drivers.

During 1977, Glen Arrington, the Respondent's President, reached an agreement with the Activity that during slack periods drivers would be obligated to keep busy by painting their trailers and, commencing during June 1973, the drivers of the TMP were requested to paint their trailers during a slack period. Upon returning from leave, TMP supervisor Charles Miller testified that he was approached by Norman Fancher, one of the Respondent's stewards, as well as by some of the other drivers, who stated that they had painted their trailers and asked when Willis and Wright were going to paint their trailers. Fancher testified that he advised Miller that, "he had some more of the union members on my back" and that "they" should have to paint their trailers. Fancher acknowledged that, at the time he talked to Miller, other trailers beside Willis' and Wright's had not been painted. In this regard, Miller testified that at about this time 6 or 8 of the 16 trailers had not been painted.

Shortly thereafter, Fancher told the Respondent's President, Arrington, that there was a problem involving Willis and Wright because allegedly they had refused to paint their trailers. Arrington, who admitted that he knew that Willis and Wright were not members of the Respondent but were, in fact, members of the NFFE, went directly to the Civilian Personnel Office without checking as to whether or not the allegation brought to his attention was true. He spoke with Personnel Officer Roger Simboli and advised the latter that there was a problem with trailer painting in the TMP. Simboli asked Arrington who he was having trouble with and Arrington replied that Willis and Wright allegedly had refused to paint their trailers. Simboli then asked if they were members of the bargaining unit and Arrington replied, "yes, but non-dues paying." Simboli advised Arrington that he would have someone look into the matter and would get back to him. Thereafter, Personnel Officer Meadows contacted supervisor Miller and asked him what was being done about the painting. Meadows stated that he understood that there were two drivers who had not painted their trailers and that the two

^{2/} The record indicates that it was general knowledge that the two Complainants were not members of the Respondent but, rather, were members of the NFFE.

were either "non-union" or "not members of NAGE." Miller asked if he meant Willis and Wright and Meadows replied in the affirmative. Miller then stated that he had already talked to Wright and Willis and that they were willing to paint the trailers. Miller testified that neither Willis nor Wright ever had refused to paint their trailers. On June 28, 1973, Miller again had a short meeting with Willis and Wright in which he asked them if they were ready to paint their trailers and they replied "yes, any time." ^{3/} Wright painted his trailer a day or two later. Willis went on leave following the conversation of June 28, and, upon his return, after finding that his trailer had been painted by mistake, assisted another driver in painting his trailer.

A short time after talking with Miller, Meadows informed Arrington that the two trailers in question were not the only ones that had not been painted, and that the trailers had not been painted because of work and leave schedules. Arrington accepted this explanation and had agreed to drop the matter.

I find, in agreement with the Administrative Law Judge, that, under the circumstances herein, the Respondent violated Section 19(b)(1) and (2) of the Executive Order. ^{4/} In reaching his determination, the Administrative Law Judge, in large measure, relied on the motivation and conduct of the Respondent's President, Arrington, rather than on the motivation and conduct of the Respondent's steward, Fancher. In this respect, I disagree. In my view, the evidence establishes that, by his actions, Fancher was the moving force behind the singling out of Willis and Wright for trailer painting duties based on their nonmembership in the Complainant and their membership in the NFFE. Thus, in June 1973, the Respondent, as the exclusive representative of the Activity's Wage Board employees, including the drivers in the TMP, agreed with the Activity that during slack periods of employment the drivers in the bargaining unit would paint their own trailers. Further, it appears that, at all times material herein, the Respondent's agents, including Fancher, were aware that Willis and Wright were not members of the Respondent, but rather, held membership in the NFFE. Notwithstanding the fact, as testified to by Foreman Miller, that 6 or

^{3/} Miller acknowledged that Willis and Wright had been making runs and that he had offered to give them some extra time to paint their trailers.

^{4/} Section 19(b)(1) of the Order provides that it is an unfair labor practice for a labor organization to "interfere with, restrain, or coerce an employee in the exercise of rights assured by this Order." Section 19(b)(2) of the Order provides that it is an unfair labor practice for a labor organization to "attempt to induce agency management to coerce an employee in the exercise of his rights under this Order."

8 of the 16 trailers in the TMP had not yet been painted, 5/ Fancher and other drivers confronted Foreman Miller and complained that they had painted their trailers and wanted to know when Willis and Wright were going to paint their trailers. As noted above, Fancher testified that he advised Miller that, "he had some more of the union members on my back" and that "they" (Willis and Wright) should have to paint their trailers. Shortly thereafter, Fancher complained to the Respondent's president that Willis and Wright allegedly had refused to paint their trailers. It is clear that neither Wright nor Willis ever refused to paint their trailers and, in fact, shortly before these events occurred, they had assured Miller that they would paint them when time permitted. Further, it does not appear that Fancher, at the time he was advising the Respondent's president that Willis and Wright allegedly had refused to paint their trailers, mentioned the fact that a number of other trailers had not been painted.

Based on these circumstances, I find that the Respondent's steward, Fancher, chose to single out Willis and Wright and to initiate a complaint to the Activity against them based upon their nonmembership in the Respondent and their membership in the NFFE. Thus, I conclude that Fancher's conduct in singling out and reporting to an Activity supervisor the alleged work performance deficiencies of nonmembers of the Respondent who were members of the NFFE, while not raising similar known deficiencies on the part of certain of the Respondent's members, improperly interfered with, restrained, or coerced employees Willis and Wright in the exercise of their right assured by the Order to refrain from union activity - i.e., refrain from joining the Respondent and from continuing to be members of the NFFE. I find also, in agreement with the Administrative Law Judge, that, by its conduct herein, the Respondent failed in its obligation as exclusive representative, to represent "the interests of all employees in the unit without discrimination and without regard to labor organization membership" as required by Section 10(e) of the Order. Accordingly, I conclude that the Respondent's conduct herein violated Section 19(b)(1) of the Order.

Further, I find, in agreement with the Administrative Law Judge, that the Respondent's attempt to induce the Activity to be more demanding with respect to the work performance of Willis and Wright because of their nonmembership in the Respondent and membership in the NFFE constituted an attempt to induce the Activity to coerce these employees in the exercise of their right under the Order to refrain from the above-noted union activity and, therefore, constituted a violation of Section 19(b)(2) of the Order.

ORDER

11/01 as amended. and

for Labor-Management Relations hereby orders that the National Association of Government Employees, Local R14-32, Newburg, Missouri, shall:

1. Cease and desist from:

(a) Singling out and reporting alleged work performance deficiencies of Mr. Leo Willis and Mr. James S. Wright, or any other employees because of their nonmembership in National Association of Government Employees, Local R14-32, and/or their membership in National Federation of Federal Employees, or any other labor organization.

(b) Failing and refusing to represent fairly and equally the interests of Mr. Leo Willis and Mr. James S. Wright, or any other employees in the bargaining unit, because of their nonmembership in National Association of Government Employees, Local R14-32, and/or their membership in National Federation of Federal Employees, or any other labor organization.

(c) Attempting to induce Fort Leonard Wood to coerce Mr. Leo Willis or Mr. James S. Wright, or any other employee, in the exercise of their rights under the Order, because of their nonmembership in National Association of Government Employees, Local R14-32, and/or their membership in National Federation of Federal Employees, or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

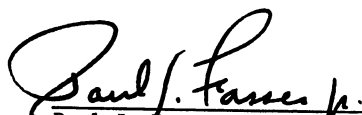
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Post in its local business office and in normal meeting places, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the President of the National Association of Government Employees, Local R14-32, and shall be posted and maintained by him for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. The President shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Submit signed copies of said notice to the Commanding Officer, Fort Leonard Wood, Fort Leonard Wood, Missouri, for posting in conspicuous places, where unit employees are located, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
December 19, 1974


Paul J. Fasser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL MEMBERS AND EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members and other
employees at Fort Leonard Wood, Missouri
that:

WE WILL NOT single out and report alleged work performance deficiencies of Mr. Leo Willis and Mr. James S. Wright, or any other employees, because of their nonmembership in National Association of Government Employees, Local R14-32, and/or their membership in the National Federation of Federal Employees, or any other labor organization.

WE WILL NOT fail and refuse to represent fairly and equally the interests of Mr. Leo Willis and Mr. James S. Wright, or any other employees in the bargaining unit, because of their nonmembership in National Association of Government Employees, Local R14-32, and/or their membership in National Federation of Federal Employees, or any other labor organization.

WE WILL NOT attempt to induce Fort Leonard Wood to coerce Mr. Leo Willis or Mr. James S. Wright, or any other employee, in the exercise of their rights under the Order because of their nonmembership in National Association of Government Employees, Local R14-32, and/or their membership in National Federation of Federal Employees, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured by Executive Order 11491, as amended.

Local R14-32
National Association of
Government Employees

Dated _____ By _____
President

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20210



.....
 In the Matter of :
 :
 NATIONAL ASSOCIATION OF GOVERNMENT :
 EMPLOYEES, LOCAL R14-32 :
 NEWBURG, MISSOURI :
 Respondent :
 and :
 L. WILLIS and :
 JAMES WRIGHT :
 Complainants :
 and :
 FORT LEONARD WOOD, :
 FORT LEONARD WOOD, MISSOURI :
 Intervenor :

Case No. 62-3834 (CO)

Paul J. Hayes, Esq.
National Association of Government Employees
710 West Fifth Street
O'Fallon, Ill., 62269
For the Respondent

Michael Sussman, Esq.
National Federation of Federal Employees
1737 H Street, N.W.
Washington, D.C.

and
Delores M. Willis
Representative
Route 2
Newburg, Missouri
For the Complainants

Leroy Bates, Esq.
Fort Leonard Wood, Management-Employee Relations Branch
Fort Leonard Wood, Missouri
For the Intervenor

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

Pursuant to a Complaint filed on November 5, 1973, under Executive Order 11491, as amended (herein called the Order by Mr. L. Willis and Mr. James Wright (herein referred to jointly as the Complainants) against National Association of Government Employees Local R14-32 (herein called NAGE or Respondent) a Notice of Hearing on Complaint was used by the Assistant Regional Director for Labor-Management Services for the Kansas City Region on March 19, 1974.

A hearing was held in this matter before the undersigned on April 30, 1974, in Fort Leonard Wood, Missouri. At the outset of the hearing Fort Leonard Wood (herein called the Intervenor or Activity) was permitted to intervene in this proceeding. All parties were represented and afforded a full opportunity to be heard and to present witnesses and to introduce other relevant evidence. Upon the conclusion of the taking of testimony, all parties were given an opportunity to present oral arguments. The Complainants and the Respondent filed timely posthearing briefs. 1/

Upon the entire record herein, including the relevant evidence adduced at the hearing and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations.

Findings of Fact

NAGE was, at all times material herein, the collective bargaining representative for a unit composed of the Activity's nonsupervisory wage board employees. Complainants were employed by the Activity as truckdrivers and were members of the collective bargaining unit represented by NAGE. Neither Mr. Willis nor Mr. Wright were members of NAGE. 2/

1/ Complainants brief, although the affidavit of service is dated May 29, 1974, was actually filed and received in my office on May 28, 1974. The Respondent's brief, although received on May 29, was apparently timely mailed on May 24. In view of the foregoing therefore, both briefs were considered.

2/ Mr. Willis and Mr. Wright were members of the National Federation of Federal Employees (herein called NFFE).

During 1973 Mr. Glen Arrington, President of NAGE, agreed with the Activity that during slack periods truckdrivers could be required to paint their trailers. Accordingly, during June 1973 the truckdrivers at the transportation motor pool 3/ were advised, 4/ because it was a slack period, to paint their trailers. Because they were making various runs Mr. Wright and Mr. Willis had not painted their trailers. Complainants had agreed with Mr. Miller to paint their trailers when they had the opportunity.

Mr. Miller testified that when he returned from leave on a Monday a few drivers, including NAGE Shop Steward Fancher, complained that they had painted their trailers and wanted to know when Mr. Willis and Mr. Wright were going to paint their trailers. Mr. Fancher testified that he advised Mr. Miller that he had "some more of the union members on my back" and that "they" 5/ should have to paint their trucks.

Mr. Fancher also advised NAGE President Arrington of these complaints during the latter part of June, but admits he might have mentioned Complainants' names. Mr. Arrington recalls that Mr. Fancher did refer to Complainants by name.

Mr. Arrington then went to the Activity's Civilian Personnel Office where he spoke to Personnel Officer Roger Simboli. Mr. Arrington advised Mr. Simboli that there was a problem with truck painting in the motor pool. Mr. Simboli asked Mr. Arrington who he was having trouble with and Mr. Arrington replied that Mr. Wright and Mr. Willis had allegedly refused to paint their trucks. Mr. Simboli then asked if they were members of the bargaining unit and Mr. Arrington replied "yes, but non-dues-paying." Mr. Simboli advised Mr. Arrington that he would have someone look into the matter and would get back to Mr. Arrington.

3/ There was approximately 16 trailers. Some however, had two drivers assigned to them, a day driver and a night driver.

4/ Lead Foreman Charles Miller, the first-line supervisor and Mr. Lewis C. Bottom, Supervisor of the drivers and operation of the transportation motor pool, testified that the drivers knew they were to paint their trailers.

5/ He denied mentioning any names.

Mr. Miller then received a telephone call from Mr. Meadows of the Civilian Personnel Office who asked what they were doing about the painting. Mr. Meadows stated that he understood that there were two drivers that hadn't painted their trailers and that the two were either "non-union" or "not-members of NAGE..." Mr. Miller asked if he meant Mr. Willis and Mr. Wright and Mr. Meadows replied that he did. Mr. Miller replied that he had already talked to the two and they were willing to paint the trucks. Mr. Meadows stated that his office had been contacted by a union representative inquiring about this problem. On or about June 28, 1973, Mr. Miller advised Mr. Wright and Mr. Willis that he had received the above described phone call from the Civilian Personnel Office and the two employees agreed to paint the trucks when they had the chance. They had not painted their trucks before because they had been on "runs." At this time only about one half of the trailers had been painted. Mr. Wright painted his truck a day or two after this June 28th meeting.

Mr. Willis went on annual leave for about three days following the June 28th conversation. Upon his return he found that his truck had already been painted.^{6/} Mr. Bottom asked Mr. Wright and Mr. Willis to paint another trailer to "get them off his back." He did not explain who "them" referred to. Mr. Wright and Mr. Willis did paint a truck assigned to a Mr. Laferty. Mr. Laferty and another employee helped paint this latter vehicle.

A few days after Mr. Arrington's conversation with Mr. Simboli, Mr. Meadows called Mr. Arrington and advised him that the two trucks in question weren't the only ones that had not been painted, that more were involved, and that the trailers hadn't been painted because of work and leave schedules. Mr. Arrington replied "I will accept that. We will drop the matter."

Conclusions of Law

A. Alleged Violation of Section 19(b) (1) of the Order

Section 19(b) (1) of the Order makes it an unfair labor practice of a labor organization to "interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order;..." Section 1(a) of the Order secures to each employee the right to "form, join, and assist a labor organization or to refrain from any such activity" and provides further that "each employee shall be protected in the exercise of this right." Section 10(e) of the Order provides that an

^{6/} It was painted, in error, by a detail of soldiers.

exclusive bargaining representative "is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership...."

The record establishes that during June the truck drivers in the transportation motor pool were faced with performing an apparently onerous task, painting their trucks. After about one half of the trucks had been painted NAGE, through Mr. Fancher and Mr. Arrington, singled out Mr. Willis and Mr. Wright for special treatment and concern. Mr. Fancher and Mr. Arrington clearly singled out these two employees and complained to the Activity to make sure they painted their trucks, even though a number of other drivers had not yet performed this onerous task, because they were not members of NAGE and were members of NFFE. Mr. Arrington admitted that when he was asked if the two employees in question were in the unit, he replied that they were but were "non-dues-paying." Mr. Arrington further testified that he picked out these two drivers for this special treatment because not only were they not members of NAGE but were in fact members of NFFE and, further, that if they were the only two drivers who did not paint their vehicles it would be very damaging for NAGE. These NAGE representatives did not complain about NAGE members who failed to paint their trucks. Therefore, in view of the record as a whole, and the foregoing in particular, it is clear that the NAGE representative chose to complain to the Activity about Mr. Wright and Mr. Willis because they were not members of NAGE and were members of NFFE.

In such circumstances it is concluded that this conduct on the part of NAGE of observing and making sure that employees who were not NAGE members and were NFFE members performed all of their work tasks, including the onerous ones, and of reporting to the Activity the work performance deficiencies of such employees while not observing and reporting similar deficiencies on the part of NAGE members would necessarily and unlawfully restrain employees from deciding not to join and support NAGE and from deciding to join and support NFFE. Similarly NAGE, the collective bargaining representative, failed in its obligation, as set forth in Section 10(e) of the Order, to represent all members of the unit "without discrimination and without regard to labor organization membership."

It is concluded that all of the foregoing conduct by NAGE would, therefore, foreseeably have the effect of interfering with, restraining and coercing employees in the exercise of their rights as protected by the Order and would thus violate Section 19(b) (1) of the Order.

B. Alleged Violation of Section 19(b)(2) of the Order

Section 19(b)(2) of the Order provides that a labor organization shall not "attempt to induce agency management to coerce an employee in the exercise of his rights under this Order." It is concluded, that the Union's attempt to induce the Activity to be more demanding with respect to the work performance of Mr. Willis and Mr. Wright because they were not members of NAGE and were members of NFFE would necessarily constitute such an attempt to induce the Activity to coerce the employees in the exercise of their rights protected by the Order and would therefore constitute a violation of Section 19(b)(2) of the Order.

Recommendation

In view of the entire foregoing, I conclude that Respondent NAGE has engaged in certain conduct prohibited by Sections 19(b)(1) and (2) of the Order and I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the National Association of Government Employees, Local R14-32 shall:

(1) Cease and desist from:

a. Keeping track of the work performance of any employees, including Mr. Leo Willis and Mr. James S. Wright, because of their nonmembership in National Association of Government Employees Local R 14-32, and/or their membership in National Federation of Federal Employees or any other labor organization and requiring any such employee, because of his nonmembership in National Association of Government Employees Local R 14-32 and/or membership in National Federation of Federal Employees or any other labor organization, to do any specific work related tasks.

b. Failing and refusing to represent fairly and equally the interests of Mr. Leo Willis and Mr. James S. Wright, or any other employee in the bargaining unit because of their nonmembership in National Association of Government Employees and/or membership in National Federation of Federal Employees or any other labor organization.

c. Attempting to induce Fort Leonard Wood to coerce Mr. Leo Willis or Mr. James S. Wright, or any other employee in the exercising of their protected rights because of their nonmembership in National Association of Government Employees and/or their membership in National Federation of Federal Employees or any other labor organization.

d. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order.

a. Post in its office and upon bulletin boards made available to it at the facility at Fort Leonard Wood, Missouri, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the President of the National Association of Government Employees Local R 14-32 and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The President shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

b. Pursuant to Section 203.26 of the Regulations notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: August 28, 1974
Washington, D.C.

APPENDIX

- 2 -

NOTICE TO ALL MEMBERS AND EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

National Association of Government Employees

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED,

Dated _____ By _____
President

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members and other employees at Fort Leonard Wood, Missouri that:

WE WILL NOT keep track of the work performance of any employees, including Mr. Leo Willis and Mr. James S. Wright, because of their nonmembership in National Association of Government Employees Local R 14-32, and/or their membership in National Federation of Federal Employees or any other labor organization and requiring any such employee, because of his nonmembership in National Association of Government Employees Local R 14-32 and/or membership in National Federation of Federal Employees or any other labor organization, to do any specific work related tasks.

WE WILL NOT fail and refuse to represent fairly and equally the interests of Mr. Leo Willis and Mr. James S. Wright, or any other employee in the bargaining unit because of their nonmembership in National Association of Government Employees and/or membership in National Federation of Federal Employees or any other labor organization.

WE WILL NOT attempt to induce Fort Leonard Wood to coerce Mr. Leo Willis or Mr. James S. Wright, or any other employee in the exercising of their protected rights because of their nonmembership in National Association of Government Employees and/or their membership in National Federation of Federal Employees or any other labor organization.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,
MONTROSE, NEW YORK
A/SLMR No. 470

This case involved a petition filed by the American Federation of Government Employees, Local 2440, AFL-CIO (AFGE) seeking to amend the recognition granted by the Activity in December 1966, to the United Brotherhood of Carpenters and Joiners, Local 2440, AFL-CIO (Carpenters).

On December 6, 1966, the Activity executed a negotiated agreement with the Carpenters Local 2440 covering a unit of all of the Activity's Wage Grade employees. A subsequent agreement was executed on February 3, 1971. A desire on the part of some members of Carpenters Local 2440 to affiliate with a national labor organization which dealt on a full-time basis with the problems of Federal employees led, in October 1973, to a request to the General President of the Carpenters for a release from its charter for the purpose of affiliating with the AFGE. This request was accompanied by a petition signed by some 85 of the then approximately 120 members of the Carpenters Local 2440. Subsequently, representatives of the Carpenters and the AFGE arranged for a transfer of affiliation, which was completed on May 6, 1974. The arrangement provided that the AFGE, through the local officers who remained the same, would assume responsibility for the affairs of Carpenters Local 2440 and would administer the negotiated agreement entered into by the latter and the Activity.

The Assistant Secretary concluded that any change brought about as a result of the processing of a petition for amendment of certification or recognition should not affect the continuity of the unit employees' representation and clearly should not leave open questions concerning such representation. In order to assure that any such change in affiliation accurately reflects the desires of the membership and that no question concerning representation exists, he stated it was necessary that the procedures invoked to effectuate the change in affiliation meet certain standards. Thus, in order to assure that such an amendment conforms to the wishes of the membership, the following steps, as a minimum, should be taken: (1) A proposed change in affiliation should be the subject of a special meeting of the members of the incumbent labor organization, called for this purpose only, with adequate advance notice provided to the entire membership; (2) the meeting should take place at a time and place convenient to all members; (3) adequate time for discussion of the proposed change should be provided, with all members given an opportunity to raise questions within the bounds of normal parliamentary procedure; and (4) a vote by the members of the incumbent labor organization on the question should be taken by secret ballot, with the ballot clearly stating the change proposed and the choices inherent therein. The Assistant Secretary concluded that these steps encompass the standards by which an affiliation vote should be measured.

Under the circumstances, the Assistant Secretary found insufficient evidence that the change of affiliation from the Carpenters to the AFGE, which is the basis for the instant petition for amendment of recognition, took place in a manner which assured that the required standards were met. In this regard, he noted that the evidence failed to establish that any special meeting of the membership of Carpenters Local 2440, limited solely to the issue of a change in affiliation, was held in October 1973; that the members who signed the petition forwarded to the Carpenters had the opportunity to be fully apprised of the consequences of a change in affiliation; or that a vote of the members by secret ballot was taken on the question. Accordingly, he ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
MONTROSE, NEW YORK 1/

Activity

and

Case No. 30-5553(AC)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2440, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Louis A. Schneider. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Petitioner, the American Federation of Government Employees, Local 2440, AFL-CIO, herein called AFGE, and the "Party-in-Interest," 2/ the Assistant Secretary finds:

1/ The name of the Activity appears as amended at the hearing.

2/ The National Federation of Federal Employees, Local 1119, Ind., herein called NFFE, sought to intervene in this proceeding in accordance with Section 202.5 of the Assistant Secretary's Regulations, by timely submitting a ten percent showing of interest of the employees in the unit involved for the purpose of arguing for the dismissal of the AFGE's petition. The Assistant Regional Director designated the NFFE as a "Party-in-Interest" and, in effect, denied the request for intervention. As a "Party-in-Interest," at the hearing, the NFFE was permitted only to state its position with regard to the issues raised by the instant petition. In view of the disposition herein, I find it unnecessary to rule upon the propriety of the Assistant Regional Director's denial of the NFFE's request to intervene in this matter or upon the NFFE's objections, made at the hearing, that the limitations imposed by its status prejudiced its position.

The AFGE filed the subject petition for amendment of recognition seeking to amend the designation of the labor organization named in the recognition granted by the Activity in December 1966. The Activity took no position regarding the AFGE's petition for amendment of recognition.

The record indicates that on May 27, 1963, the Activity granted recognition for a unit of all of its employees to the Montrose Employees Union Council, which consisted of the United Brotherhood of Carpenters and Joiners, Local 2440, AFL-CIO, herein called the Carpenters, and Local 178, Hotel, Restaurant and Bartenders International Union. Later in 1963, the Activity executed a negotiated agreement with the Council, effective October 24, 1963. On December 6, 1966, the Activity executed a separate negotiated agreement with the Carpenters covering a unit of all of the Activity's Wage Grade employees. Thereafter, on February 3, 1971, the Activity executed another negotiated agreement with the Carpenters which contained a two-year duration provision, and which was automatically renewable thereafter from year to year. This latest negotiated agreement, which was supplemented on June 26, 1972, without affecting the termination date, indicated that the unit consisted of all the Wage Grade employees of the Activity, including Wage Leaders. 3/

The record reflects that sometime in 1971, certain members of Carpenters Local 2440 indicated their desire to change their affiliation from the Carpenters to a national labor organization which dealt on a full-time basis with the problems of Federal employees. In this regard, on October 29, 1971, a letter was sent to the General President of the Carpenters, signed by the officers of Carpenters Local 2440 and accompanied by cards signed by some 102 of the 120 members, requesting a release from the charter by the Carpenters for the purpose of affiliating with the AFGE. Thereafter, Carpenters Local 2440 was asked by its national organization to defer its request for a year. In October 1973, Carpenters Local 2440 solicited the views, through its shop stewards, of its members regarding the question of changing their affiliation and, on October 26, 1973, it renewed its request to the General President of the Carpenters for a release from its charter. This request was accompanied by a petition signed by some 85 of the then approximately 120 Carpenters members. The record evidence reflects that, subsequently, representatives of the Carpenters and the AFGE arranged for a transfer of affiliation, which was completed on May 6, 1974. 4/ Under this arrangement, the AFGE, through the local officers who remained the same, agreed to assume responsibility for the affairs of Carpenters Local 2440 and to administer the negotiated agreement entered into by the latter and the Activity. It was indicated that the local officers have continued to hold regular meetings with the Activity, and have continued to represent the interests of the members of the unit.

3/ This unit, whose recognition the AFGE seeks to amend, consists of some 350 employees.

4/ The Carpenters at no time sought to intervene in this proceeding.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF SUPPLEMENTAL DECISION AND ORDER
 OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF THE NAVY,
 NAVAL ORDNANCE STATION,
 LOUISVILLE, KENTUCKY
 A/SLMR No. 471

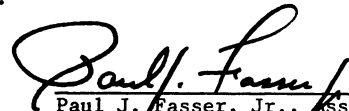
In my view, any change brought about as a result of the processing of a petition for amendment of certification or recognition should not affect the continuity of the unit employees' representation and clearly should not leave open questions concerning such representation. In the instant situation, the evidence noted above reveals that certain members of Carpenters Local 2440 initiated an attempt to change the affiliation of their exclusive representative and that a change in affiliation was arranged which resulted in the local labor organization maintaining the same officers as before the change in affiliation and in the continued representation of the unit employees. However, in my view, in order to assure that any such change in affiliation accurately reflects the desires of the membership and that no question concerning representation exists, it is necessary that the procedures invoked to effectuate the change in affiliation meet certain standards which I find were not met in the instant case. Thus, in order to assure that an amendment for certification or recognition conforms to the desires of the membership, the following steps, at a minimum, should be taken: (1) A proposed change in affiliation should be the subject of a special meeting of the members of the incumbent labor organization, called for this purpose only, with adequate advance notice provided to the entire membership; (2) the meeting should take place at a time and place convenient to all members; (3) adequate time for discussion of the proposed change should be provided, with all members given an opportunity to raise questions within the bounds of normal parliamentary procedure; and (4) a vote by the members of the incumbent labor organization on the question should be taken by secret ballot, with the ballot clearly stating the change proposed and the choices inherent therein. In my opinion, these steps encompass the standards by which an affiliation vote should be measured.

Under the circumstances presented in this case, I find insufficient evidence that the change of affiliation from the Carpenters to the AFGE, which is the basis for the instant petition for amendment of recognition, took place in a manner which assured that the required standards were met. Thus, the evidence fails to establish that any special meeting of the membership of Carpenters Local 2440, limited solely to the issue of a change in affiliation, was held in October 1973; that the members who signed the petition forwarded to the Carpenters had the opportunity to be fully apprised of the consequences of a change in affiliation; or that a vote of the members by secret ballot was taken on the question. Accordingly, I shall order that the petition in the instant case be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 30-5553(AC) be, and it hereby is, dismissed.

Dated, Washington, D.C.
 December 30, 1974


 Paul J. Fasser, Jr., Assistant Secretary of
 Labor for Labor-Management Relations

On December 11, 1974, the Federal Labor Relations Council (Council) determined, based on the facts and circumstances presented, that the issuance of a stay of certain of the paragraphs of the Assistant Secretary's order in A/SLMR No. 400 was warranted.

As to those portions of the order in A/SLMR No. 400 which were not stayed by the Council, the Assistant Secretary ordered that the Respondent comply with his order in the manner prescribed in paragraph 2.d. of A/SLMR No. 400. In this regard, he required that a notice to all employees be posted in accordance with A/SLMR No. 400, as modified by the Council's decision.

UNITED STATES DEPARTMENT OF LABOR

NOTICE TO ALL EMPLOYEES

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PURSUANT TO

A SUPPLEMENTAL DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions concerning employees in the unit without giving International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT inform employees that an official of the employees' exclusive representative, International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, in his official capacity, may not be designated as an employees' representative in making a reply to a notice of proposed adverse action.

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 Executive Order.

WE WILL, upon request of the International Association of Machinists and Aerospace Workers, Local Lodge 830, AFL-CIO, treat as null and void Grievance Examiner Shaw's report and recommendation relative to employee Paul Prince's appeal of his letter of reprimand, and will rescind the Commanding Officer's approval and adoption thereof, and will proceed with the processing of Paul Prince's appeal of his letter of reprimand under the formal administrative grievance procedure as though Grievance Examiner Shaw had not yet conducted his inquiry into the matter.

UNITED STATES DEPARTMENT OF THE NAVY,
NAVAL ORDNANCE STATION,
LOUISVILLE, KENTUCKY

Respondent

and

Cases Nos. 41-3126(CA),
41-3128(CA),
41-3129(CA),
A/SLMR No. 400, and
FLRC No. 74A-54

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
LOCAL LODGE 830, AFL-CIO

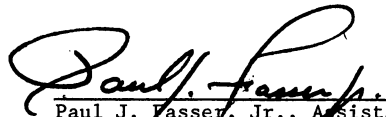
Complainant

SUPPLEMENTAL DECISION AND ORDER

On December 11, 1974, the Federal Labor Relations Council (Council), pursuant to Section 2411.47(c) of its Rules, issued the attached decision in which it determined, based on the facts and circumstances presented, that the issuance of a stay of paragraphs 1.c. and 2.c. of the Assistant Secretary's order in A/SLMR No. 400 was warranted. Further, the Council concluded that to the extent that paragraph 2.d. of the order required the Respondent to post a notice which reflected the requirements of paragraphs 1.c. and 2.c., a stay of paragraph 2.d. was likewise warranted.

As to those portions of the order in A/SLMR No. 400 which were not stayed by the Council, pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, take such actions as were required under paragraphs 1.a., 1.b., 1.d., 1.e., 2.a., 2.b., and 2.e. of the order. With respect to the posting requirements contained in paragraph 2.d. of the order, attached herewith is a modified notice marked "Appendix," copies of which should be posted at the Naval Ordnance Station, Louisville, Kentucky, in the manner prescribed in paragraph 2.d. of A/SLMR No. 400.

Dated, Washington, D.C.
December 30, 1974


Paul J.asser, Jr., Assistant Secretary of
Labor for Labor-Management Relations

(Agency or Activity)

Dated _____ By _____

(Signature and Title)

(Cont'd)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is 1371 Peachtree Street, N.E., Room 300, Atlanta, Georgia 30309.



UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 11, 1974

Mr. A. Di Pasquale, Director
Labor and Employee Relations Division
Office of Civilian Manpower
Management
Department of the Navy
Washington, D.C. 20390

Mr. Louis E. Schmidt
Grand Lodge Representative
International Association of
Machinists and Aerospace Workers
6500 Pearl Road
Cleveland, Ohio 44130

Re: United States Department of the Navy, Naval
Ordnance Station, Louisville, Kentucky,
A/SLMR No. 400, FLRC No. 74A-54

Gentlemen:

Upon careful consideration of the petition for review submitted by the agency in the above-captioned case, the Council is of the opinion that major policy issues are raised by the Assistant Secretary's decision in this case, namely:

- whether section 10(e) of the Order imposes upon a labor organization holding exclusive recognition an obligation to represent a bargaining unit employee in an adverse action proceeding until such time as the employee indicates a desire to choose his own representative; and
- whether an agency's failure to recognize a labor organization's status as an employee's representative in an adverse action proceeding, until the employee elects to choose a different representative, constitutes an unfair labor practice under the Order?

Accordingly, pursuant to section 2411.15 of the Council's rules of procedure, you are hereby notified that the Council has accepted the agency's petition for review of the above-mentioned issues. You are reminded that briefs may be filed, as provided in section 2411.16(a) of the rules.

The Council has also carefully considered the agency's request for a stay of the Assistant Secretary's order insofar as it directs the activity to cease and desist from, and to take affirmative action with respect to, the matter appealed pending Council resolution of the instant appeal. Pursuant to section 2411.47(c) of its rules, the Council has determined, based on the facts and circumstances presented, that issuance of a stay of paragraphs 1.c. and 2.c. of the Assistant Secretary's order is warranted in this case. Further, to the extent that paragraph 2.d. of the order requires the agency to post a notice which reflects the requirements of paragraphs 1.c. and 2.c., a stay of that paragraph is likewise warranted. Therefore, the agency's request for a stay of those portions of the Assistant Secretary's order is granted.

By the Council.

Sincerely,

A handwritten signature in cursive script that reads "Henry B. Frazier III". The signature is written in dark ink and is positioned above the printed name and title.

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

**REPORTS ON RULINGS
OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS**

Nos. 56 & 57

January 1, 1974, through December 31, 1974

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
REPORT ON A RULING OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491 AS AMENDED

Report Number 56.

Problem

The question was raised whether, for the purposes of computing the sixty (60) day filing period of an Application for Decision on Grievability or Arbitrability under Section 205.2(a) of the Assistant Secretary's Regulations, a final written rejection of the arbitrability of a matter in dispute may be made prior to the arbitration clause of the negotiated agreement actually being invoked.

Ruling

For the purposes of computing the sixty (60) day filing period of an Application for Decision on Grievability or Arbitrability under Section 205.2(a) of the Assistant Secretary's Regulations, there must be a final written rejection after the arbitration clause is invoked.

Report Number 57

Problem

The question was raised as to whether the Assistant Secretary should make a finding of grievability or arbitrability, pursuant to an Application for decision on grievability or arbitrability, when the parties have entered into a settlement agreement which disposes of the grievance.

Decision

Pursuant to Section 6(a)(5) of the Order, the Assistant Secretary is responsible for deciding "questions as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement." Accordingly, where the parties have entered into a settlement agreement which disposes of the grievance, the issue or issues raised by an Application for decision on grievability or arbitrability will be considered to be moot, and the Application will be dismissed.

